COMPENSATION IN CASES OF INFRINGEMENT TO ABORIGINAL AND TREATY RIGHTS

by Robert Mainville
Faculty of Law, McGill University, Montreal

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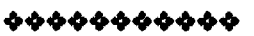
ABSTRACT

This paper discusses the legal principles which are relevant in determining the appropriate level of compensation for infringements to aboriginal and treaty rights. This issue has been left open by the Supreme Court of Canada in the seminal case of *Delgamuukw*. The nature of aboriginal and treaty rights as well as the fiduciary relationship and duties of the Crown are briefly described. The basic constitutional context in which these rights evolve is also discussed, including the federal common law of aboriginal rights and the constitutional position of these rights in Canada. Having set the general context, the paper then reviews the legal principles governing the infringement of aboriginal and treaty rights, including the requirement for just compensation. Reviews of the legal principles applicable to compensation in cases of expropriation and of the experience in the United States in regards to compensation in cases of the taking of aboriginal lands are also carried out. Six basic legal principles relevant for determining appropriate compensation in cases of infringement to aboriginal and treaty rights are then suggested, justified and explained: a) compensation is to be determined in accordance with a methodology which takes into account fiduciary law principles; b) compensation is to be determined in accordance with federal common law and will thus be governed by rules which apply uniformly throughout Canada; c) compensation is to be assumed by the Crown but may be paid by third parties; d) relevant factors in determining compensation include the impact on the affected aboriginal community and the benefits derived by the Crown and third parties from the infringement; e) compensation is to be provided through structured compensation schemes which need not meet mathematical accuracy tests; f) compensation is normally to be awarded for the benefit of the affected aboriginal community as a whole.



Cette thèse concerne les principes juridiques pertinents afin d'établir le niveau approprié d'indemnisation en cas d'atteinte aux droits ancestraux et issus de traités. Cette question fut laissée ouverte par la Cour suprême du Canada dans l'arrêt *Delgamuukw*. La nature des droits ancestraux et issus de traités de même que la relation fiduciaire et les obligations fiduciaires de la Couronne sont brièvement décrits. Le contexte constitutionnel dans lequel ces droits s'inscrivent est aussi analysé, dont le droit commun fédéral des droits autochtones et le partage constitutionnel des pouvoirs à l'égard de ces droits au Canada. Ayant ainsi établi le contexte général, la thèse examine alors le régime juridique encadrant les atteintes aux droits ancestraux et issus de traités, y compris l'obligation de fournir une juste indemnité. Les principes régissant la compensation en cas d'expropriation de même que l'expérience américaine dans les cas de prise de possession des terres autochtones sont également commentés. Six principes fondamentaux pouvant servir dans l'évaluation du niveau approprié des indemnités dans les cas d'atteintes aux droits ancestraux et issus de traités sont enfin proposés, justifiés et analysés: a) l'indemnité doit être établie en vertu d'une méthodologie qui tient compte des principes du droit des fiduciaires; b) l'indemnité doit être établie en fonction du droit commun fédéral et sera ainsi soumise à des règles qui s'appliquent uniformément à travers le Canada; c) l'indemnité doit être assumée par la Couronne, mais peut être versée par des tiers; d) les facteurs pertinents afin d'établir l'indemnité comprennent l'impact de l'atteinte sur la communauté autochtone concernée et les bénéfices tirés de l'atteinte par la Couronne et les tiers; e) l'indemnité doit être fournie par le biais de méthodes structurées d'indemnisation qui ne requièrent pas une précision mathématique; f) l'indemnité sera normalement versée au bénéfice de l'ensemble de la communauté autochtone concernée.

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COMPENSATION IN CASES OF INFRINGEMENT TO ABORIGINAL AND TREATY RIGHTS

by Robert Mainville

INTRODUCTION

In the case of *Delgamuukw v. B.C.*,[1] the Supreme Court of Canada discussed the content and nature of aboriginal title at common law as well as the scope of the constitutional protection afforded common law aboriginal title under section 35 of the *Constitution Act, 1982*.[2] However, in addressing these matters, the Court did not discuss extensively the legal principles applicable to the determination of compensation in cases of infringements to common law aboriginal title. The Chief Justice stated the following in this regard:

> "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 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."[3]

It is these "difficult questions" which this paper attempts to discuss. The difficult issues raised by compensation in cases of infringements to common law aboriginal title are

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1 *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010.

2 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, reprinted in R.S.C. 1985, app. II, no. 44.

3 *Delgamuukw*, *supra* note 1 at 1114 (para. 169).

compounded by the important implications which compensation issues also raise in cases of infringements to aboriginal and treaty rights generally. Indeed, the Supreme Court of Canada has reiterated on many occasions that compensation is an important factor in evaluating the justification of infringements to both aboriginal and treaty rights, yet it has provided to date no clear guidance as to the legal principles which should govern the determination of the level and adequacy of such compensation.

Moreover, the explosion of aboriginal rights claims in recent years makes the issue of compensation particularly pressing. The numerous pending and potential cases related in one way or another to aboriginal and treaty rights represent a substantial liability for the governments. In addition, numerous development projects are being proposed in northern Canada and elsewhere which will potentially affect aboriginal land or aboriginal traditional activities, yet the proponents of these projects as well as the affected aboriginal populations are left essentially with few guidelines to govern the determination and assessment of the appropriate compensation packages which should be made available in such circumstances.

The varied circumstances which are captured under the concept of aboriginal and treaty rights also raise numerous questions related to the appropriate principles which govern the determination of compensation in cases of infringements to such rights. Should the compensation rules be the same when hunting and fishing rights are infringed rather than common law aboriginal title? Are the provincial expropriation acts applicable in such circumstances and, if so, do the compensation principles there expounded apply? How can the value of aboriginal title be determined when this title is inalienable and often concerns land which has no or little market value? How does one compensate for the loss of a lifestyle and for the disruption of traditional societies brought about by economic development projects?

The principal objective or ambition pursued here is to provide legal principles for the determination of compensation in cases of infringements of aboriginal and treaty rights.

There exists in Canada little case law or legal doctrine on this matter,[4] yet compensation issues in this context are dealt with continuously by governments, developers and aboriginal communities, and are soon to be addressed more openly by the judiciary. The determination of compensation in specific cases is essentially reached through an empirical approach which loosely takes for theoretical reference expropriation principles which, as we shall see below, are ill adapted when aboriginal interests are involved. Legal principles for the determination of compensation in such cases and which properly take into account the legal framework surrounding aboriginal and treaty rights would, it is believed, be of assistance to both aboriginals and non-aboriginals.

This paper clearly does not look at the law from an external standpoint nor does it purport in any way to challenge the epistemological premises of traditional legal discourse. The methodological and epistemological choices made in this regard are essentially driven by the objective of this paper, namely the development of basic legal principles which can be of use to the legal community at large in resolving compensation issues raised in cases of infringements of aboriginal and treaty rights. Though different approaches in discussing aboriginal rights issues are justified, this paper basically focuses on the discourse of law as found in the decisions of the courts. This is assumed to be the approach which best satisfies the objective pursued here.

Simple but comprehensive legal principles governing the determination of compensation for infringements to aboriginal or treaty rights can thus be developed within traditional legal discourse to address some of the issues raised here using as a basis the existing common law and constitutional law rules discussed by the Supreme Court of Canada when dealing with aboriginal matters generally.

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4 As noted by K. Roach: *"The remedies available for violations of aboriginal rights are largely unexplored"*: K. Roach, *Constitutional Remedies in Canada* (Aurora, Ontario: Canada Law Book Inc., 1998) at 15-1.

These legal principles require, for their development and proper comprehension, a good understanding of the principal aspects of aboriginal rights as defined by the courts. In this regard, before embarking on our discussion of compensation issues, it is first necessary to properly review the nature of the rights involved, the fiduciary relationship and duties of the Crown, the legal and constitutional context and the principles related to infringements of aboriginal and treaty rights. Though this preliminary study may seem long and fastidious, it is essential for the proper understanding of the arguments made later in this paper and related to compensation principles. The reader is thus asked to abide with this preliminary study in order to properly follow the core subject addressed here.

It is thus first required to first properly describe the nature of the rights and interests at issue. For this purpose, the first chapter describes the nature and content of aboriginal rights at common law. The second part of the first chapter then discusses treaty rights and how they differ from common law aboriginal rights. This discussion leads to the conclusion that treaty rights are for the most part analogous to aboriginal rights and tend to be superadded to such rights in order to protect and regulate them at the same time.

The fiduciary relationship of the Crown and the attending fiduciary duties which this relationship entails are examined in chapter two. This paper argues that the fiduciary relationship is the key element upon which should be based all principles related to the determination of compensation in cases of infringements to aboriginal and treaty rights.

In chapter three, the basic legal and constitutional context is discussed. Aboriginal and treaty rights are *sui generis* rights which are part of a special sphere of federal common law operating uniformly across Canada. This federal common law falls entirely under the exclusive jurisdiction of Parliament which may legislate in this regard subject to the provisions of sections 25 and 35 of the *Constitution Act, 1982*. The principles related to the determination of compensation in cases of infringements to aboriginal or treaty rights fall squarely within this special sphere of federal common law. The determination of

compensation in cases of such infringements is thus governed by legal principles which apply uniformly throughout Canada and which are beyond the constitutional reach of any provincial legislative assembly. This of course has far reaching implications, not only for the legal principles applicable to the determination of adequate compensation in such cases, but also in regard to such important related issues as the applicability of provincial limitation of actions legislation. It is argued that the principles governing compensation in cases of infringements to these *sui generis* rights are themselves *sui generis* and governed exclusively by federal common law and attending fiduciary and trust principles adapted to take into account the particular nature of the rights and interests at issue.

In the fourth chapter, a review of the legal principles governing the infringements of aboriginal or treaty rights is carried out. This includes as well a review of the justification principles developed by the Supreme Court of Canada in order to allow such infringements to proceed in certain circumstances. The principles first set out in *R. v. Sparrow*[5] and expanded in the subsequent decisions of the Court are thus examined. It is argued that the infringement and justification principles, though developed in the context of section 35 of the *Constitution Act, 1982*, are, to some extent, common law rules which flow from the *sui generis* nature of aboriginal title and of other aboriginal and treaty rights. This is important in that the same principles apply under the common law and under the *Constitution Act, 1982* in regards to the determination of appropriate compensation in cases of infringements to aboriginal or treaty rights. This has significant implications for infringements which occurred prior to the 1982 constitutional amendments. These constitutional amendments have provided aboriginal peoples with a superadded constitutional right to compensation in cases of infringements to their aboriginal and treaty rights. However the right to compensation in such cases did not arise solely with these constitutional changes.

The constitutional status of these rights is distinctive to aboriginal peoples in light of the fact that the *Constitution Act, 1982* and the *Canadian Charter of Rights and Freedoms*

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5 *R. v. Sparrow*, [1990] 1 R.C.S. 1075.

which it contains do not provide an equivalent right to compensation for other property interests. A constitutional right to compensation in cases of government taking of property does not exist in Canada similar to the Fifth Amendment to the Constitution of the United States. However, such a constitutional right to compensation appears to have been extended to aboriginals in certain circumstances under section 35 of the *Constitution Act, 1982.*

The legal principles used in order to determine compensation in cases of expropriations by public authorities are reviewed in chapter five. Though principles developed in expropriation cases may not be applicable to cases of infringements to aboriginal or treaty rights, they may serve a useful comparative purpose.

An extensive review of the American experience with compensation for the taking of aboriginal land is carried out in chapter six. Though instructive, this experience is for the most part of limited value since aboriginal peoples subject to the jurisdiction of the United States do not benefit from a constitutional right to compensation for the taking of their land. Their right to compensation is limited to what has been characterized as "recognized" native title. The compensations granted by the courts of the United States thus often turn on the wording of the congressional acts authorizing the taking of aboriginal land or authorizing the initiation of the proceedings for the determination of the level of compensation. Moreover the particularities of the legal system and of the relationship between the United States and the aboriginal nations residing within its borders render difficult any extensive parallel with Canada.

Finally, in chapter seven, the principles applicable to the determination of compensation in cases of infringements to aboriginal and treaty rights are developed and reviewed in light of the general discussions in the previous chapters.

CHAPTER 1

THE NATURE OF ABORIGINAL AND TREATY RIGHTS

A. Aboriginal rights at common law

No single event influenced more deeply Western European culture in this millennium than the discovery of the Americas by European explorers. This event changed and shaped history as few others have. Through the conquest of a large portion of the Americas, Spain became the then dominant world power soon to be followed by Portugal, France, England and the Netherlands in the pursuit of wealth, land and power in this vast continent. This European discovery was followed by one of the most important migrations of populations the world has known and which was destined to almost completely overrun the aboriginal populations who had initially occupied the continent. The resulting factual situation resulted in each European state developing moral concepts and political rules relating to the methods by which to incorporate the affected aboriginal populations and their territories within their American colonies.[6]

The common law had to adapt to this special situation. With time, a common law theory of aboriginal title was developed. Other aspects of aboriginal rights were also dealt

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[6] See generally R.A. Williams, Jr., *The American Indian in Western Legal Thought* (Oxford University Press, 1990) and M. Morin, *L'usurpation de la souveraineté autochtone* (Montréal: Les Éditions du Boréal, 1997); B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 1; L.C. Green & Olive P. Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989); A.Lajoie et al., *Le statut juridique des peuples autochtones au Québec et le pluralisme* (Cowansville: Les Éditions Yvon Blais Inc., 1996); B. Slattery, "Did France Claim Canada on "Discovery"?", in J.M. Bumsted, ed., *Interpreting Canada's Past*, Vol. I (Toronto: Oxford University Press, 1986).

with under the common law. In the result, a doctrine of aboriginal rights came to exist under the common law.[7]

A discussion of aboriginal rights in contemporary terms begins with a review of some 19th century decisions of the Supreme Court of the United States, and particularly the opinions of Chief Justice Marshall in the seminal cases of *Johnson v. M'Intosh*,[8] *Cherokee Nation v. Georgia*[9] and *Worcester v. Georgia*.[10] In an often quoted passage, Chief Justice Marshall had this to say in *Johnson v. M'Intosh*:

> "On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves

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7 See generally K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); K. McNeil, "The Meaning of Aboriginal Title", in Michael Ash, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: U.B.C. Press, 1997); K. McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection" (1997) 36 Alta. L. Rev. 117; B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar. Rev. 727; R.H. Bartlett, "Aboriginal Land Claims at Common Law" [1984] 1 C.N.L.R. 1; K. Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can. Bar Rev. 513; B. Slattery, *The Land Rights of Indigenous Canadian Peoples* (Doctoral Thesis, Oxford University, 1979), available from University of Saskatchewan, Native Law Centre; P. Macklem, "Aboriginal Rights and State Obligations" (1997) 36 Alta. L. Rev. 97; H. Brun, "Les Droits des Indiens sur le territoire du Québec" (1969) 10 C. de D. 415; B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 Am. J. Comp. L. 361; H. Brun, *Le territoire du Québec* (Québec: Les Presses de l'Université Laval, 1974); B. Clark, *Indian Title in Canada* (Toronto: Carswell, 1987); K. Lysyk, "The Indian Title Question in Canada: An Appraisal in Light of Calder" (1973) 51 Can. Bar Rev. 450; D.W. Elliott, "Aboriginal Title", in B.W. Morse, ed., *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1989); N. Rouland, S. Pierré-Caps & J. Poumarède, *Droits des minorités et des peuples autochtones* (Paris: PUF, 1996).

8 *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

9 *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

10 *Worcester v. Georgia*, 31 U.S. (6 Pet.) 530 (1832).

> that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequently war with each other, to establish a principle which all would acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it is made, against all other European governments, which title might be consummated by possession.
>
> The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.
>
> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it." [11]

Justice Marshall further explained in *Worcester v. Georgia* the common law legal consequences of European discovery on aboriginal title:

> "It [the principle that discovery gives title] regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants or of occupants by virtue of a discovery made before the memory of man. It

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11 *Johnson v. M'Intosh, supra* note 8 at 572-573 [emphasis added].

> gave the exclusive right to purchase, but did not found that right on a denial of the possessor to sell." [12]

These statements have been very influential in Canada in formulating the common law in regards to aboriginal title.[13] Indeed, for a very long time a debate existed in Canada as to whether or not aboriginal land rights were recognizable at common law or whether these rights could only be recognized by the courts when they were the subject of a prior acknowledgement by the British Crown. Such prior acknowledgement was seen to flow from the *Royal Proclamation, 1763*.[14]

An extensive review of the notion of aboriginal title was carried out by the Supreme Court of Canada in *St. Catherine Milling and Lumber Co. v. The Queen*.[15] There, Justice Strong, who later became the Chief Justice, recognized aboriginal title at common law in Canada in terms somewhat similar to those of U.S. Chief Justice Marshall. For Justice Strong, aboriginal interests in land were recognized at common law as legal rights and were in the nature of a usufructuary right in traditional land. Such right could not be surrendered by the concerned aboriginal peoples to any party except the Crown. Other members of the Court were more reserved on the common law recognition of aboriginal title, though most agreed that at least a right of occupation and use of land by aboriginal peoples flowed from the *Royal Proclamation, 1763* if it could not be recognized by the common law itself.

The issues of native title and of the common law in relation thereto were however largely ignored by the Privy Council when rendering its decision in the appeal of this case. The important issue of whether aboriginal land rights were recognized under the common

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12 *Worcester v. Georgia, supra* note 10 at 544 [emphasis added].

13 J. Hurley, "Aboriginal Rights, the Constitution and the Marshall Court" (1982-83) 17 R.J.T. 403.

14 *The Royal Proclamation*, October 7, 1763, reprinted in R.S.C. 1985, App. II, no. 1.

15 *St. Catherine Milling and Lumber Co. v. The Queen* (1886), 13 S.C.R. 577.

law or rather flowed from prior Crown recognition and the *Royal proclamation, 1763* was thus not dealt with clearly by the Privy Council in *St. Catherine Milling and Lumber Co. v. The Queen.*[16] Lord Watson recognized that aboriginal land rights existed in Canada, but he ascribed these to the *Royal Proclamation, 1763* and refused to discuss their recognition at common law since this did not appear relevant to the resolution of the legal dispute at hand in the case. Lord Watson however stated that the rights of aboriginal peoples in land were in any event less than a fee simple. For Lord Watson, the tenure of aboriginal peoples under the *Royal Proclamation, 1763* could be described as "a personal and usufructuary right" which could be surrendered only to the Crown, and since the passing of the *Constitution Act, 1867*, only to the Crown in Right of Canada.

The modern Canadian law relating to aboriginal rights begins with the decision of the Supreme Court of Canada in the case of *Calder v. Attorney-General of British Columbia.*[17] In that case a declaration as to the existence of aboriginal title in British Columbia was being sought on behalf of the Nishga. Though the claims of the plaintiffs were denied on narrow procedural grounds, the *Calder* decision stands for one of the most important judicial statements on aboriginal title. This decision influenced considerably the subsequent development of aboriginal law not only in Canada but throughout the Commonwealth.

Six of the seven Supreme Court Justices hearing the case clearly recognized that aboriginal title existed in British Columbia and could be recognized under the terms of the common law irrespective of the application of *Royal Proclamation, 1763* to that province. As Justice Judson stated in his reasons:

> "Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the

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16 *St. Catherine Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46.

17 *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. See also K. Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder", *supra* note 7 at 328.

> settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right."[18]

Although Justice Hall rather took the position that the terms of the *Royal Proclamation, 1763* applied to British Columbia, he also emphasized that aboriginal title could nevertheless be recognized under the common law and did "*not depend on treaty, executive order or legislative enactment*".[19]

Both Justices did not deem it appropriate to define the content of aboriginal title at common law, an exercise which was finally completed by the Supreme Court of Canada nearly twenty-five years later in the case of *Delgamuukw v. B.C.*,[20] and which we discuss extensively below.

Both Justices disagreed over the issue of extinguishment of aboriginal title. For Justice Judson, aboriginal title at common law could be unilaterally extinguished by the Sovereign, and this without any common law obligation to provide compensation. Justice Judson also added that such extinguishment need not be made by a direct statutory enactment. Adverse dominion over aboriginal land resulting from legislative action fundamentally incompatible with the right of occupation by aboriginal peoples was, according to Justice Judson, sufficient to effect an extinguishment of common law aboriginal title. Justice Hall, on the other hand, took firmly the view that common law aboriginal title could not be extinguished other than by the "clear and plain" intention of the Sovereign, and the onus of proving such "clear and plain" intent was to be assumed by those claiming such extinguishment. For Justice Hall, since aboriginal title is a legal right recognizable *inter alia* under the common law, it could not be extinguished except by voluntary surrender to the

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18 *Calder v. Attorney-General of British Columbia, supra* note 17 at 328.

19 *Ibid.* at 390.

20 *Supra* note 1.

Crown or by specific legislation from the competent authority specifically purporting to extinguish the rights of the aboriginals to their land. Justice Hall also took the view that even in the case of a "clear and plain" intent on the part of the Sovereign to extinguish aboriginal title, there existed in such circumstances a common law right to fair compensation for the affected aboriginal peoples.

Both Justices disagreed as to whether aboriginal title recognized at common law had been extinguished or still existed in British Columbia, and since the other Justices hearing the case supported evenly both the reasons of Judson and of Hall on this issue, no final determination was made.

The Supreme Court of Canada discussed aboriginal title at common law a decade later in the case of *Guerin v. The Queen*.[21] Though this case was concerned in large part with the fiduciary obligations of Canada in dealing with *Indian Act* reserve land, Justice Dickson (later Chief Justice) nevertheless dealt with the issue of common law aboriginal title within the context of that case since:

> "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see *A.G. Que. v. A.G. Can.*, [1921] 1 A.C. 401 at pp. 410-11 (the "*Star Chrome*" case)."[22]

Justice Dickson confirmed that aboriginal title is not dependent for its existence on any prior legislative or Crown recognition or on the terms of *Royal Proclamation, 1763*. Aboriginal title results from the use and occupation of the land by aboriginal peoples prior to the arrival of the Europeans and is recognizable by the courts under the common law. He

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21 *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

22 *Ibid.* at 379 [emphasis added]. This statement of the law was reiterated by Chief Justice Lamer in *Delgamuukw v. B.C.*, *supra* note 1 at 1085 (para. 120).

declined to define the content and scope of aboriginal title referring to it as a *sui generis* interest which defies a precise description:

> "Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading."[23]

The coming into force of the *Constitution Act, 1982* considerably affected the constitutional position of aboriginal title and of aboriginal rights generally. In particular, section 35(1) of the *Constitution Act, 1982* and its explicit recognition and affirmation of the aboriginal and treaty rights of the aboriginal peoples of Canada, has elevated these rights to a constitutional plane. However, in light of the case law developed prior to and independently of these constitutional provisions, one must guard against ascribing to section 35 the legal origin or basis of aboriginal rights. It must always be clearly kept in mind that these rights are fully recognized under the common law irrespective of any constitutional provision which may pertain to them. Thus aboriginal title as well as all other aboriginal rights existed prior to the 1982 constitutional amendments and exist as legal rights irrespective of these constitutional provisions.

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23 *Ibid.* at 382.

Moreover, it is important to note that the recognition at common law of aboriginal rights is not limited simply to aboriginal title. Indeed aboriginal rights generally have been held to exist and are recognized at common law irrespective of whether the rights involved relate to land. In analysing aboriginal rights within the context of section 35 of the *Constitution Act, 1982*, Chief Justice Lamer clearly pointed out in *R. v. Van der Peet*[24] that the common law recognizes aboriginal rights generally and in this respect he was fully supported by Justice L'Heureux-Dubé as well as by Justice McLachlin in their separate opinions in that case.[25] Thus, the doctrine of aboriginal rights is essentially a common law doctrine which has, through *inter alia* section 35, been elevated to a constitutional status. [26] By acquiring this constitutional status, aboriginal rights at common law are protected from unilateral extinguishment and can only be regulated in accordance with the rules set out by the Supreme Court of Canada and which will be examined below. However, aboriginal rights – including but not limited to aboriginal title – existed as enforceable and compensable legal rights at common law prior to 1982.

Since the adoption of the *Constitution Act, 1982*, the courts have had a greater opportunity to discuss the nature and content of these common law rights. Of particular interest to our discussion here are the cases of *R. v. Van der Peet*,[27] *R. v. Adams*,[28] and *Delgamuukw v. B.C.*.[29]

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24 *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

25 *Ibid.* at 538 (para. 28 and 29), 579 (para. 116) and 642 to 648 (para. 263 to 275).

26 See K. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada", in W.S.Tarnopolsky and G.-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982). See also K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 Supreme Court L.R. 255.

27 *R. v. Van der Peet*, *supra* note 24.

28 *R. v. Adams*, [1996] 3 S.C.R. 101.

29 *Delgamuukw v. B.C.*, *supra* note 1.

It flows from the *R. v. Van der Peet* and the *R. v. Adams* decisions, that common law aboriginal rights lie on a spectrum. At one end are those rights which relate to the traditional practices, customs and traditions of the aboriginal peoples and which have nothing or little to do with land, and at the other end there is aboriginal title in its full form. As Chief Justice Lamer stated in *Delgamuukw*:

> "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 (emphasis in original)). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity."
>
> (...)
>
> 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."[30]

The general method for identifying and defining the common law aboriginal rights which lie on this spectrum was first discussed by the Supreme Court of Canada in the *R. v. Van der Peet* decision and in its companion cases of *R. v. N.T.C. Smokehouse Ltd.*[31] and *R. v. Gladstone*.[32]

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30 *Ibid.* at 1094-95 (para. 138).

31 *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672.

32 *R. v. Gladstone*, [1996] 2 S.C.R. 723

Before proceeding with a review of this method, it is appropriate to note that it was developed by the Supreme Court of Canada in the context of section 35 of the *Constitution Act, 1982* and of the infringement and justification test contained therein. Indeed, pursuant to section 35, the courts now have a major role to play in controlling the administrative and legislative actions of governments that affect aboriginal rights. This power of review and control over administrative and legislative actions did not exist at common law. It can be argued that the method for identifying and defining aboriginal rights stated in the *Van der Peet* decision and its companion cases may be more restrictive than what the common law itself recognizes as rights for aboriginal peoples. The rights of aboriginal peoples which may be recognized at common law and which may be compensated by the courts under common law principles may be more expansive than those aboriginal rights recognized and affirmed under section 35. This distinction may, to some extent, serve to reconcile the different approaches to the identification and definition of aboriginal rights found in the reasons of Chief Justice Lamer and of Justices L'Heureux-Dubé and McLachlin in the case of *R. v. Van der Peet*, the latter dealing with rights of aboriginal peoples recognized at common law generally and which are recognizable and compensable at common law and the former dealing with that subset of rights known as aboriginal rights and which have been afforded constitutional protection and which warrant the supervisory and control powers of the judiciary over government actions which affect them. However, since this distinction has not been explicitly recognized by the Supreme Court of Canada itself, we will deal with the issue of the identification and definition of the rights of aboriginal peoples recognized at common law as if these were wholly included in those common law aboriginal rights contemplated by section 35 of the *Constitution Act, 1982*.

For Chief Justice Lamer, section 35 of the *Constitution Act, 1982* provides a constitutional framework through which the fact that the aboriginal peoples were already living in communities on the land prior to the arrival of the Europeans is acknowledged and reconciled with the sovereignty of the Crown. In order to fulfill the purpose underlying section 35, the test for identifying those aboriginal rights recognized and affirmed by that

section must be directed at identifying the crucial elements of those pre-existing distinct aboriginal societies. It must "*aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans*"[33]. For the Chief Justice and the majority of the Supreme Court, in order to qualify as an aboriginal right contemplated by section 35, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming that right.

This test involves two steps: the first stage of the analysis of a claim to an aboriginal right requires a determination of the precise nature of the claim being made, taking into account such factors as the nature of the action taken pursuant to the claimed aboriginal right, the government regulation argued to infringe upon the right, and the tradition, custom or practice relied upon to establish the right. The second stage requires a determination of whether the practice or custom claimed to be an aboriginal right was, prior to contact with Europeans, an integral part of the distinctive aboriginal society of the aboriginal peoples in question or, in other words, whether the practice or custom was of central significance to the concerned aboriginal society, was one of the things that truly made the society what it was prior to European contact. In assessing such a claim, the perspective of aboriginal peoples and the perspective of the common law must equally be taken into account.[34]

In addition, for such a right to be recognized under section 35, there must be some continuity between the practice, custom or tradition prior to contact with Europeans and modern times and thus the claimed practice must still today be integral to the distinctive aboriginal culture of the concerned aboriginal peoples. The evolution of the practice, custom or tradition to modern forms will not impede its protection as an aboriginal right recognized and affirmed under section 35. However, where the practice, custom or tradition arose solely

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33 *R. v. Van der Peet, supra* note 24 at 548 (para. 44) [emphasis added].

34 This raises interesting evidentiary issues which were partially addressed in *Delgamuukw v. B.C., supra* note 1 at 1070 to 1079.

as a response to European influences, then that practice, custom or tradition will not meet the standard for recognition as an aboriginal right under the terms of section 35 of the *Constitution Act, 1982.*[35]

Such an approach necessarily implies that aboriginal rights are not general and universal to all aboriginal communities. These rights are thus determined on a case by case basis and are specific to each aboriginal community.

The position of Chief Justice Lamer and of the majority of the Supreme Court on the method of identification and definition of those aboriginal rights recognized and affirmed under section 35 can be seen as limiting the scope and extent of such rights. By limiting section 35 aboriginal rights to those practices, customs and traditions existing previous to contact with Europeans, the majority of the Court has, to some extent, limited recognition of the dynamic evolution of aboriginal societies since first contact with the Europeans and ignored to a large degree the important impact the contact between Europeans and aboriginals has had in shaping both the aboriginal and the mainstream Canadian societies and cultures.[36]

Furthermore, the approach based on aboriginal "practices, traditions and customs" considers only part of aboriginal culture and requires, to a certain degree, a separation between particular elements of a culture and the general cultural and social context in which

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35 This restriction to the recognition of aboriginal rights denying constitutional recognition to those practices, customs and traditions emerging from the aboriginal contact with Europeans sharply divided the Court as shown by the strong dissents of L'Heureux-Dubé J. (at 596 to 603) and of McLachlin J. (at 633 to 636) in *R. v. Van der Peet, supra* note 24. As we note above, it may be argued that aboriginal practices, customs and traditions which arose from the contact with the Europeans may still be recognized as enforceable rights under the common law, albeit not receiving the constitutional protection of s. 35 of the *Constitution Act, 1982.*

36 See in this regard J. Webber, "Relations of Force and Relations of Justice" (1995) 33 Osgoode Hall L.J. 623.

these elements are rooted. This approach renders difficult a holistic focus on aboriginal rights based on an analysis of the concerned culture and society as a whole dynamic phenomenon interrelating with strong external factors such as European society. It can be argued that the approach taken on these matters by the majority of the Supreme Court is somewhat culturally static. Nevertheless, the approach described above is the one applicable in Canada for identifying and defining those common law aboriginal rights which are recognized and affirmed under section 35 of the *Constitution Act, 1982.*

As noted previously, this approach may not necessarily be applicable in identifying and defining all rights of aboriginal peoples recognized at common law. Indeed, it can be argued that certain rights of aboriginal peoples may exist at common law irrespective of their recognition under the terms of section 35. The common law may thus recognize as legal rights certain aboriginal practices which resulted from contact with the Europeans. Though these rights may not be afforded the constitutional protection provided by section 35 and may thus be regulated by government without recourse to the constitutionally mandated supervisory and control powers of the courts, such rights may well be cognizable at common law and subject to appropriate compensation when infringed upon or extinguished, save when clear legislation to the contrary has been adopted by the competent authority. Section 25 of the *Constitution Act, 1982* may itself be referring to such common law rights extending beyond those set out in section 35 when it provides for the "*aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada (...)*".[37]

Moreover, the recognition by the common law of an aboriginal right is not in itself a prerequisite for recognition under section 35 of the *Constitution Act, 1982.* Aboriginal rights may receive constitutional protection irrespective of their recognition at common

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[37] *Constitutional Act, 1982*, s. 25, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [emphasis added].

law.[38] Conversely, it may be argued that certain common law rights of aboriginal peoples may exist irrespective of their recognition as constitutionally protected rights, though no case has to date specifically dealt with this issue.

Though extensive discussions have been carried out by the Supreme Court of Canada in relation to the method of identification of aboriginal rights, the contents of such rights have not been afforded extensive attention. This results in large part from the approach favoured by the Court which calls for a case by case review and which defies generalizations as to the contents of such rights. These rights have nevertheless been characterised by the Court as *sui generis* and as possessing attributes similar to those of aboriginal title, including the inalienability of the rights, the particular origin of the rights rooted in prior occupation of the land, and the collective aspect of the rights.[39]

The Supreme Court of Canada has however proceeded with an extensive discussion of the content of aboriginal title in the seminal case of *Delgamuukw v. B.C.*.[40] Aboriginal title is but one particular manifestation of aboriginal rights generally. Like all other aboriginal rights, it is recognizable under the common law as a legal right enforceable by the courts. In addition, common law aboriginal title in its full form is recognized and affirmed under section 35 of the *Constitution Act, 1982*. As held in the *R. v. Guerin*[41] case and reiterated in *Delgamuukw v. B.C.*,[42] aboriginal title is a *sui generis* interest in land distinguishable from a fee simple and which cannot be entirely explained in traditional common law property terms. The principal characteristics of aboriginal title at common law

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38 See *R. v. Côté*, [1996] 3 S.C.R. 139 at 174-175 (para. 52-53), and *Delgamuukw v. B.C.*, *supra* note 1 at 1093 (para. 136).

39 *Delgamuukw v. B.C.*, *supra* note 1 at 1066 (para. 82). See also *R. v. Sparrow*, *supra* note 5 at 1112; *St. Mary's Indian Band v. Cranbrook*, [1997] 2 S.C.R. 657 at 666-667 (para. 14).

40 *Delgamuukw v. B.C.*, *supra* note 1.

41 *R. v. Guerin*, *supra* note 21.

42 *Delgamuukw v. B.C.*, *supra* note 1.

are its inalienability except to the Crown in Right of Canada, its origin which flows from the prior occupation of Canada by the aboriginal peoples, and the fact that aboriginal title is held collectively by all the members of the concerned aboriginal nation.

Aboriginal title however differs from other aboriginal rights in that it involves a right to the land itself. In order to take into account this specificity of aboriginal title, the Supreme Court of Canada has adapted the test set out in *R. v. Van der Peet*[43] in order to identify or prove aboriginal title. Thus, while an aboriginal right generally requires establishing a practice existing prior to European contact in order to be recognized under section 35, in the case of aboriginal title, exclusive occupation of the land by the concerned aboriginal peoples prior to the assertion of sovereignty by the Crown is rather required.

The actual content of aboriginal title is quite broad. Chief Justice Lamer summarizes as follows in *Delgamuukw v. B.C.* the content of aboriginal title at common law:

> "(...) I have arrived at the conclusion that the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land." [44]

As can easily be ascertained by the above quote, aboriginal title is not the equivalent of a common law fee simple land interest. However, it allows for the exclusive use of the land for broad and extensive purposes which are clearly not limited to traditional aboriginal uses of land. Indeed, though aboriginal title generally flows from the use and occupation of the land for traditional aboriginal activities, once it is established, it allows the concerned

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[43] *R. v. Van der Peet, supra* note 24.

[44] *Delgamuukw v. B.C., supra* note 1 at 1083 (para. 117).

aboriginal peoples the possibility of using the land on an exclusive basis for all kinds of purposes, including commercial purposes unrelated to aboriginal practices. Aboriginal title also extends to the natural resources on or in the land.[45]

The inherent limitation to common law aboriginal title is the requirement that the land not be used by the aboriginals for purposes which are completely at odds and totally incompatible with their traditional activities on the concerned land. Aboriginal title cannot thus justify uses of the land by the aboriginal peoples themselves which would sever their special relationship with the land. This limitation has been compared to the land use restriction found at common law under the concept of equitable waste and under which a person who holds a life estate cannot commit wanton and extravagant acts of destruction.[46] However, barring such rare incompatible uses, aboriginal title ensures to the concerned aboriginal peoples the undisturbed and exclusive use of the land which is subject to it for a large variety of purposes which need not be tied to traditional aboriginal activities.

B. Treaty Rights

Treaty rights generally flow from the agreements made between the aboriginal peoples and the representatives of the Crown.[47] Though there is a tendency to perceive treaty

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45 *Delgamuukw v. B.C.*, *supra* note 1 at 1086-1087 (para. 122); see also *Haida Nation v. British Columbia (Minister of Forests)* (1997), 153 D.L.R. (4th) 1 (B.C.C.A.) at 4-5 (para. 5-6).

46 *Delgamuukw v. B.C.*, *supra* note 1 at 1090 (para. 130).

47 See generally on the issue of treaties: S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville: Éditions Yvon Blais, 1995); S. Grammond, "Aboriginal Treaties and Canadian Law" (1994) 20 Queen's L.J. 57; S. Aronson, "The Authority of the Crown to Make Treaties with Indians" [1993] 2 C.N.L.R. 1; A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke and Co., 1880), reprinted 1991 by Fifth House Publishers, Saskatoon; Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Minister of Supply and Services, 1995); J. (continued...)

rights as inherently different in origin and content than aboriginal rights, this is not an entirely correct view, particularly when dealing with those treaty rights which confirm or regulate pre-existing aboriginal rights such as hunting and fishing rights or the carving out of reserve land from land subject to aboriginal title. Indeed, when, as they often do, treaties confirm to the aboriginal signatories the continuation of their hunting and fishing activities, the scope and extent of such activities must essentially be found in the underlying aboriginal right recognized at common law. Likewise, the nature of the rights of aboriginal peoples in traditional land reserved to them by treaty must also be found in common law aboriginal title. A treaty may modify or restrict or expand these common law rights, however absent clear language to the contrary in the treaty, the common law applicable in such matters will be presumed to have been maintained and confirmed by the treaty. Thus, treaties often provide superadded protection to underlying surviving common law aboriginal rights.

Treaties also allow aboriginal peoples and the Crown to create new rights unknown or unrecognized by the common law and to extinguish or regulate existing common law aboriginal rights. Although treaties can be characterized as contracts, they are very special contracts of a *sui generis* and public nature.[48]

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47 (...continued)
Woodward, *Native Law* (Toronto: Carswell, 1994) (particularly chapter 21); B.H. Wildsmith, "Pre-Confederation Treaties", in B.W. Morse, ed., *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1989); N.K. Zlotkin, "Post-Confederation Treaties", in B.W. Morse, ed., *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1989); K. Lysyk, "Indian Hunting Rights: Constitutional Considerations and the Role of Indians Treaties in British Columbia" (1966) 2 U.B.C. L. Rev. 401; D. Knoll, "Treaty and Aboriginal Hunting and Fishing Rights" [1979] 1 C.N.L.R. 1; I. Brownlie, *Treaties and Indigenous Peoples* (Oxford: Clarendon Press, 1992).

48 *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), aff'd [1965] S.R.C. vi; (1965), 52 D.L.R. (2d) 481 (S.C.C.); *Simon v. The Queen*, [1985] 2 S.C.R 387, in particular at 404 and 410; *R. v. Sioui*, [1990] 1 S.C.R. 1025, in particular from 1038 to 1044 and 1063; *R. v. Badger*, [1996] 1 S.C.R. 771, in particular at 813-814 (para. 78-79); *R. v. Sundown*, [1999] 1 S.C.R. 393 at 406-407 (para. 24-25); *R. v. Marshall*, September 17, 1999, file no. 26014 (S.C.C.), [1999] 4 C.N.L.R. 161.

Treaties are *sui generis* documents in that they often purport to be binding in perpetuity, they are often binding not only on the aboriginal signatories but also on whole aboriginal peoples as well as on their descendants, and they often create various forms of *sui generis* rights. They are of a public nature in that they clearly bind the Crown, they purport to regulate the relationship of the Crown with entire populations and often over vast territories, and they are regulated by a corpus of public common law rules as regard *inter alia* the capacity of the parties to enter into a treaty, the formalities related thereto and the rules governing treaty interpretation.

Many cases have dealt with these common law rules. It can be surmised from the case law[49] that treaties with aboriginal peoples represent an exchange of solemn promises between the Crown and the concerned aboriginals. This exchange of promises takes the form of an agreement whose nature is said to be sacred and which places upon the Crown a high responsibility in the fulfilment of all the undertakings made in the context of this agreement. The integrity and honour of the Crown are always at stake in the implementation of treaties with aboriginal peoples. Thus no sharp dealings with aboriginal peoples will be sanctioned nor will the courts provide a restrictive interpretation to the commitments of the Crown in the treaties it has signed. On the contrary, ambiguities or doubtful expressions in a treaty will be interpreted in the favour of the aboriginal party and limitations to the rights of the aboriginal party are to be narrowly construed.

Consequently, restrictions to common law aboriginal rights or extinguishments of such rights purported to be effected by a treaty will be narrowly construed in favour of the aboriginal party. Moreover, it will be incumbent upon the Crown to prove that such a restriction or extinguishment was indeed effected by the treaty. Likewise, the onus of establishing that a treaty right itself has been extinguished or restricted lies on the party

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49 See amongst other *R. v. White and Bob, Ibid.*; *R. v. Taylor and Williams* (1982), 34 O.R. (2d) 360; *Simon v. The Queen, Ibid.*; *Saanichton Marina Ltd. v. Tsawout Indian Band* (1989), 57 D.L.R. (4th) 161 (B.C.C.A.); *R. v. Sioui, Ibid.*; *R. v. Badger, Ibid.*; *R. v. Sundown, Ibid.*; *R. v. Marshall, Ibid.* at para. 49 to 52 and 78.

relying on the extinguishment or restriction. Strict evidence of a clear and plain intent to effect such a restriction or to carry out such an extinguishment is also required.

Treaty rights are provided with statutory protection from interference by the provincial legislatures through the terms of section 88 of the *Indian Act*.[50] Though this protection may have existed in any event under constitutional division of powers principles as discussed further below, the terms of the *Indian Act* indicate clearly the importance of treaty rights for Parliament and the clear priority such rights are to be afforded.

Like common law aboriginal rights, treaty rights have also been constitutionally recognized and affirmed through *inter alia* the terms of section 35 of the *Constitution Act, 1982*. The wording of section 35 has been held as supporting a common approach to infringements of aboriginal and treaty rights.[51] The similarities between these rights are not limited to the infringement and justification principles implicit in section 35, but also extend to the common law compensation principles applicable in cases of infringement or extinguishment.

This brief review of both aboriginal rights at common law and of treaty rights allows to set the stage for the next chapters of this paper which will deal first with the fiduciary relationship and attending fiduciary duties of the Crown and second with the constitutional framework in which treaty and aboriginal rights evolve in Canada. Once this is completed, we will then be in a position to discuss the standards applicable in cases of infringement or extinguishment of such rights in order to then address the legal principles applicable to compensation in such cases.

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50 *Indian Act*, R.C.S. 1985, c. I-6, s. 88.

51 *R. v. Badger*, *supra* note 48 at 812 to 814 (para. 77 to 82). See also *R. v. Bombay*, [1993] 1 C.N.L.R. 92 (Ont. C.A.) and *R. v. Sundown*, *supra* note 48 at para. 43 and 46.

CHAPTER 2

THE FIDUCIARY RELATIONSHIP AND THE FIDUCIARY DUTIES OF THE CROWN

The Supreme Court of Canada has often stated that a *sui generis* fiduciary relationship binds the Crown and aboriginal peoples and colours all government actions relating to aboriginal matters.[52]

This relationship implies political obligations and duties for governments in their dealings with aboriginal peoples. However, this relationship is not limited to the political arena. It also finds judicial expression and recognition in that the courts are, *inter alia*, bound to consider and take into account this relationship when reviewing government actions affecting aboriginal peoples.

Thus, this relationship colours the interpretation of legislation, treaties and other documents relating to aboriginal peoples. As Justice Sopinka pointed out in *R. v. Badger*, the principles applicable to the interpretation of treaties with aboriginal peoples *"arise out of the nature of the relationship between the Crown and aboriginal peoples with the result*

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52 Reference may be made in this regard, amongst other, to *R. v. Sparrow*, *supra* note 5 at 1108; *Guerin v. The Queen*, *supra* note 21 at 375-376; *R. v. Van der Peet*, *supra* note 24 at 536-537; and *Delgamuukw v. B.C.*, *supra* note 1 at 1125-1126. See generally L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (U. of T. Press, 1996); J.D. Hurley, "The Crown's Fiduciary Duty and Indian Title: Guerin v. The Queen" (1985) 30 McGill L.J. 559; R.H. Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53 Sask. L. Rev. 301; R.H. Bartlett "You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: Guerin v. The Queen" (1984-85) 49 Sask. L. Rev. 367; W.R. McMurtry & A. Pratt, "Indians and the Fiduciary Concept, Self-Government, and the Constitution: Guerin in Perspective" [1986] 3 C.N.L.R. 19; D.P. Owen, "Fiduciary Obligations and Aboriginal Peoples: Devolution in Action" [1994] 3 C.N.L.R. 1; B. Slattery, "First Nations and the Constitution: A question of Trust" (1992) 71 Can. Bar Rev. 261; B. Slattery, "Understanding Aboriginal Rights", *supra* note 7; E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1; P. Hutchins et al, "When do Fiduciary Obligations to Aboriginal Peoples Arise?" (1995) 59 Sask. L. Rev. 97.

that, whatever the document in which that relationship has been articulated, the principles should apply to the interpretation of that document".[53]

This relationship also finds expression in section 35 of the *Constitution Act, 1982* and must be taken into account by the courts when applying this constitutional provision. As the Supreme Court of Canada stated in *R. v. Sparrow*:

> "(...) In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."[54]

Thus, the relationship between the Crown and aboriginal peoples is fiduciary and this fiduciary relationship must be taken into account by the courts in all circumstances where aboriginal rights are at issue.

This fiduciary relationship also entails, in certain circumstances, judicially enforceable fiduciary duties on the Crown, particularly in regard to dealings in aboriginal land, rights and interests. In *Guerin v. The Queen*,[55] the Supreme Court of Canada confirmed a lower court award of $10 million against Canada for mishandling land transactions involving the lease of Musqueam Indian Band reserve land. The Supreme Court of Canada there set aside the "political trust" theories of the British courts discussed in *Kinlock v.*

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53 *R. v. Badger, supra* note 48 at 782 (para. 9). See also *Province of Ontario v. Dominion of Canada and Province of Quebec: In Re Indian Claims* (1895), 25 S.C.R. 434, at 534-535.

54 *R. v. Sparrow, supra* note 5 at 1108.

55 *Guerin v. The Queen, supra* note 21.

Secretary of State for India in Council[56] and in *Tito v. Waddell (No. 2)*,[57] and rather found that the Crown was subject to a judicially enforceable fiduciary duty towards aboriginal peoples in cases involving aboriginal land transactions. The Supreme Court of Canada found the origin of this judicially enforceable fiduciary duty of the Crown in the fiduciary relationship between the Crown and aboriginal peoples coupled with the nature of aboriginal title and, in particular, with the proposition that the aboriginal interest in land is inalienable except upon surrender to the Crown.

Professor Slattery has set out this judicially enforceable fiduciary duty of the Crown in very broad terms in his seminal 1987 article "Understanding Aboriginal Rights": "*The Crown has a general fiduciary duty towards native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands.*"[58]

Thus, the fiduciary relationship between the Crown and aboriginal peoples, in addition to serving as a guiding principle for the courts when reviewing legal issues involving aboriginals, also leads to judicially enforceable fiduciary duties on the Crown whenever the Crown assumes or exercises a discretionary power over aboriginal peoples, or over their rights or interests. These fiduciary duties are always present in cases involving the surrender or management of aboriginal land because of the very nature of aboriginal title and of the surrender restrictions relating thereto. However, the judicially enforceable fiduciary duties of the Crown are clearly not limited to transactions involving aboriginal land. They exist each time where by statute, agreement or by unilateral undertaking, the Crown assumes

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56 *Kinlock v. Secretary of State for India in Council* (1882), 7 App. Cas. 619.

57 *Tito v. Waddell (No. 2)*, [1977] 3 All. E. R. 129 (Ch.).

58 B. Slattery, "Understanding Aboriginal Rights", *supra* note 7 at 753.

an obligation to act for the benefit of an aboriginal group or an aboriginal individual and that obligation carries with it a discretionary power.[59]

The fiduciary relationship of the Crown extends to treaties with aboriginal peoples. In interpreting and applying the terms of a treaty, the courts will always keep in mind and enforce the underlying fiduciary relationship in which the treaty was made and the fiduciary relationship the treaty itself generally represents. Moreover, in most treaties the Crown will undertake to assume certain obligations. In executing these obligations, the Crown will normally be held by the courts to the standards of execution required under a fiduciary relationship.

This is exemplified in the decision of the Supreme Court of the United States in the case of *Seminole Nation v. United States*.[60] In that decision, the Supreme Court of the United States reviewed a damage award from the U.S. Court of Claims in which the Seminole nation had sued the United States for failing to make payments under various treaties. The Supreme Court of the United States remanded certain issues to the Court of Claims and in so doing decided that a judicially enforceable duty of care in the nature of a fiduciary obligation was incumbent upon the government in discharging its treaty obligations. Indeed, it had been established that the Seminole tribal government was utterly corrupt during the years 1870 to 1874, yet the government of the United States continued treaty payments to this tribal government knowing that the monies would be diverted from tribal uses. The Supreme Court of the United States asked the Court of Claims to review again the case based on a breach of the government's fiduciary duty in discharging its treaty obligations. For the Supreme Court of the United States, the conduct of government in discharging treaty

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59 See *Guerin v. The Queen*, *supra* note 21 at 383-384. See also *Semiahmoo Indian Band v. Canada*, [1998] 1 F.C. 3 (C.A.).

60 *Seminole Nation v. United States*, 316 U.S. 286 (1942).

obligations must be examined by the courts and judged *"by the most exacting fiduciary standards"*.[61]

This is also the position held in Canada. In *Ontario (Attorney General) v. Bear Island Foundation*,[62] the Supreme Court of Canada rejected the aboriginal claims of the Teme-Augawa Anishnabay and Temagami on the basis that the rights which were claimed had been surrendered by arrangements under which the ancestors of the concerned aboriginals had adhered to the Robinson-Huron treaty in exchange for treaty annuities and a reserve. It was however recognized in that case that the Crown had failed to discharge its obligations as provided for under the terms of the concerned treaty. The Supreme Court of Canada found that by failing to comply with the terms of the treaty, the Crown had breached its fiduciary obligation towards the concerned aboriginal peoples.[63]

This idea had been expressed in Canada as early as 1895 in the dissenting opinion of Gwynne J. in *Province of Ontario v. Dominion of Canada and Province of Quebec: In Re Indian Claims*:

> "(...) what is contended for and must not be lost sight of, is that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of "treaties" with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that the terms and conditions expressed in those instruments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and

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61 *Ibid.* at 296-297. See also *Carlo v. Gustafson*, 512 F. Supp 833 (1981) at 838.

62 *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570.

63 *Ibid.* at 575. See also *Cree Regional Authority v. Canada*, [1992] 1 F.C. 440 at 463-464.

> honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown."[64]

Thus, when the Crown exercises discretionary powers over aboriginal peoples or in the management of aboriginal lands, rights, property, or interests, it assumes a fiduciary duty or obligation to discharge these powers in accordance with exacting fiduciary standards which are subject to review and enforcement by the courts. In implementing treaty obligations, the Crown will be held to the obligations of a fiduciary and the courts will review Crown action in this regard in light both of the general fiduciary relationship and of the specific fiduciary obligation to discharge treaty obligations with due regard to the most exacting fiduciary standards.

The fiduciary relationship between the Crown and aboriginal peoples, as well as the fiduciary duties and obligations which flow from this relationship in certain circumstances, both predate the 1982 constitutional framework and exist irrespective of the provisions of section 35 of the *Constitution Act, 1982*. Rather, it is the fiduciary relationship which conditions the approach of the courts towards section 35. The fiduciary relationship between the Crown and aboriginal peoples finds constitutional confirmation through the operation of sections 91(24) and 109 of the *Constitution Act, 1867*,[65] and this relationship strongly conditions the application and interpretation of section 35 of the *Constitution Act, 1982*.

In addition, the fiduciary relationship and its attending fiduciary duties extend in certain circumstances to the provincial Crown, particularly when the provinces affect aboriginal lands, rights, property or interests or assume discretionary powers over aboriginal peoples or their lands, rights, property or interests. Clearly the courts have found this

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64 *Province of Ontario v. Dominion of Canada and Province of Quebec: In Re Indian Claims*, *supra* note 53 at 511-512 [emphasis added]. This very quote has been approved as a correct statement of the law by the majority decision in *R. v. Marshall*, *supra* note 48 at para. 50. See also *Ontario Mining Co. v. Seybold* (1901), 32 S.C.R. 1 at 2.

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

fiduciary relationship to extend to the provincial Crown when section 35 of the *Constitution Act, 1982* comes into play.[66]

Insofar as the provincial Crown assumes powers or responsibilities over aboriginal peoples or their interests, it appears that it also assumes the resulting duty and obligation to discharge these powers in accordance with fiduciary standards. In particular, should a provincial government assume obligations through treaty undertakings with aboriginal peoples – as is now common in modern treaties such as the *James Bay and Northern Quebec Agreement*[67] – it seems that in so doing the provincial Crown assumes a superadded duty to discharge these treaty undertakings following fiduciary standards. These standards probably extend to all cases in which a provincial Crown has the discretionary power to affect the rights or interests of aboriginal peoples. Professor Slattery puts it this way:

> "The Crown's general fiduciary duty binds both the federal Crown and the various provincial Crowns within the limits of their respective jurisdictions. The federal Crown has primary responsibility toward native peoples under section 91(24) of the Constitution Act, 1867, and thus bears the main burden of the fiduciary trust. But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust."[68]

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66 See *R. v. Sparrow*, *supra* note 5 at 1105; *Ontario (Attorney General) v. Bear Island Foundation*, *supra* note 62 ; R. v. Côté, *supra* note 38 at 185; *R. v. Badger*, *supra* note 48 at 820; *Côté v. R.*, [1993] R.J.Q. 1350 (Que. C.A.) at 1371-1372; *Cree Regional Authority v. Canada*, *supra* note 63 at 470; *The Queen v. Secretary of State*, [1981] 4 C.N.L.R. 86 (Eng. C.A.), at 97 and 117; *Gitanyow First Nation v. Canada*, [1999] 3 C.N.L.R. 89 (B.C.S.C.) at 100 to 102 (para. 45 to 53).

67 Reprinted as *James Bay and Northern Quebec Agreement and Complementary Agreements*, 1998 ed. (Sainte-Foy: Les Publications du Québec, 1998). The James Bay and Northern Quebec Agreement was approved, given effect and declared valid by the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32 and the *Act approving the Agreement concerning James Bay and Northern Quebec*, 1976 S.Q. c. 46.

68 B. Slattery, "Understanding Aboriginal Rights", *supra* note 7 at 755. See also Manitoba, *Report of the Aboriginal Justice Inquiry*, vol. I (1991) at 155.

CHAPTER 3

FEDERAL COMMON LAW AND ABORIGINAL AND TREATY RIGHTS

The law pertaining to aboriginal rights, to treaty rights and to aboriginal law matters generally is governed by a corpus of rules which can be termed the federal common law of aboriginal rights.

These rules are in large part *sui generis* and they include, *inter alia*, elements of international law and of Imperial policy, as well as various rules and principles found in or derived from the common law relating to aboriginal and treaty rights, aboriginal treaties, *the Royal Proclamation, 1763*, the provisions of sections 91(24) and 109 of *Constitution Act. 1867*, and the provisions of sections 25 and 35 of the *Constitution Act, 1982*.

The main purpose of these *sui generis* rules known as the federal common law of aboriginal rights is to govern the relationship resulting from the contact between aboriginal and European societies.

In Canada, the *sui generis* rules which govern this relationship belong to a special branch of constitutional law, a branch which was first closely related to the Imperial policy of Great Britain as well as to Imperial and colonial constitutional law. Because of the strategic and geopolitical importance of the relationship between Imperial Britain and the aboriginal nations of the Americas, the law and policy relating to aboriginal matters was closely guarded by the Imperial authorities. Indeed, the very basis of British control of North America – including control through the Hudson's Bay Company – depended to a large extent on maintaining a relationship with the aboriginal nations and ensuring their support as allies of the Crown. Relations between aboriginal peoples and the Imperial Crown – directly or through the Hudson's Bay Company – thus often involved issues of war and peace

and of jurisdiction and control over large territories. In consequence, aboriginal policy – and by extension legal matters relating to aboriginals – held a special position in the British imperial political, legal and constitutional system.

At Confederation, overall jurisdiction over aboriginal affairs was devolved to Parliament. Thus, section 91(24) of the *Constitution Act, 1867* specifically assigns exclusively to Parliament all matters relating to *"Indians, and Lands reserved for the Indians"*. Aboriginal law and its *sui generis* rules were thus entirely placed within the federal sphere of constitutional authority. As a result, aboriginal law is now a branch of "federal" law. In particular, the common law rules relating to aboriginal title, to aboriginal rights and to treaty rights and briefly described in the first chapter are now part of what is called – for lack of a better term – the federal common law of aboriginal rights. The fundamental rules which govern the relationship between aboriginal peoples and the mainstream Canadian society are thus within the federal sphere of constitutional authority and cannot be substantially affected or modified by provincial legislation.

With the coming into force of the *Constitution Act, 1982*, the *sui generis* rules known as the federal common law of aboriginal rights became to a large extent constitutionalized. These rules, which had in the past been largely beyond the reach of the provincial legislatures, are now also largely beyond the reach of Parliament.

It is important not to confuse the federal common law of aboriginal rights with the *common law* in a private law sense or with the civil law of a province. Thus, the federal common law relating to aboriginal rights is an autonomous branch of the law which operates within the federal sphere of constitutional authority. It is also to a large extent federal public law. In consequence, the common law of aboriginal rights operates uniformly across Canada within the federal sphere of authority. These distinctions are crucial for the determination of the legal framework and legal rules relating to compensation in cases of infringements to aboriginal or treaty rights.

It is to these issues which this chapter dwells into further.

The leading case in these regards is the decision of the Supreme Court of Canada in *Roberts v. Canada*.[69] The case revolved around the issue of the jurisdiction of the Federal Court of Canada to adjudicate a trespass action brought by one *Indian Act* Indian band against another. In *Roberts*, the Supreme Court of Canada found that federal common law was an essential element of the laws of Canada under the meaning of section 101 of the *Constitution Act, 1867*. The Court then went on to add that this federal common law includes the common law of aboriginal title as well as the rules governing the fiduciary relationship between the federal Crown and aboriginal peoples and the resulting fiduciary obligations of the federal Crown. As a result, the common law rules relating to aboriginal title and to the fiduciary relationship and duties of the federal Crown apply uniformly across Canada within the federal sphere of authority. As professors Evans and Slattery have commented in discussing this specific case: *"In this manner, the common law of aboriginal title – and indeed the common law governing aboriginal and treaty rights generally – became federal common law. To put the point precisely, it became a body of basic public law operating uniformly across the country within the federal sphere of competence."*[70]

The idea that the common law of aboriginal title – and by extension the common law of aboriginal and treaty rights – applies uniformly across Canada in the guise of federal

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69 *Roberts v. Canada*, [1989] 1 S.C.R. 322.

70 J.M. Evans & B. Slattery, "Federal Jurisdiction-Pendant Parties-Aboriginal Title and Federal Common Law-Charter Challenges-Reform Proposals: *Roberts v. Canada*" (1989) 68 Can. Bar Rev. 817 at 832 [emphasis in original]. See also B. Slattery, "Understanding Aboriginal Rights", *supra* note 7 at 732, 736 to 741 and 777; Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-government and the Constitution* (Canada, 1993) at 20.

common law was reiterated in the cases of *R. v. Côté*[71] and of *R. v. Adams.*[72] The issue of the existence of aboriginal land rights in the province of Quebec was raised in these cases and it was argued that the French regime did not recognize aboriginal title and that, in any event, the common law relating to aboriginal title had not been received in Quebec. In rejecting these arguments, Chief Justice Lamer found that section 35 of the *Constitution Act, 1982* ensured the affirmation and recognition of aboriginal rights irrespective of the colonial legal regime in force prior to the assertion of sovereignty by the British Crown and irrespective of whether or not the common law of aboriginal title had been received in a particular province or territory. However, the Chief Justice also discussed beyond the constitutional argument based solely on section 35. In so doing, he not only threw doubt on the contention that the French had failed to recognize aboriginal land rights in their colonial empire in North America, but he also reiterated the idea of aboriginal title as an essential component of the federal common law applying uniformly across Canada. The Chief Justice argued that the common law of aboriginal title was a necessary incident of British sovereignty which displaced any prevailing foreign colonial law relating to the matter. The Chief Justice reiterated the finding in *Roberts v. Canada* that the law of aboriginal title represented *"a distinct species of federal common law rather than a simple subset of the common or civil law or property law operating within the province".*[73]

The Chief Justice also had an opportunity to review the implications of the inclusion of the doctrine of aboriginal rights within the federal sphere of constitutional authority in the case of *Delgamuukw v. B.C.*. Though *Delgamuukw* deals in large part with the notion of aboriginal title, the constitutional concepts discussed there within the context of aboriginal title extend to the federal common law of aboriginal and treaty rights generally. The Chief Justice himself notes in this regard that his comments relating to the constitutional position

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71 *R. v. Côté, supra* note 38 at 170 and 172 to 175 (para. 45, 46 and 49 to 54).

72 *R. v. Adams, supra* note 28 at 120 to 122 (para. 31 to 33).

73 *R. v. Côté, supra* note 38 at 173 (para. 49).

of land subject to aboriginal title extend to aboriginal rights.[74] The comments of the Supreme Court of Canada in this regard can be extended as well to treaty rights.[75]

A proper discussion of these constitutional considerations must begin with a brief analysis of section 109 of the *Constitution Act, 1867*. This provision states that the ownership of the land and natural resources located in a province at Confederation belong to the Crown in right of that province, subject however to *"(...) any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same"*.[76] The Privy Council has long ago decided that this exception to provincial propriety interests includes aboriginal title. This title is an underlying burden on provincial lands and, by extension, on the natural resources of the provinces.[77]

In *St. Catherine Milling and Lumber Co. v. The Queen*,[78] the Privy Council also recognized that those lands subject to aboriginal title where *"Lands reserved for the Indians"* under the meaning of section 91(24) of the *Constitution Act, 1867*, and consequently the exclusive power to legislate over the aboriginal title burdening these lands is vested within Parliament. The result of this Privy Council decision is to confer on the federal authorities the exclusive power to receive a surrender of aboriginal title, but if this surrender concerns land located in a province and which is subject to section 109 of the *Constitution Act, 1867*, then the beneficiary of this surrender is the concerned province which sees the aboriginal

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74 *Delgamuukw v. B.C., supra* note 1 at 1118-1119 (para. 176 and 179).

75 Since both aboriginal rights and treaty rights are part of the federal common law and fall under the federal sphere of constitutional authority, it follows logically that the constitutional position of treaty rights is similar to that afforded to aboriginal rights.

76 *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c. 3, s. 109, reprinted in R.S.C. 1985, App. II, No. 5.

77 *St. Catherine Milling and Lumber Co. v. The Queen, supra* note 16. The territory contemplated in that case was subject to the *Royal Proclamation, 1763*.

78 *Ibid.*

burden on its proprietary interest lifted. The provinces are however left powerless in these regards.

In *Delgamuukw* v. B.C.,[79] the Supreme Court of Canada had to contend with the proposition that the province of British Columbia had extinguished aboriginal title and other aboriginal land rights in that province through various legislations relating to land and adopted by the provincial legislature after the adhesion of that province to Canada. Chief Justice Lamer rejected this contention as constitutionally inaccurate since only Parliament is constitutionally empowered to legislate in relation to aboriginal title and consequently only Parliament could have validly extinguished aboriginal title subsequent to 1867 and prior to 1982. In consequence, provincial legislation could not have the effect of extinguishing common law aboriginal title.[80]

In order to properly understand this position, a brief review of the case law pertaining to the application of provincial laws to "Indians" is in order.[81]

The exclusive federal authority under section 91(24) of the *Constitution Act, 1867* contains two branches, one relating to "Indians" and for which much case law exists as

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79 *Delgamuukw v. B.C.*, *supra* note 1.

80 *Ibid.* at 1121 (para. 180-181).

81 See in general P.W. Hogg, *Constitutional Law of Canada*, 4th ed., Vol. 1 (looseleaf) (Toronto: Carswell, 1997), particularly chapter 27; K. Lysyk, "The Unique Constitutional Position of the Canadian Indian", *supra* note 7; K. McNeil, "Aboriginal Title and the Division of Powers" (1998) 61 Sask. L. Rev. 431; J. Woodward, *Native Law*, supra note 47, in particular chapters 3 and 4; B. Slattery, "Understanding Aboriginal Rights", *supra* note 7; M. Patenaude, *Le droit provincial et les terres indiennes* (Montréal: Les Éditions Yvon Blais Inc., 1986); N. Lyon, "Constitutional Issues in Native Law", in B.W. Morse, ed., *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1989); D. Sanders, "The Application of Provincial Laws", in B.W. Morse, ed., *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1989); B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada", *supra* note 7.

regards its impact on provincial laws,[82] and the other concerning the "Lands reserved for the Indians". The case law relating to the impact of this second branch on provincial laws is still in a state of flux.[83]

Section 91(24) clearly precludes the provinces from legislating directly in relation to "Indians". The real difficulty resides in the impact of this first branch of federal power on provincial laws of general application. As a general constitutional principle, the "Indians" branch of federal power does not act as a bar to the application to "Indians" of laws of general application adopted by the provinces within the provincial sphere of jurisdiction. Provincial laws of general application and which do not single out "Indians" are deemed to apply *ex proprio vigore* to "Indians". The example of provincial traffic regulations is usually given to illustrate this matter. There are nevertheless serious constitutional limits as to the extent to which such provincial laws of general application may so apply.

Indeed, it has been held that section 91(24) of the *Constitution Act, 1867* protects a core of "Indianness" from provincial legislation of general application. In consequence, provincial laws of general application cannot affect this core of "Indianness" *ex proprio vigore*. The extent of this core remains largely undefined, however aboriginal rights squarely fall within it:

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82 Some of the relevant Supreme Court of Canada cases decided prior to *Delgamuukw v. B.C.*, *supra* note 1, and dealing with the application of provincial laws in regards to the first branch of the federal jurisdiction, namely "Indians," are *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R 751; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *The Queen v. Sutherland et al*, [1980] 2 S.C.R. 451; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *R. v. Francis*, [1988] 1 S.C.R. 1025.

83 See *Derrickson v. Derrickson*, *Ibid.*; Compare *Oka (Municipality) v. Simon*, [1999] 2 C.N.L.R. 205 (Qué. C.A.) (leave to appeal to S.C.C. refused October 21, 1999 (file 27212)) with *Surrey v. Peace Arch Ent. Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.).

> "The core of Indianness at the heart of s. 91(24) has been defined in both negative and positive terms. Negatively, it has been held to not include labour relations (*Four B*) and the driving of motor vehicles (*Francis*). The only positive formulation of Indianness was offered in *Dick*. Speaking for the Court, Beetz J. assumed, but did not decide, that a provincial hunting law did not apply *proprio vigore* to the members of an Indian band to hunt and [fish] because those activities were "at the centre of what they do and what they are" (at p. 320). But in *Van der Peet*, I described and defined the aboriginal rights that are recognized and affirmed by s. 35(1) in a similar fashion, as protecting the occupation of land and the activities which are integral to the distinctive aboriginal culture of the group claiming the right. It follows that aboriginal rights are part of the core of Indianness at the heart of s. 91(24). Prior to 1982, as a result, they could not be extinguished by provincial laws of general application."[84]

In the existing constitutional framework relating to the separation of powers between the provincial legislatures and Parliament, aboriginal rights fall squarely within the exclusive jurisdiction of Parliament. As a necessary consequence, these rights cannot be regulated detrimentally *ex proprio vigore* by the provinces through laws of general application.

These constitutional principles also extent to the treaty rights of aboriginal peoples. Indeed, only the federal authorities can validly accept the surrender of aboriginal title and this surrender is usually made through a treaty. Though treaties are not limited to aboriginal title surrender transactions, the importance of treaties for aboriginal peoples and the crucial role treaties play in defining the relationship between aboriginal peoples and the mainstream Canadian society militates strongly in favour of including all treaty rights of aboriginal peoples – be they related or not to aboriginal title – within the core of "Indianness" protected under section 91(24) of the *Constitution Act, 1867*. This argument is moreover reinforced by the inclusion of treaty rights within sections 25 and 35 of the *Constitution Act, 1982* thus showing the central – or, to paraphrase the Supreme Court of Canada, the "core" – importance of treaties in the relationship between the Crown and aboriginal peoples.

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[84] *Delgamuukw v. B.C.*, *supra* note 1 at 1121 (para. 181) [emphasis added].

Aboriginal and treaty rights thus fall under the core protected by section 91(24) of the *Constitution Act, 1867* and they cannot in consequence be directly regulated by the provinces *ex proprio vigore*. Moreover, provincial laws of general application cannot *ex proprio vigore* detrimentally affect the aboriginal and treaty rights of aboriginal peoples. The regulation of such rights, including the regulation of the rules relating to compensation in cases of infringements to these rights, falls under the core protected by section 91(24) of the *Constitution Act, 1867*. Since 1982, this core has also been protected from detrimental federal legislative and regulatory activities through the terms of the *Constitution Act, 1982*.

The second branch of federal jurisdiction under section 91(24) of the *Constitution Act, 1867*, namely that branch relating to the "Lands reserved for the Indians", involves similar constitutional considerations. Though the case law in this regard is much less developed (see note 83), it can nevertheless be safely concluded that the rules in regard to the application *ex proprio vigore* of provincial laws to "Indians" will also apply to the second branch of federal powers relating to "Lands reserved for the Indians". Though provincial laws of general application may in certain circumstances apply over the territories subject to aboriginal title, these laws can neither purport to regulate that title nor to limit the enjoyment by the "Indians" of the land subject to the said title. In particular, provincial laws of general application cannot purport to regulate the means and conditions under which aboriginal title or aboriginal treaty land rights may be surrendered or detrimentally affected, nor may they – by implication – purport to regulate the principles governing compensation in such circumstances.

It is very important to note that though aboriginal and treaty rights may not be detrimentally affected or regulated through provincial laws of general application applying *ex proprio vigore*, provincial laws of general application may be made to regulate such rights under federal legislation or under the terms of the treaties themselves, subject of course to certain legal and constitutional limits, including those limits set out in the *Constitution Act, 1982*. It is thus open for Parliament to adopt laws incorporating provincial legislation or

rendering such provincial legislation applicable to "Indians" or to "Lands reserved for the Indians". In fact Parliament has, to a limited extent, proceeded to render applicable to "Indians" provincial laws of general application through the operation of section 88 of the *Indian Act* which reads as follows:

> "88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act."[85]

This section reaffirms the primary federal jurisdiction over treaties. It also reiterates that the terms of all treaties with aboriginal peoples cannot be detrimentally regulated or affected by provincial legislation of general application referentially incorporated through this section 88 unless the treaty itself so provides.[86]

Section 88 of the *Indian Act* also confirms the overriding power of Parliament to legislate in relation to aboriginal affairs generally. By making provincial laws of general application subject to the terms of any Act of Parliament including the *Indian Act*, Parliament is simply affirming its overriding jurisdiction to deal with aboriginal and treaty rights issues generally.

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85 *Indian Act*, R.S.C. 1985, c. I-6, s. 88.

86 As we shall discuss in the next chapter, this legislative prohibition in regard to provincial legislation detrimentally affecting treaties has far reaching implications. In particular, and as more fully argued in the next chapter, the justification test laid out by the Supreme Court of Canada in application of section 35 of the *Constitution Act, 1982* when provincial laws purport to infringe upon aboriginal rights may not be fully applicable to treaty rights through the operation of section 88 of the *Indian Act*. Section 88 may thus afford a special and paramount statutory protection for the terms of treaties against any potentially conflicting provincial law. See generally: *Kruger v. The Queen*, *supra* note 82 at 114-115; *Simon v. The Queen*, *supra* note 48; *R. v. Sioui*, *supra* note 48 at 1065; *R. v. Badger*, *supra* note 48 at 809 (para. 69); *R. v. Côté*, *supra* note 38 at 191 (para. 86); *R. v. Sundown*, *supra* note 48 at para. 47.

Provincial laws of general application are made to apply only in relation to the first branch of federal powers under section 91(24) of the *Constitution Act, 1867*, namely that branch relating to "Indians". Section 88 of the *Indian Act* does not appear *prima facie* to extend provincial laws of general application to the second branch of federal powers relating to "Lands reserved for the Indians" which includes, as we have already discussed, lands subject to aboriginal title as well as those lands reserved under the meaning of the *Indian Act*. Thus, provincial laws of general application may not apply pursuant to section 88 of the *Indian Act* in order to regulate the aboriginal interest in "Lands reserved for the Indians" under the meaning of section 91(24) of the *Constitution Act, 1867*, though this issue is not definitely settled.[87] The extent of the application *ex proprio vigore* of provincial laws of general application which may incidentally regulate such lands also remains somewhat unsettled. Nevertheless, it can be safely stated that such provincial laws cannot affect the core aboriginal interest in such lands and these provincial laws may be displaced by federal aboriginal land legislation such as those provisions found in the *Indian Act* relating to the regulation of "reserves" under the meaning of that act.

The operation of provincial laws of general application through the terms of section 88 of the *Indian Act* is subject to further restrictions. Only those provincial laws which would not be otherwise constitutionally applicable and which regulate or affect indirectly or incidentally "Indians" are contemplated by the section. Section 88 does not however allow the provinces to legislate directly in regard to "Indians" – and by extension in regard to aboriginal rights – and its terms should not be interpreted as validating provincial laws which destroy or detrimentally affect the core of federal jurisdiction under section 91(24) of the *Constitution Act, 1867*. All section 88 provides for is the application to "Indians" of

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87 See generally: *Derrickson v. Derrickson, supra* note 82, at 293 to 296 and 299 to 303; *Delgamuukw v. B.C., supra* note 1 at 1116 to 1123 (para. 174 to 183); *Surrey v. Peace Arch Ent. Ltd. supra* note 83; *Matsqui Indian Band v. Bird*, [1993] 3 C.N.L.R. 80 (B.C.S.C.); *Stoney Creek Indian Band v. British Columbia*, [1999] 1 C.N.L.R. 192 (B.C.S.C.) at 201 to 210 (leave to appeal to B.C.C.A. granted: (1999), 172 D.L.R. (4th) 679 (B.C.C.A.); *contra*: *Oka (Municipality) v. Simon, supra* note 83.

provincial laws of general application which would not be otherwise constitutionally applicable *ex proprio vigore* and which incidentally affect the core of "Indianness".[88] As an example, provincial hunting laws of general application and which may incidentally affect aboriginal hunting activities may be made to apply to aboriginal peoples through the operation of section 88 of the *Indian Act* even though the hunting or fishing activities may be carried out pursuant to an aboriginal right. Section 88 operates to make these provincial laws of general application applicable in certain circumstances and subject to certain legal and constitutional constraints.

Were it not for section 88 of the *Indian Act*, provincial laws, including those of general application, could not operate – even incidentally – to infringe or restrict aboriginal rights. This results from the exclusive federal jurisdiction provided under section 91(24) of the *Constitution Act, 1867* and from the concept of the core of "Indianness" section 91(24) is intended to encompass and which includes aboriginal and treaty rights. With section 88 of the *Indian Act*, it is thus possible for provincial legislation of general application referentially incorporated through that piece of federal legislation to incidentally affect this core of "Indianness" in relation to certain aboriginal rights. In so incidentally affecting certain aboriginal rights, this federally incorporated provincial legislation is subject to certain constraints which flow from the federal common law of aboriginal rights.[89]

The common law constraints are the same as those which apply to any federal legislation affecting aboriginal rights. First, in order to cause an extinguishment of a common law aboriginal right, a clear and plain intent on the part of Parliament must exist to that effect. Since section 88 of the *Indian Act* does not show such a clear and plain intent on

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88 See *Dick v. The Queen*, *supra* note 82 and *Delgamuukw v. B.C.*, *supra* note 1 at 1121-1122 (para.182).

89 Since 1982 – like all other federal legislation – the provincial legislation referentially incorporated under the terms of the *Indian Act* is also additionally subject to certain constitutional constraints which flow, *inter alia*, from the provisions of section 35 of the *Constitution Act, 1982*.

the part of Parliament, provincial legislation of general application referred to in that piece of federal legislation cannot thus purport to cause the extinguishment of an aboriginal right.[90] Second, in certain circumstances, federal legislation may infringe upon or impair the aboriginal right itself or the exercise of that right. This may lead to compensation under the federal common law relating to aboriginal rights unless Parliament has shown a clear intention not to provide such compensation.[91]

Provincial legislation of general application rendered applicable through the operation of section 88 of the *Indian Act* and which incidentally affect aboriginal rights would be in the same position as federal legislation which infringes upon aboriginal rights. Thus, barring specific federal legislation excluding compensation for the affected aboriginal peoples, compensation would normally be available pursuant to the infringement or impairment of an aboriginal right through the operation of referentially incorporated provincial legislation, presuming such legislation would be nevertheless constitutionally applicable.

The rules governing compensation in such circumstances would be those of the federal common law of aboriginal rights since laws of general application in a province cannot displace the federal common law in this regard. A law which would displace federal common law in this regard would be in relation to "Indians" or to "Lands reserved for the Indians" and, as such, would be beyond the constitutional powers of a province. Such

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90 See *Delgamuukw v. B.C.*, *supra* note 1 at 1122-1123 (para. 183).

91 See *Delgamuukw v. B.C.*, *supra* note 1 at 1114 and 1133-1134 (para. 169 and 203); *Guerin v. The Queen*, *supra* note 21; *Calder v. Attorney-General of British Columbia*, *supra* note 17, in particular, the reasons of Hall J.; *Oyekan v. Adele*, [1957] 2 All E.R. 785 (P.C.) at 788; *Tijani v. Secretary of Southern Rhodesia*, [1921] 2 A.C. 399; *Tamaki v. Baker*, [1901] A.C. 561; *The Queen v. Symonds*, [1847] N.Z.P.C.C. 387. This right to compensation may also be available in light of the *Canadian Bill of Rights*, R.S.C. 1985, c. C-12.3, in particular subsections 1a) and b). Indeed, the right to compensation for extinguishment of aboriginal title in Australia is deemed to flow, *inter alia*, from the application of human rights legislation: *Mabo v. Queensland (No. 1)* (1989), 166 C.L.R. 186. This last issue remains however unsettled in Canada.

provincial laws would not be contemplated by section 88 of the *Indian Act* since this would be going beyond a simple incidental impact on aboriginal rights.[92]

Aboriginal law in Canada is thus governed by a corpus of rules which are part of federal common law and which consequently apply uniformly across Canada. These common law rules fall within the exclusive jurisdiction of Parliament and they cannot be changed or detrimentally affected by the provincial legislatures acting directly or through laws of general application. This federal common law has a strong public law component and comprises *sui generis* rules which are exorbitant of and to a large degree unrelated to common law property principles and private law rules.[93]

The nature of aboriginal and treaty rights as described in the first chapter, the special relationship between the Crown and aboriginal peoples as described in the second chapter, the *sui generis* rules of the applicable federal common law as well as the other elements described in this chapter allow us to conclude that the remedies available in cases of infringements to aboriginal or treaty rights are those common law and equitable remedies available in cases of breach of a fiduciary duty or obligation. These remedies operate under the federal common law irrespective of the constitutional remedies available since 1982 under the terms of section 35 of the Constitution Act, 1982. These constitutional remedies are superadded to those other remedies available under the federal common law of aboriginal rights. It is to these common law and constitutional remedies that we now turn our attention.

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92 See our discussion above and *Delgamuukw v. B.C.*, *supra* note 1 at 1121-1122 (para. 182-183). For a general discussion of section 88 of the *Indian Act*, see P.W. Hogg, *Constitutional Law of Canada*, *supra* note 81 at 27-12 to 27-14; B. Slattery, "Understanding Aboriginal Rights", *supra* note 7 at 777.

93 See *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344 at 358 and 387 (para. 6 and 72); *Canadian Pacific v. Paul*, [1988] 2 S.C.R. 654 at 678; *St. Mary's Indian Band v. Cranbrook*, *supra* note 39 at 666-667 (para. 14); *Delgamuukw v. B.C.*, *supra* note 1 at 1090 (para. 130).

CHAPTER 4

THE INFRINGEMENT OF ABORIGINAL AND TREATY RIGHTS

Aboriginal and treaty rights are not absolute. At common law, aboriginal rights may be extinguished unilaterally by appropriate legislation and both aboriginal and treaty rights may be infringed upon in certain circumstances.

In *Calder v. Attorney-General of British Columbia*, Justice Hall clearly noted that common law aboriginal title may be extinguished not only by an appropriate surrender to the Crown, but also without the consent of the concerned aboriginal peoples through specific legislation carried out by the competent legislative authority.[94] Justice Hall added that the legislative intent to effect such extinguishment must however be clear and plain.[95]

Since 1867, the power to extinguish unilaterally common law aboriginal rights, including aboriginal title, rests exclusively with Parliament.[96] For the period prior to 1867, it has been argued that the *Royal Proclamation, 1763* imposed constitutional limitations on the Canadian legislatures in regard at least to the extinguishment of aboriginal title and that consequently unilateral extinguishment of aboriginal title could only be effected through Imperial action.[97] This issue remains however somewhat moot, most cases revolving around the absence of the required clear and plain intent by the local Canadian legislatures prior to

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94 *Calder v. Attorney-General of British Columbia, supra* note 17 at 402 to 404.

95 *Ibid* at 404. See also in this regard *Guerin v. The Queen, supra* note 21 at 377; *Delgamuukw v. B.C., supra* note 1 at 1122-1123 (para. 183); *Delgamuukw v. B.C.* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.); *Watt v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 C.N.L.R. 326 (F.C.A.) at 336 (para. 16); and B. Slattery, "Understanding Aboriginal Rights", *supra* note 7 at 748-749 and 765-766.

96 *Delgamuukw v. B.C., supra* note 1 at 1116 to 1123 (para. 173 to 183).

97 B. Slattery, "Understanding Aboriginal Rights", *supra* note 7 at 766.

1867 in order to accomplish such unilateral extinguishment.[98] In any event, there does not appear to be much, if any, pre-1867 "clear and plain" colonial legislation or Imperial action purporting to unilaterally extinguish aboriginal title or aboriginal rights in Canada.

Moreover there are very few pieces of federal legislation subsequent to 1867 which purport to achieve such an extinguishment without the consent of the concerned aboriginal populations. The only case which readily comes to mind being the federal legislation which purported to extinguish certain aboriginal rights in the territory contemplated by the *James Bay and Northern Quebec Agreement*, including certain rights pertaining to those aboriginal populations who were not signatories to that agreement.[99]

Treaty rights are, in this regard, somewhat in the same position as aboriginal rights. Some distinctions are nevertheless in order. Indeed, prior to 1982, treaty rights could be unilaterally infringed upon by the competent legislative authority if a clear and plain intent for this purpose was expressed.[100] However, there remains some doubt as to whether treaty rights could be unilaterally extinguished prior to 1982. Indeed, contrary to aboriginal rights, treaty rights result from the clear commitments of the Crown. Taking into account that these commitments are deemed most sacred, it can be argued that, barring extraordinary action by the aboriginal signatories (such as war) justifying the repudiation of the treaty, treaty rights could not be unilaterally extinguished prior to 1982. Treaty rights often involve large

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98 In this regard reference may be made, amongst other, to the mixed opinions of Justices Judson and Hall in *Calder v.Attorney-General of British Columbia*, *supra* note 17 and to the mixed opinions delivered in the decision of the British Columbia Court of Appeal in *Delgamuukw v. B.C.*, (1993) 104 D.L.R. (4th) 470.

99 *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 3(3) and 4(1) b. The validity of such unilateral extinguishment is subject to some doubt in regards to *inter alia* of the terms of the *Canadian Bill of Rights*, R.S.C. 1985, c. C-12.3.

100 *Sikyea v. The Queen*, [1964] S.C.R. 642 affirming (1964), 43 D.L.R. (2d) 150; *R. v. George*, [1966] S.C.R. 267; *Frank v. The Queen*, [1978] 1 S.C.R. 95; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282 at 293; *R. v. Horseman*, [1990] 1 S.C.R. 901 at 936; *R. v. Badger*, *supra* note 48, at 795 to 797 (para. 45 to 48) and 812-813 (para. 74 and 77); *R. v. Marshall*, *supra* note 48 at para. 48.

transfers of land and of jurisdictions and thus many treaties can be seen as quasi-constitutional instruments. It has thus been argued that, prior to 1982, treaty rights could not be unilaterally extinguished even though they could be unilaterally infringed.[101] In *R. v. Sioui*, Justice Lamer stated that the very definition of a treaty *"makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned."*[102]

To summarise our discussion, aboriginal rights could be unilaterally extinguished by the competent legislative authority through clear and plain legislation to this effect. Since 1867, this legislative authority is exclusively vested in Parliament. However, very few laws purporting to unilaterally extinguish aboriginal rights have been adopted. The existence of the power to effect a unilateral extinguishment of treaty rights prior to 1982 remains an open question, though a strong case can be made that treaty rights could not have been extinguished without the consent of the concerned aboriginals. Since 1982, the power to unilaterally extinguish aboriginal or treaty rights has been substantially curtailed by the terms of section 35 of the *Constitution Act, 1982*.[103]

Thus, the principal unilateral restrictions to aboriginal and treaty rights are not to be found in purported extinguishments of these rights. Rather, it is the right to unilaterally regulate and infringe upon common law aboriginal rights and upon treaty rights which has had a substantial impact on these rights and not the rare cases of unilateral extinguishment.

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101 See *Chippewas of Sarnia Band v. Canada (Attorney General)*, April 30, 1999, Carswell Ont. 1244 (Ont. S.C.) at para. 562 to 570.

102 *R. v. Sioui, supra* note 48 at 1063. However, in *R. v. Marshall*, supra note 48, Justice Binnie does state at para. 48, that *"Until the enactment of the Constitution Act, 1982, the treaty rights of Aboriginal peoples could be overridden by competent legislation as easily as could the rights and liberties of other inhabitants"*.

103 See amongst other *Watt v. Canada (Minister of Citizenship and Immigration), supra* note 95 at 335 (para. 15).

Aboriginal and treaty rights can be regulated by the competent legislative authorities. As with extinguishment, the constitutional authority to regulate these rights belongs since 1867 to Parliament under the terms of section 91(24) of the *Constitution Act, 1867.* In this regard reference may be made to the discussion in chapter three above. Thus Parliament can adopt legislation to regulate aboriginal and treaty rights and, prior to 1982, such legislation was not normally subject to review and control by the courts. Though the provinces cannot regulate directly aboriginal and treaty rights, much provincial legislation of general application has been made to apply and indeed effectively regulates certain aboriginal rights. This has been carried out in large part through section 88 of the *Indian Act* as discussed in the previous chapter. In the case of treaty rights, the terms of the treaties themselves often render provincial legislation applicable for the purposes of regulating certain of the rights they contain, particularly as pertaining to hunting and fishing rights.

The power to regulate aboriginal and treaty rights has important implications for our discussion of compensation in cases of infringements to such rights. Indeed, compensation is available at common law in cases where aboriginal and treaty rights have been extinguished. It is not however obvious that compensation would be available in all cases where aboriginal and treaty rights are simply regulated. Indeed, regulating the exercise of a common law right – including a property right – through otherwise constitutionally valid legislation does not necessarily entail an ensuing common law right to compensation.[104] If this were otherwise, governments would be continuously called upon to provide compensation to their constituents when adopting laws since the very purpose of much legislation is precisely to regulate the exercise of common law rights. As a simple example, reasonable restrictions to the use of motor vehicles through traffic regulations would not normally entail a common law right to compensation for those affected. It is thus difficult to sustain that a common law right to compensation exists each time an aboriginal or treaty right is otherwise validly regulated.

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104 E.C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Carswell, 1992) at 24-25. See also *R.* v. *Marshall (no. 2)*, November 17, 1999, File no. 26014 (S.C.C.), at para. 36 and 37, [1999] 4 C.N.L.R. 301, at 319.

However, there are situations where outright extinguishment of an aboriginal or treaty right may not be achieved but where the regulation actually negates the exercise of the right. Such a situation exists where the right is not extinguished unequivocally but is affected to such an extent as to render the fundamental exercise of that right difficult or meaningless. There is therefore a distinction to draw at common law between the regulation of an aboriginal and treaty right and the impairment of such a right.[105] In the case of the regulation of an aboriginal or treaty right which does not fundamentally impair such right, compensation would not normally be available at common law. An example in this regard are regulations restricting the use of certain firearms in hunting activities for public safety purposes. Though such regulations may affect an aboriginal or treaty hunting right, they do not necessarily fundamentally impair the exercise of such right and thus do not necessarily lead to compensation at common law. On the other hand, the granting of lands used by aboriginals for agricultural purposes or the authorization of the use of aboriginal lands for hydroelectric or forestry operations would in most cases result in an impairment of the affected aboriginal right to such a degree as to render the exercise of such right on the affected lands difficult or meaningless.[106] In these cases compensation would be available even if the concerned aboriginal or treaty right has not been extinguished outright. Thus, through regulation, an aboriginal or treaty right may be impaired to such an extent as to justify at common law in certain circumstances the payment of compensation even if a full extinguishment of such a right is not accomplished.

Likewise, through the operation of section 88 of the *Indian Act*, provincial laws of general application may also impair though not extinguish certain common law aboriginal rights. In such cases, compensation may be owed at common law when the regulation

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105 See by analogy *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101; *The Queen (B.C.) v. Tener*, [1985] 1 S.C.R. 533 at 549 to 552 and 557; *Casamiro Resource Corp. v. British Columbia (Attorney General)* (1991), 80 D.L.R. (4th) 1 (B.C.C.A.); *Cream Silver Mines Ltd. v. British Columbia* (1991), 85 D.L.R. (4th) 269 (B.C.S.C.); B. Barton, "Comment" (1987) 66 Can. Bar Rev. 145.

106 See *R. v. Sundown*, *supra* note 48 at para. 41-42.

constitutes an impairment of the aboriginal right to such a degree as to render the exercise of such right difficult or meaningless.[107]

For example, provincial legislation of general application relating to hunting and fishing, to the colonization of agricultural lands or to the development of forestry, mining or hydroelectricity may result in compensation in circumstances where the impact of such legislative schemes on aboriginal rights impairs the exercise of such rights to a substantial extent.

These common law principles have to a large extent been incorporated in section 35 of the *Constitution Act, 1982.* In addition, section 35 provides for a new supervisory power of the courts in regard to federal or provincial regulatory schemes which affect aboriginal and treaty rights.[108] Section 35 of the *Constitution Act, 1982* incorporates within its terms the doctrine of aboriginal rights and by extension the basic common law rules relating to aboriginal and treaty rights generally.[109] Thus, the common law of aboriginal rights is encompassed within section 35, including the common law right to just and adequate compensation in cases of extinguishment of or impairment to such rights. What section 35

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107 As discussed in chapter three, such provincial laws of general application which fundamentally impair an aboriginal right may not in any event be constitutionally applicable since they may be deemed beyond the scope of section 88 of the *Indian Act*. Thus, in addition to other possible remedies, compensation could be owed either as a result of the consequences of the unconstitutional provincially sanctioned impairment or either as a result of the common law of aboriginal rights should the impairment be deemed constitutionally valid through the referential incorporation provided by section 88 of the *Indian Act*. In either case compensation could be claimed in the appropriate circumstances.

108 See generally D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can. Bar. Rev. 314; J. O'Reilly, "La Loi constitutionnelle de 1982, droit des autochtones" (1984) 25 C. de D. 125; B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83) 8 Queen's L.J. 232.

109 *R. v. Van der Peet, supra* note 24 at para. 28 and 29; *Delgamuukw v. B.C., supra* note 1 at 1092 (para. 134 and 135).

has achieved in addition is the constitutionalization of these rights and of the underlying common law principles which sustain these rights.[110]

In addition to extending constitutional recognition and affirmation to these rights, section 35 also provides for a measure of control by the courts over federal and provincial legislative schemes when such schemes affect aboriginal or treaty rights. With the coming into force of section 35 of the *Constitution Act, 1982*, the courts may grant the remedies available at common law and which flow from the recognition at common law of aboriginal and treaty rights, and they may also now provide new constitutional remedies relating in particular to the setting aside by judicial fiat of federal or provincial legislative or regulatory schemes which infringe upon an aboriginal or treaty right and which cannot be constitutionally justified. This supervisory role of the courts over legislative and regulatory activities was not available at common law. As was stated in *R. v. Sparrow*:

> "The constitutional recognition afforded by the provision [sec. 35(1)] therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1)."[111]

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110 See *R. v. Van der Peet*, *supra* note 24 at 538 (para. 28 and 29); *Delgamuukw v. B.C.*, *supra* note 1 at 1092 (para. 134).

111 *R. v. Sparrow*, *supra* note 5 at 1110. See M. Asch & P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 26:2 Alta. L. Rev. 502; W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1991) 15 Queen's L.J. 217; L.I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997) 36 Alta. L. Rev. 149; S. Grammond, "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt Sparrow" (1991) 36 McGill L.J. 1382.

In *Sparrow*, the Supreme Court of Canada set out a double pronged test. First there is a test to establish a *prima facie* interference with a right recognized and affirmed under section 35, and second, a test for the justification of such interference.

The first question relates to interference. This addresses the issue of whether the impugned legislation has the effect of interfering with a right contemplated by section 35 of the *Constitution Act, 1982*. If it does have such a consequence, it represents a *prima facie* infringement of section 35. This inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake.[112] Speaking for the Supreme Court of Canada in *Sparrow*, Chief Justice Dickson and Justice La Forest described the applicable test for infringement to an aboriginal right to fish for food in these terms:

> "To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation."[113]

The *Sparrow* test for infringement was further reviewed in *R. v. Gladstone*, where the Court noted that the original formulation of the infringement test suggested an internal inconsistency as it equated an analysis of *prima facie* infringement with an analysis of whether the infringement is unreasonable or undue.[114] The Supreme Court of Canada further explained the test by specifying, first, that the three factors identified in the *Sparrow* decision were not an exhaustive enumeration and therefore other factors could be taken into account, and second, by further specifying that there is no need to answer all three *Sparrow* factors in

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112 *Ibid.* at 1111.

113 *Ibid.* at 1112.

114 *R. v. Gladstone*, *supra* note 32 at 757 (para. 43).

order to conclude to a *prima facie* infringement.[115] Thus the test to determine whether an infringement has occurred involves a relatively easy onus on those claiming infringement.

Moreover, infringements to aboriginal or treaty rights are to be presumed when dealing with statutory or regulatory instruments which confer an administrative discretion which might potentially be exercised in a manner which encroaches on a right recognized and affirmed under section 35 of the *Constitution Act, 1982.* This approach contrasts significantly with the one taken by the Supreme Court of Canada in regards to Charter rights. As stated by the Chief Justice in *R. v. Adams*:

> "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*. (...)
>
> 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

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[115] *Ibid.* This was further reiterated in *R. v. Côté, supra* note 38 at 185-186 (para. 75).

> fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test."[116]

The second question raised under *Sparrow* arises when a *prima facie* interference to an aboriginal or treaty right is found. The analysis then moves to the issue of justification. This is the test that addresses the question of what constitutes a legitimate regulation of an aboriginal or treaty right.

First, a valid legislative objective must be found. This objective must be something more than the public interest since such an objective is so vague and broad as to provide no meaningful guidance in order to place limits on rights which are recognized and affirmed by the Constitution. The courts must rather be satisfied that the asserted legislative objective is compelling and substantial.[117]

However, the scope of such compelling and substantial objectives has been found to be very broad. In the context of an aboriginal right to fish for personal subsistence, conservation and resource management have been found as meeting the test.[118] Within the context of the distribution of commercial fisheries allocations, additional objectives such as the pursuit of economic and regional fairness and the recognition of the historical reliance of and the participation in the fishing by other groups have also been held to constitute such compelling and substantial objectives.[119] Within the context of aboriginal title, objectives such as the "*development of agriculture, forestry, mining, and hydroelectric power, the*

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116 *R. v. Adams*, *supra* note 28 at 131-132 (para. 53-54) [emphasis in original]. See also *R. v. Côté*, *supra* note 38 at 186-187 (para. 76); *R. v. Marshall*, *supra* note 48 at para. 64; and *R. v. Marshall (no. 2)*, *supra* note 104, at para. 33.

117 *R. v. Sparrow*, *supra* note 5 at 1113. See also *R. v. Côté*, *supra* note 38 at 189 (para. 89) and *R. v. Adams*, *supra* note 28 at 133 (para. 56).

118 *R. v. Sparrow*, *supra* note 5 at 1113-1114.

119 *R. v. Gladstone*, *supra* note 32 at 774-775 (para. 73 and 75).; *R. v. Marshall (no. 2)*, *supra* note 104 at para. 41-42.

general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims" are all sufficiently compelling and substantial to justify the infringement of aboriginal title.[120]

Second, if a valid legislative objective is found, the analysis proceeds to the second part of the justification test which involves the courts in ensuring that the honour of the Crown is maintained in the regulation of aboriginal or treaty rights. The special fiduciary relationship and the responsibilities of the governments towards aboriginal peoples must be fully taken into account by the courts in determining whether a legislative or regulatory scheme may be justified under section 35 of the *Constitution Act, 1982* as a legitimate interference with a right contemplated by that section. In essence, the courts must ensure that the affected aboriginals have been treated fairly and in a manner consistent with the preservation of the honour of the Crown when an interference with their aboriginal or treaty rights is required in the pursuit of a compelling and substantial legislative objective.

The onus to meet this justification test is very high. This is to ensure that aboriginal and treaty rights are taken seriously.[121] The courts cannot supply their own justifications in this regard, and it is thus incumbent on those who claim proper justification to bear the burden of demonstrating that the honour of the Crown has been maintained and the standards required to meet the justification test have been complied with.[122]

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120 *Delgamuukw v. B.C., supra* note 1 at 1111 and 1132-1133 (par 165 and 202).

121 *R. v. Sparrow, supra* note 5 at 1119.

122 *R. v. Badger, supra* note 48 at 822.

The Supreme Court of Canada has identified certain of the factors which must be taken into account by the courts in satisfying themselves as to whether this justification burden has been properly discharged.[123]

These include first the question of whether there has been as little infringement as possible to the concerned right. Thus an important factor in reviewing the infringement is to determine whether all appropriate measures have been taken to ensure that the aboriginal or treaty right will be the least possible impacted in order to meet the substantial and compelling legislative objective sought to be achieved. In cases where land subject to aboriginal title is required for a compelling and substantial legislative purpose, only that part of the land which is absolutely required for that purpose may be infringed upon. If reasonable alternatives not requiring the use of aboriginal land are available, the infringement will not be justified. Moreover, if more aboriginal land than absolutely necessary is affected, the justification burden in regard to that land will not have been discharged. Similar minimal impairment rules will be applied by the courts in cases of infringements to other aboriginal rights or to treaty rights. The minimal impairment standards will be determined in accordance, *inter alia*, with the type of aboriginal or treaty right affected and with the alternatives reasonably available in each case.

Second, there is a fundamental requirement of consultation with the concerned aboriginal group. The absence of such consultation or its inadequacy will in most circumstances lead to the conclusion that the justification burden has not been discharged. The resulting consequence will be to have section 35 of the *Constitution Act, 1982* applied in order to render nugatory the impugned legislative or regulatory scheme, at least to the extent of preventing infringement upon the rights of aboriginal peoples.

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123 See *R. v. Sparrow*, *supra* note 5 at 1119; *R. v. Badger*, *supra* note 48 at 821; *R. v. Nikal*, [1996] 1 S.C.R. 1013 at 1064-1065; *R. v. Côté*, *supra* note 38 at 189 (para. 81); *Delgamuukw v. B.C.*, *supra* note 1 at 1111 to 1114 (para. 165 to 169).

The requirement of consultation contains an implied duty to fully and adequately inform the concerned aboriginals or their representatives of all pertinent aspects of the proposed legislation, regulation, action or decision which may infringe upon an aboriginal or treaty right of interest to them. In particular, the impacts on the exercise of the concerned rights and the reasonable alternatives to avoid such impacts must be provided in sufficient detail in order for a reasonable person to make informed decisions on the matter. All remedial or compensation proposals related to the infringement thus likewise need to be explained with sufficient details in order for a reasonable person to make an informed decision on the adequacy of the proposed remedial measures and of the compensation package. The extent of information required will be assessed in each case taking into account all the circumstances. The courts would certainly frown upon fundamental aspects of the proposal not being revealed when known or misleading information about the proposal being willfully provided.

Since aboriginal rights and most treaty rights are collective rights, the required information will usually be channelled through the representatives of the concerned aboriginal group holding the right. However in cases where the proposal may impact substantially upon the aboriginal group as a whole, appropriate information about the proposal will be required to be channelled to the group as a whole. Again, the content of such information and its method of distribution will largely vary according to the circumstances. A reasonable approach which takes into account the wishes and preoccupations of the leadership of the concerned aboriginal group should be favoured.[124]

The consultation process must take place in a timely manner and in such a way that the results of the consultation may be fully taken into account before final or irremediable decisions or actions are taken. In particular, alternatives to eliminate or reduce the proposed

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[124] The issue of aboriginal leadership is complex since there may often exist various power structures within a given aboriginal community, including traditional leadership structures at odds with *Indian Act* band council leadership. It is however beyond the scope of this paper to address further this matter.

infringement to the concerned right, including remedial measures and compensation packages, should be discussed with the concerned aboriginal group or its representatives. These matters should be discussed at the earliest stage of the proposal and, in any event, prior to final decisions being made.

In short, the required consultation must be in good faith and with the intention of substantially addressing the concerns of the affected aboriginal community as expressed by its representative leadership. Plays on dissensions within aboriginal groups or attempts to avoid or circumvent aboriginal leadership – particularly elected aboriginal leadership – should be strongly frowned upon.

The requirement for consultation will often comprise an additional requirement for aboriginal consent, including, in appropriate circumstances, the full consent of the affected aboriginal community. As already discussed in previous chapters, this full consent is normally required in all cases which concern the cession of aboriginal title or the extinguishment of other aboriginal rights or of treaty rights. In *Delgamuukw v. B.C.*, Chief Justice Lamer added that the full consent of the affected aboriginal community may be required in other circumstances, such as when provinces adopt hunting and fishing regulations in relation to aboriginal lands.[125] These other circumstances remain for the most part to be determined. However, as a general rule any proposal which purports to affect substantially aboriginal lands or any other aboriginal or treaty rights – including hunting and fishing rights – should normally be subject to the consent of the affected aboriginal community. When such consent is sought but not obtained, then the proposed action should normally be abandoned unless the legislative objective underlying the action is so compelling and substantial as to justify nevertheless the infringement of the concerned right notwithstanding the absence of consent by the affected aboriginal community or where the refusal to consent is patently unreasonable taking into account all the circumstances. In these cases, the requirements of

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[125] *Delgamuukw v. B.C.*, *supra* note 1 at 1113 (para. 168).

minimum impairment described above and of just and adequate compensation discussed below take on added importance.

It is appropriate to note that the consent of the affected aboriginal community may be required in all cases of infringements to treaty rights resulting from provincial legislative schemes. This results in part from the terms of section 88 of the *Indian Act* discussed above and from the special constitutional position of treaties. It is indeed as yet unsettled as to whether an implied justification requirement exists in section 88 in order to override treaty rights through provincial legislative schemes without aboriginal consent. As Chief Justice Lamer stated in *R. v. Côté*:

> "(...) Second, s. 88 accords a special statutory protection to aboriginal treaty rights from contrary provincial laws through the operation of the doctrine of federal paramountcy. (...) This second purpose, of course, has become of diminished importance as a result of the constitutional entrenchment of treaty rights in 1982. But I note that, on the face of s. 88, treaty rights appear to enjoy a broader protection from contrary provincial law under the *Indian Act* than under the *Constitution Act, 1982*. Once it has been demonstrated that a provincial law infringes "the terms of [a] treaty", the treaty would arguably prevail under s. 88 even in the presence of a well grounded justification. The statutory provision does not expressly incorporate a justification requirement analogous to the justification stage included in the *Sparrow* framework. But the precise boundaries of the protection of s. 88 remains a topic for future consideration. I know of no case which has authoritatively discounted the potential existence of an implicit justification stage under s. 88."[126]

The third fundamental factor which must be taken into account in regard to the justification of the infringements to aboriginal or treaty rights is the issue of compensation. As we have discussed above, compensation is normally owed at common law in cases of extinguishment of aboriginal title or of other aboriginal or treaty rights and in cases of

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126 *R. v. Côté*, *supra* note 38 at 191-192 (para. 86-87).

infringements which fundamentally impair the exercise of such rights.[127] The common law entitlement to compensation takes on an added fundamental importance within the context of the justification test incorporated within section 35 of the *Constitution Act, 1982.*[128]

In light of the importance compensation plays not only in regard to the common law of aboriginal rights but also within the context of the justification requirement contained in section 35, the rest of this paper will attempt to flesh out in greater detail the contents of this notion of compensation. It is thus to the method of determining such compensation that we now turn our attention.

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127 See amongst other *Delgamuukw v. B.C. supra* note 1 at 1114 and 1133-1134 (para. 169 and 203); *Guerin v. The Queen, supra* note 21; *Calder v. Attorney-General of British Columbia., supra* note 17, in particular the reasons of Hall J.; *Oyekan v. Adele, supra* note 91 at 788; *Tijani v. Secretary of Southern Nigeria , supra* note 91; *Tamaki v. Baker, supra* note 91; *The Queen v. Symonds, supra* note 91.

128 As already noted, this entitlement to compensation may also be available in light of the *Canadian Bill of Rights*, R.S.C. 1985, c. C-12.3, though this issue remains unsettled in Canada. In this regard, see also *Mabo v. Queensland (No. 1), supra* note 91.

CHAPTER 5

COMPENSATION IN CASES OF EXPROPRIATION UNRELATED TO ABORIGINAL AND TREATY RIGHTS

We will start our discussion with a review of the principles applicable in cases of property expropriations unrelated to aboriginal or treaty rights.

As a general rule, a statute will not be read as allowing the compulsory taking of property without payment of just compensation unless a legislative intention to do so is clearly expressed.[129] The right to fair and adequate compensation in cases of compulsory taking of property is thus one of the fundamental pillars of the law as we know it in Canada.

The general test to be applied when assessing compensation in cases of compulsory taking is to determine what constitutes "just compensation" in each case. The notion of "just compensation" is however extremely vague and can only be properly understood through a review of certain basic principles developed by the courts in assessing compensation in cases of expropriation.

In general, when land is at issue, the courts have attempted to assess compensation based on the notion of the value to the owner as opposed to the value to the taker.[130] In

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129 See *Attorney-General v. de Keyser Royal Hotel Ltd.*, [1920] A.C. 508 (H.L.) at 542; *Newcastle Breweries Ltd. v. The King*, [1920] 1 K.B. 854 at 866; *Montreal v. Montreal Harbour Commission*, [1926] A.C. 299 at 313; *Burmah Oil Co. v. Lord Advocate*, [1965] A.C. 75 at 167-168; *Manitoba Fisheries Ltd. v. The Queen*, *supra* note 105; *The Queen (B.C.) v. Tener*, *supra* note 105 at 547 and 559; *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32; E.C.E. Todd, *The Law of Expropriation and Compensation in Canada*, *supra* note 104 at 31 to 38.

130 *Cedar Rapids v. Lacoste*, [1914] A.C. 569, at 576; *Fraser v. Fraserville (City)*, [1917] A.C. 187 at 194.

general this has tended to result in an assessment of the "market value" of the land at the time of taking. The courts attempt to derive this "market value" by estimating the price at which a willing owner, but not obliged to sell, would sell to a person desiring, but not obliged to buy.[131]

Assessment of the market value of the land at the time of taking may be based on the highest and best use of the land, thus placing into consideration those advantages which will give the land the greatest value in respect to the best uses to which can be made of it. Accordingly, "just compensation" is to be determined on the basis of the market value of the property for the most profitable uses to which it could be put.[132]

One of the major difficulties in making these assessments relates to the added value the land may have for the expropriating authority. Indeed, land which is used for certain economic purposes – as an example agriculture – may have special value to the expropriating authority largely in excess of the present uses of the land – as an example the same agricultural land required for a hydroelectric project. The extent to which this added value is to be taken into account in determining "just compensation" is problematic and may lead to conflict as to the true measure of "just compensation". As a general rule, the courts have been hesitant to provide expropriated owners with huge windfalls resulting from expropriations for schemes which were unforeseeable prior to the actual expropriation. Increases in value to the land which are exclusively and entirely attributable to the scheme underlying the compulsory acquisition are not generally considered.[133]

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131 *R. v. Quebec Gas* (1917), 17 Ex. C.R. 386, 42 D.L.R. 61, aff'd 49 D.L.R. 692, 59 S.C.R. 677; *Vyricheria v. Revenue Divisional Officer*, [1939] A.C. 302.

132 *R. v. Quebec Improvement Co.* (1913), 18 Ex. C.R. 35; *R. v. Carrière de Beauport*, [1915] 17 Ex. C.R. 414; *R. v. Fowlds* (1893), 4 Ex.C.R. 1.

133 *Pointe Gourde Quarrying & Transport Co. v. Sub-Intendant of Crown Lands*, [1947] A.C. 565 (P.C.); *Re Lucas Chesterfield Gas and Water Board*, [1909] 1 K.B. 16 (C.A.) at 25; *The King v. Beech*, [1930] Ex. C.R. 133 at 142; *Fraser v. Fraserville (City)*, *supra* note 130 at 192 to 194; *Gough & The Aspatria, Silloth & District Joint Water Board*, [1904] 1 K.B. 417

(continued...)

However, the value of the adaptability of the land for a special purpose, including the special purpose which may justify the expropriation, or for which the land is especially or uniquely suited, such as, for example, the unique character of the land for hydroelectric development, is to be considered in determining the appropriate level of "just compensation" for compulsory taking of the land.[134]

Thus, the special value of the land for a particular scheme is to be considered, but not to the extent of granting compensation which involves providing a share of the full value of the development which has crystalized at the time of expropriation. In short, the value of the land to the owner consists in the present value of all advantages of the land and of all special future uses for which it is suited, without however specific regard to the particular scheme for which the land is being expropriated. This special added value is to be determined by the imaginary market which would have ruled immediately prior to the specific expropriation. The rule was expressed in the following terms Chief Justice Rinfret in *Woods Manufacturing Co. Ltd. v. The King*:

> "While the principles to be applied in assessing compensation to the owner for property expropriated by the Crown under the provisions of the *Expropriation Act*, c. 64, R.S.C. 1927, and under various other Canadian statutes in which powers of expropriation are given, have been long time settled by decisions of the Judicial Committee and this Court in a manner which appears to us to be clear, it is perhaps well to restate them. The decision of the Judicial Committee in Cedar Rapids Manufacturing and Power Co. v. Lacoste, where expropriation proceedings were taken under the provisions of the *Railway Act*. 1903, determined that the law in Canada as regards the principles upon which compensation for land taken was to be awarded was the same as the law of England at that time and the

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133 (...continued)
(C.A.) at 423; *Vyricheria v. Revenue Divisional Officer, supra* note 131 at 313.

134 *Cedar Rapids Manufacturing and Power Co. v. Lacoste, supra* note 130 at 576-577; *Re Lucas Chesterfield Gas and Water Board, Ibid.* at 28; *The King v. Elgin Realty Co. Ltd.*, [1943] S.C.R. 49 at 52; *Fraser v. The Queen*, [1963] S.C.R. 455; *C.N.R. v. Palmer*, [1965] 2 Ex. C.R. 305; *Lamb v. Manitoba Hydro-Electric Board*, [1966] S.C.R. 229; *Saint John Priory v. City of Saint John*, [1972] S.C.R. 746.

> judgment delivered by Lord Dunedin expressly approved the statement of these principles contained in the judgments of Vaughan-Williams and Fletcher-Moulton, LL. JJ. , in *Re Lucas and Chesterfield Gas and Water Board.* The subject matter of the expropriation in the Cedar Rapids case consisted of two islands and certain reserved rights over a point of land in the St. Lawrence River, the principal value of which lay not in the land itself but in the fact that these islands were so situated as to be necessary for the construction of a water power development on the river. It is in this case that the expression appears that where the element of value over and above the bare value of the ground itself consists in adaptability for a certain undertaking, the value to the owner is to be taken as the price which possible intended undertakers would give and that that price must be tested by the imaginary market which would have ruled had the land been exposed to sale before any undertakers had secured the powers or acquired the other subjects which make the undertaking as a whole a realized possibility."[135]

This rule is to be applied liberally and in a manner which ensures that the full prospective or potential value and special adaptability of the concerned land are adequately factored in the determination of the "market value" criteria usually used to determine the appropriate level of compensation in compulsory taking cases.[136]

Accordingly, in determining the level of compensation appropriate in cases of forcible taking, the courts usually take into account the special value of the land related to its fitness for a particular use which may not be its current use. The fact that the potentiality of the land has not been or may not be exploited by the owner does not bear on the applicability of considering this factor. Thus, this factor should normally be fully taken into account in determining the "market value" of the land within the context of a virtual transaction between an owner willing but not obliged to sell and a third party willing but not obliged to buy. So

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135 *Woods Manufacturing Co. Ltd. v. The King*, [1951] S.C.R. 504 at 506-507.

136 *The King v. Beech, supra* note 133 at 142; *Brown v. Commissioner for Railways* (1890), 15 A.C. 240 (P.C.); *Bailey v. Isle of Thanet Light Railways*, [1900] 1 Q.B. 722; *Montreal v. Brown et al*, [1876-77] 2 App. Cas. 168 at 184; *Trent Stoughton v. Barbados Water Supply Co.*, [1893] A.C. 502 at 504; *Morrison v. Montreal*, [1877-78] 3 App. Cas. 148 at 156; *Fitzpatrick v. New Liskard* (1909), 13 O.W.R. 806 (C.A.); *Re Ridell & Newcastle Gateshead Water Co.* (1879), 90 L.T. 44n.

long as the potentiality of the future uses or special adaptability of the land is reasonably foreseeable, it follows that the owner would take into account the potential future added value of the land when determining the price at which he would part with it. Likewise a potential acquirer of the land would also factor this potential value into the transaction. A court would thus take this into account in the determination of the appropriate level of compensation. This valuation of the land by its unusual features, special adaptability or potentiality applies irrespectively of whether there is only one possible purchaser who is acquiring under powers enabling compulsory acquisition.[137]

Moreover, the appropriate level of compensation to be provided in cases of compulsory taking is not necessarily limited to the "market value" of the property. The owner is always entitled to the "market value" and to the added value for the unusual features, special adaptability or potentiality of the land as discussed above. However, the land may have a value to the owner which goes beyond simple market considerations: "*Fair compensation would include payment of the value of the land taken, not necessarily limited to the market value but the value to the college in view of the purposes for which the land was used and to which it had been dedicated.*"[138] In such circumstances the intrinsic value to the owner which is not captured by the market must also be taken into account in order to fairly compensate for the true but unmarketable value of the property. In *Sisters of Charity v. R.*, Audette J. aptly commented as follows in this regard:

> "The property has been held and improved in such a manner as would serve its destination, its useful purposes to the owners, and if they were desiring to sell they would be unable to obtain a price like its real value. It is impossible, in a case like the present one, to ascertain the actual market value of such a property by the usual tests which presuppose a willing buyer; the conditions upon which such values are based are not

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137 *Re Lucas Chesterfield Gas and Water Board, supra* note 133 at 25; *Vyricheria v. Revenue Divisional Officer, supra* note 131 at 315 to 318 and 323; *Gough & The Aspatria, Silloth & District Joint Water Board, supra* note 133 at 423.

138 *St. Michael's College v. City of Toronto*, [1926] S.C.R. 318 at 324.

> present. In a case of this character, market value is not the measure of compensation. Therefore some other measure must be sought. In the absence of market value, the intrinsic value or value to the owners is the real value to ascertain for measuring the compensation."[139]

The law of expropriation in France has developed notions of "valeur de convenance", being that ascertainable but unmarketable value which the property affords a particular owner, and of "valeur d'affection", which aims to address the more subjective value that a particular property may have for its owner.[140] These notions have found some support in expropriation cases dealt within Quebec.[141]

The common law appears to prefer to deal with these situations through the concept of reinstatement by which, in appropriate circumstances, the owner is provided with sufficient funds in order to be reinstated in an equivalent facility of comparable utility and commodity. This doctrine of equivalent reinstatement was developed at common law in order to provide adequate compensation in cases where notions such as "market value" could not capture the true value of a property in regard to the particular purpose for which the property was being used, such as a church, school or hospital.[142] Reinstatement is not however to be used in order to deprive an owner of the existing or potential economic value of the land. Indeed, one can imagine a situation where land on which a church is located would take on a new added value, as an example if a gold deposit was found to exist within the land. In such circumstances, it is the true market value of the land, including the value in excess of the cost of reinstatement, which would constitute appropriate compensation.

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139 *Sisters of Charity of Rockingham v. R.*, [1924] Ex. C.R. 79 at 82-83.

140 G.S. Challies, "Quelques problèmes d'expropriation" (1961) 21 R. de B. 165, at 165-181. See also E. Picard, *Traité général de l'expropriation pour utilité publique* (Bruxelles: F. Larcier,1875) at 237 to 249.

141 J. Forgues & J. Prémont, *Loi sur l'expropriation annotée* (Les Éditions Yvon Blais, 1998) at 77 to 80.

142 See Ontario Law Reform Commission, *Report on the Basis for Compensation on Expropriation*, (1967) at 19-20.

In any event, it is recognized by the courts that there are situations where pure market valuations fail to fully compensate the owners of property affected by compulsory taking. In such circumstances, compensation in addition to "market value" is provided through the various legal mechanisms discussed above.

In addition to dealing with issues directly addressing the value of the property, the courts have also recognized that fair compensation must also extend both to the consequential impacts of the compulsory taking (also referred to as disturbance damages) and to the injurious affection caused to the adjacent land and property.

Dealing first with the consequential impacts of compulsory takings, it is rare that such takings are not accompanied by a series of costs and disturbances unrelated to the actual value of the expropriated property but which the owner would never have incurred were it not for the expropriation itself. The costs of relocating, the legal fees and appraisal costs involved in obtaining adequate advice and in negotiating or otherwise setting appropriate compensation levels, business loss resulting from relocation, and the general overall disturbance, stress and aggravation almost invariably associated with compulsory taking are all elements which are subject to compensation in the appropriate circumstances.[143]

Injurious affection is another major component in determining adequate levels of compensation in compulsory taking cases. The rules relating to injurious affection in expropriation cases are generally deemed to vary in accordance with whether the injury is against land remaining in the hands of the owner after expropriation or whether the injury is incurred where no land of the injured party has been expropriated.

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143 See generally *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, *supra* note 129; Ontario Law Reform Commission, *Report on the Basis for Compensation on Expropriation*, *Ibid.* at 34 to 43; E.C.E. Todd, *The Law of Expropriation and Compensation in Canada*, *supra* note 104 at 274 to 327; G.S. Challies, *The Law of Expropriation* (Montreal: Wilson et Lafleur, 1963).

Where the land remaining after an expropriation is injuriously affected by the expropriation itself, or by the activities for which the land was expropriated in the first place, compensation will be owed irrespective of whether or not the injury would be actionable at common law as a nuisance or under some other cause of action. As stated by Anglin J.: *While (...) no clear principle can be deduced from the English authorities why the measure of compensation should be more liberal in the case of a taking of land than in that of mere injurious affection, the distinction is too well established in England to admit of further discussion here".*[144]

The general rules applicable in cases of injurious affection to the remaining land have been stated in various ways and may be summarized roughly as follows: 1) the land affected must be held by the same owner with the land taken; they need not be contiguous but must be related in some way; 2) the injury must result either from the expropriation itself – such as in cases where the land is severed – or either from the activities resulting from the compulsory taking or for which the taking was made; this injury includes not only the impediments which may be incurred in relation to the activities carried out on the remaining land, but also embraces the reduction in value that the remaining land suffers as a consequence of the uses resulting from the expropriation or reasonably anticipated as resulting therefrom; 3) the injury must not be too remote from the compulsory taking or the activities or uses resulting therefrom.

Insofar as all conditions are present, the scope of compensation for injurious affection to the remaining land will generally extend to all consequential damages resulting from the

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[144] *Canadian Pacific Rway. Co. v. Albin* (1919), 59 S.C.R. 151 at 160. See also *Cowper Essex v. Local Board for Acton* (1889), 14 App. Cas. 153 at 162. One explanation given for the rule is that *a "(...) willing seller will only sell a portion of his land at a price that takes into account not only the market value of the portion sold but also any diminution in value caused to the remaining land by reason of the construction or use of the works by the purchaser or his successor in title on the portion sold.":* E.C.E. Todd, *The Law of Expropriation and Compensation in Canada, supra* note 104 at 334.

expropriation itself, from construction on the expropriated property or from the operations carried out as a result of the expropriation.

Where no land is taken, the rules related to injurious affection are somewhat more restrictive. Thus someone who is affected by constructions or operations resulting from the expropriation of land held by a third party may recover damages from the expropriating party. However, these are available only insofar as such damages are already accessible at common law irrespective of the expropriation. In such circumstances, in common law jurisdictions, the aggrieved party does not find itself in a more favourable situation than if the expropriation had not occurred. In common law jurisdictions, the issues usually revolve around tort law and nuisance concepts. However, in cases of injurious affection resulting from third party expropriation, the defence of acting upon statutory authority is generally deemed unavailable, and it is the bar to such a defence which makes injurious affection claims easier to sustain in circumstances of expropriation. The classic conditions which must be fulfilled to justify a claim for injurious affection if no land is taken are set forth as follows by the Ontario Law Reform Commission:

> "The remedy is not available on the same condition as where lands have been taken. Here, the conditions are considerably more restrictive. Four have been laid down:
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> 1. damage must result from an act rendered lawful by the statutory powers of the authority;
> 2. the damage must be such as would have been actionable at common law, but for the statutory powers;
> 3. the damage must be an injury to the land itself and not a personal injury or an injury to business or trade; and
> 4. the damage must be occasioned by the construction of the public work, not by its user."[145]

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145 Ontario Law Reform Commission, *Report on the Basis for Compensation on Expropriation, supra* note 142 at 47. This statement of the law was itself taken from Angers J. in *Autographic Register System v. C.N.R.*, [1933] Ex. C.R. 152 at 155.

Finally, compensation available in cases of compulsory taking need not be determinable nor determined with mathematical accuracy. Indeed the granting of a global amount reached in application of the above-mentioned principles appears to be the appropriate way of allocating compensation in such circumstances. In this regard, a reasonable degree of discretion is afforded to the courts in determining what constitutes fair compensation in the circumstances of a particular case.[146]

The principles of compensation in cases of compulsory taking constitute a useful but incomplete base from which a discussion of compensation in cases of infringements of aboriginal and treaty rights may proceed. This discussion is particularly useful in cases where aboriginal land rights or aboriginal rights closely connected to land are considered. Thus the concept of fair compensation based on "market value" considerations constitutes one aspect of compensation in aboriginal rights cases which must be fully taken into consideration. However the "market value" concept fails to capture many of the considerations to be taken into account in dealing with aboriginal issues and, in many cases, this concept may simply be irrelevant considering the location and nature of certain aboriginal lands. The "market value" concept certainly appeals to a commercial perspective, but it fails to take into account the special relationship which exists between aboriginal peoples and their traditional lands as well as the cultural, spiritual and social aspects of aboriginal and treaty rights. Aboriginal cultures are themselves often rooted in a relationship with particular territories. The use of such territories for activities unrelated or incompatible with traditional aboriginal activities can result in social disruptions of aboriginal societies which are obviously never captured in "market value" considerations.

From this perspective, the notions of intrinsic value to the owner and of reinstatement used in an expropriation context may be helpful in a discussion on methods of just compensation in aboriginal cases. In such cases, it is important to capture not only the

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146 *Woods Manufacturing Co. Ltd. v. The King, supra* note 135 at 515; Ontario Law Reform Commission, *Report on the Basis for Compensation on Expropriation, supra* note 142 at 14-15; G.S. Challies, *The Law of Expropriation, supra* note 143 at 94.

"market value" concept, but also the unmarketable but nevertheless fundamental spiritual, cultural and social aspects involved.

The notions of consequential or disturbance damages found in compulsory taking cases may also be transposed to a certain degree to cases of infringements of aboriginal and treaty rights. Likewise, injurious affection principles may find some application in aboriginal cases, though these principles fail to capture many aspects of aboriginal rights.

Notwithstanding these serious and important reservations, compensation principles applicable in compulsory taking cases constitute a comparative base from which a discussion on compensation in cases of infringements of aboriginal and treaty rights can proceed. However, before pursuing further our discussion, a brief review of the experience in the United States with compensation in cases of taking of aboriginal lands will be carried out. As we shall see in the next chapter, this experience cannot be fully transposed to Canada and is to be viewed with considerable reservations. Nevertheless, it is worthwhile to review this experience if only to identify the pitfalls which should be avoided this side of the border.

CHAPTER 6

THE EXPERIENCE IN THE UNITED STATES

If, paraphrasing the Supreme Court of Canada in *Sparrow*, we cannot recount with much pride the treatment of aboriginal peoples in Canada, it can be argued that the historic treatment of the aboriginal peoples by the United States has been shameful and, to a large extent, offends even the most basic and elementary notions of decency and fairness. The history of the relations between aboriginal peoples and the United States is simply too well known to merit repeat here. Suffice it to say that this relationship is characterized by war, plunder, displacement and dispossession. All too often this disturbing relationship has found justification within the judicial system of the United States, an eminent legal system which has unfortunately, to a large degree, failed aboriginal peoples.[147]

One of the leading characteristics of the legal status afforded aboriginal rights in the United States and which has heavily influenced the issue of compensation in cases of taking of aboriginal land is the refusal by the courts to extend to aboriginals many of the fundamental rights provided for in the Constitution of the United States. Of particular interest here is the refusal to extend to aboriginal peoples the full protection of the Fifth Amendment

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147 Reference in this regard may be made to D.E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court-The Masking of Justice*, (U. of Texas Press, 1997). See in general J. Hurley, "Aboriginal Rights in Modern American Case Law" [1983] 2 C.N.L.R. 9; F.S. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law*, Rennard Strickland et al, eds (Charlottesville, Virginia: The Michie Company, 1982); R.N. Clinton, N.J. Newton & M.E. Price, *American Indian Law* (Charlotteville, Virginia: The Michie Company, 1991); G.A. Wilkinson, "Indian Tribal Claims Before the Court of Claims" (1966) 55 Georgetown L.J. 511; S.P. McSloy, "Revisiting the "Courts of the Conqueror": American Indian Claims against the United States" (1994) 44 American University L.R. 537.

which provides for the right to "just compensation" in cases of property taken for public use.[148]

In the case of *Tee-Hit-Ton Indians v. United States*,[149] the dispute revolved around a claim by a small aboriginal community from Alaska which was seeking Fifth Amendment compensation following the sale of lumber rights by the United States in the Tongass National Forest pursuant to an act of the United States Congress which authorized such sales notwithstanding any claims by Alaskan natives. Though this case could have been treated as a form of unilateral extinguishment without compensation for the aboriginal rights in and to the timber, the Supreme Court of the United States went quite further. In light of the limited sovereignty recognized to aboriginal nations within the concept of "domestic dependent nation" developed in the 19th Century by the Court, these nations are deemed to stand to a certain degree outside the Constitution of the United States. Consequently, aboriginal title is not afforded the full protection of the Fifth Amendment. For the Court, only the taking of land "recognized" by Congress as subject to some form of aboriginal interest can give rise to compensation claims cognizable by the judiciary. In essence, this case stands for the proposition that compensation will be owed for the taking of aboriginal lands only insofar as the United States Congress agrees. The case essentially justifies the dispossession of aboriginal peoples as a necessary expedient for the progress of the United States and precludes the judiciary from interfering in this process of dispossession unless specifically mandated to do so by Congress:

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148 *United States v. Alcea Band of Tillamooks et al*, 341 U.S. 48 (1951); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). As noted by N.J. Newton: *"(...) the courts have developed two doctrinal strains limiting fifth amendment protection for Indian lands. First, the Supreme Court has held that aboriginal Indian land is not "property" for the purposes of the fifth amendment, in Tee-Hit-Ton. Second, the courts have, in effect, held that not all takings are takings; some acquisitions of Indian land by the federal government are outside the scope of the fifth amendment"*. N.J. Newton "The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the *Sioux Nation* Rule" (1982) 61 Oregon L.R. 245, at 248.

149 *Tee-Hit-Ton Indians v. United States, Ibid.*

> " In light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle"[150]

Nor are aboriginal peoples extended the full protection of the due process and equality provisions found in the Fourteenth Amendment which could ensure them "just compensation" in cases of taking of land through due process or equality considerations.[151] Thus, in regards to the taking of their traditional lands, aboriginals are to some extent denizens whose rights to compensation are largely dependent on the goodwill of a Congress in which they have little or no voice.

The approach described above is fundamentally incompatible with the common law of aboriginal title as known and applied in Canada and discussed extensively in the previous chapters.[152] This approach is also at odds with the treatment afforded aboriginal rights throughout the Commonwealth in countries closely following the British tradition.[153]

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150 *Tee-Hit-Ton Indians v. United States*, *Ibid.* at 290-291.

151 *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Elk v. Wilkins*, 112 U.S. 94 (1884).

152 See *Delgammukw v. B.C.*, *supra* note 1 at 1114 and 1133-1134 (para. 169 and 203); *Guerin v. The Queen*, *supra* note 21; *Calder v. Attorney-General of British Columbia*, *supra* note 17, in particular the reasons of Hall J.

153 *The Queen v. Symonds*, *supra* note 91; *Tamaki v. Baker*, *supra* note 91; *Tijani v. Secretary of Southern Nigeria*, *supra* note 91; *Oyekan v. Adele*, *supra* note 91 at 788. In Australia, the issue of the right to compensation at common law in cases of extinguishment of aboriginal title remains uncertain in light of the divided opinions on this matter in *Mabo v. Queensland (No. 2)*, [1992] 5 C.N.L.R. 1 at 11-12 and 90. However, that issue is somewhat moot in Australia since the right to compensation in cases of infringement or extinguishment of aboriginal title flows in any event from the operation of the *Racial Discrimination Act, 1975* of the Commonwealth of Australia as interpreted in *Mabo v. Queensland (No. 1)*, *supra* note 91.

In light of these fundamental incompatibilities in approach, the experience in the United States is of limited use in our discussion relating to legal principles applicable to the determination of compensation in cases of infringements of aboriginal and treaty rights in Canada. It is with this *caveat* in mind that we continue our discussion of the experience South of the border.

Thus, under the legal system of the United States, compensation for taking of lands subject to an aboriginal interest is not an issue which can be addressed by the courts unless the aboriginal interest in the land has been somehow "recognized" by treaty, agreement, statute or otherwise. Even when such interest is "recognized," the involvement of the courts in the determination of compensation for the taking of such land is seriously curtailed by the concept of the plenary power of Congress in dealings with aboriginal nations.

This concept has been exemplified at its worst in *Lone Wolf v. Hitchcock*[154]. In that case the dispute revolved around a breach of a treaty. Lands reserved under the terms of the treaty were subsequently ceded without following the requisite procedure provided for in the treaty and specifically conditioning any land cession to the consent of "at least three fourths of all adult male Indians occupying" the reserved lands. The United States Congress had enacted legislation purporting to proceed with the sale of the land in question even though the procedural requirements for a land cession under the treaty had not been fulfilled. The main holding of the Supreme Court of the United States in that case was that the United States Congress could unilaterally abrogate treaties with aboriginal nations, and that the courts would neither review congressional legislation in this regard nor review the adequacy of the compensation provided by the Congress to the aggrieved aboriginals. The Court expressed the following opinion in this regard:

> "Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation v. Hitchcock*, 187 U.S. 294, decided at this

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154 *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

> term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, relief must be sought by an appeal to that body for redress and not to the courts."[155]

This case implies that congressional legislation providing for the taking of "recognized" aboriginal lands is not subject to review by the courts either under the terms of the Fifth Amendment "just compensation" principle or under the terms of any other common law or constitutional legal principle. This radical and fundamentally inequitable view has however been largely attenuated in subsequent decisions. Nevertheless the inescapable conclusion to the *Lone Wolf* case is that the judiciary will not play a role in relation to compensation, even in the cases of the taking of "recognized" aboriginal lands, unless specifically mandated to do so by the United States Congress.

This indeed is what the United States Congress has done in many specific cases and in a more general manner in the legislation which set up the Indians Claims Commission and in subsequent legislation granting some authority to the U.S. Court of Claims over aboriginal land takings. Nevertheless, in such circumstances the right to compensation is dependent upon the terms of the statutory provision.

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155 *Ibid.* at 568.

The principles expressed in the *Lone Wolf* case where to some degree revisited in *Shoshone Tribe v. United States*.[156] In *Shoshone Tribe*, the United States was sued for breach of treaty stipulations whereby the concerned Shoshone nation had been deprived of the possession and enjoyment of an undivided half interest in tribal lands set aside by treaty. An interest in the disputed lands was in fact given by the United States to another aboriginal nation over the protests of the Shoshone. It is necessary to note in this regard that jurisdiction to hear the claim of the Shoshone was conferred upon the U.S. Court of Claims by an act of the United States Congress. Addressing the issue of congressional plenary powers over aboriginal matters as expressed in *Lone Wolf*, Justice Cardozo stated the following for the Supreme Court of the United States:

> "Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty, *Lone Wolf v. Hitchcock*, 187 U.S. 553,564, 565,566. The power does not extend as far as to enable the Government "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . . ; for that 'would not be an exercise of guardianship, but an act of confiscation'" United States v. Creek Nation, supra [295 U.S. 103], p. 110; citing *Lane v. Pueblo of Santa Rosa*, 249 U.S. 294, 307-308. The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is *"as sacred as that of the United States to the fee" United States v. Cook, supra* [19 Wall. 591], p.593; *Lone Wolf v. Hitchcock, supra; Choate v. Trapp*, 224 U.S. 665, 671; *Yankton Sioux Tribe v. United States, supra* [272 U.S. 351]. Spoliation is not management."[157]

The apparently contradictory decisions of the Supreme Court of the United States in *Lone Wolf* and *Shoshone Tribe* were to some degree reconciled in *United States v. Sioux Nation of Indians*.[158] There the Court relied on the reasoning of the U.S. Court of Claims in

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156 *Shoshone Tribe v. United States*, 299 U.S. 476 (1937).

157 *Ibid.* at 497-498.

158 *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

the *Fort Berthold Reservation* case.[159] This reconciliation was achieved through reference to the fiduciary obligations of the United States in managing "recognized" aboriginal lands.

In *Fort Berthold Reservation,* the U.S. Court of Claims came to the conclusion that the United States Congress could not, in the same transaction involving "recognized" aboriginal lands, act as a trustee for the benefit of the concerned aboriginal nation and at the same time exercise its sovereign power of eminent domain. In order to distinguish the capacity in which the Congress was acting, the U.S. Court of Claims set out a guideline by which one could distinguish between congressional "trust" action and congressional "eminent domain" action in relation to aboriginal proprietary interests. The guideline provides that where the United States Congress has made a good faith effort to give the concerned aboriginals the full value of the land and thus merely transmutes the property from land to money, there is no taking and Congress is deemed to have acted in its "trust" capacity. Insofar as such a good faith effort has been made by Congress, the courts will not interfere with the determination of compensation; however where such effort was not made, the courts may then intervene and order the payment of compensation to correct the situation.

In *Sioux Nation*, the Supreme Court of the United States expressly discarded the presumption underlying the *Lone Wolf* case to the effect that relations between the United States and the various aboriginal peoples located on its territory were political matters in which the judiciary played no role.[160] Noting that the case in *Lone Wolf* was decided at a time when Congress had not waived the sovereign immunity of the United States against claims from aboriginals based on recognized aboriginal land title, the Supreme Court of the United States concluded that the holdings in that case would appear to have lost much of their force. The Court rather substituted therefore principles closely related to fiduciary relationships:

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159 *Fort Berthold Reservation v. United States*, 390 F.2d 686 (Ct. Cl., 1968).

160 See also *Deleware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977) at 84.

> "More significantly, Lone Wolfs's presumption of congressional good faith has little to commend it as an enduring principle for deciding questions of the kind presented here. In every case where a taking of treaty-protected property is alleged, a reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that "this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in (...) a guardianship and to pertinent constitutional restrictions." *United States v. Creek Nation*, 295 U.S., at 109-110. *Accord: Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 122 (1960); *United States v. Klamath Indians*, 304 U.S. 119, 123 (1938); *United States v. Shoshone Tribe*, 304 U.S. 111, 115-116 (1938); *Shoshone Tribe v. United States*, 299 U.S. 476, 497-498 (1937)."[161]

The Court approved to a large degree the guideline set out in the *Fort Berthold Reservation* case, noting however that this guideline must be properly understood as deriving from trust relationships. Therefore the principal inquiry is not to determine in a particular case if the government acted in good faith, but rather to determine the adequacy of the consideration given by the government for the taking of "recognized" aboriginal lands, being understood that this issue of adequate compensation is a judicial and not a legislative question.[162]

It thus appears that, in the United States, the judiciary cannot interfere with issues pertaining to compensation and taking of land subject to aboriginal title unless such lands have been "recognized" through some instrument, including recognition by treaty, agreement or statute. In the cases where "recognized" aboriginal land is taken without proper aboriginal consent, the courts may intervene if little effort to compensate the concerned aboriginals has been made or if the level of compensation is clearly inadequate. Thus, if a careful review of the historical records and of the consideration paid reveals that the United States made a good

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161 *United States v. Sioux Nation*, *supra* note 158 at 414-415. See N.J. Newton, "The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the *Sioux Nation* Rule", *supra* note 148.

162 *Ibid.* at 416-417.

faith effort to provide the concerned aboriginals with payment for the full value of the land taken, the test is satisfied and the courts will not interfere. On the other hand, if the test is not satisfied, then the taking of the land will give rise to an implied undertaking to make just compensation to the aboriginals, an implied undertaking which will be enforced by the judiciary. The United States Congress may however deny to the aboriginals fair compensation or restrict their access to the courts if it adopts clear legislation to this effect.

We now move to the issue of assessing what precisely constitutes for the courts of the United States adequate consideration or just compensation in circumstances surrounding the taking of "recognized" aboriginal lands.

First, as a general rule the land will normally be valued as if the aboriginals held the fee simple to it. For instance, in *United States v. Shoshone Tribe*[163], the trial court, in valuing the lands held by the aboriginals, included the value of the timber and minerals on and in the land. On appeal, the Supreme Court of the United States rejected the government's contention that the interest of the aboriginals in the land amounted to less than a fee simple and that consequently the inclusion of timber and minerals in the assessment of the aboriginal interest was wrong. The Supreme Court of the United States rather held that: *"The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee"*.[164]

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163 *United States v. Shoshone Tribe*, 304 U.S. 111 (1938).

164 *Ibid.* at 116. See also *United States v. Klamath and Moadoc Tribe of Indians*, 304 U.S. 119 (1938); *Otoe & Missouria Tribe of Indians v. United States*, 131 F. Supp. 265 (Ct. Cl., 1955), cert. denied 350 U.S. 848 (1955); *Miami Tribe of Oklahoma v. United States*, 175 F. Supp. 926 (Ct. Cl., 1959) at 942.

Second, the valuation is generally determined from the date of taking.[165] The date of taking is not always easy to ascertain and this date can often only be determined through a detailed review of the historical record. The date of taking will generally be deemed to be when the United States formally deprived the concerned aboriginals of their possession of the concerned land. The date at which third parties may have encroached on the land prior to formal government taking is not normally taken into account. Moreover, when the land taken was held by the aboriginals under instruments, including treaties, either granting the land to them in fee simple or confirming a fee simple tenure in the land, the date of taking will be deemed to be the date actual title to the land was transferred to a third party through letters patent.[166]

Third, the determination of the actual value of the land must be made. This determination is usually based on "market value" considerations where the aboriginal interest in the land is usually largely ignored. The concept of "market value' was considered in *Miami Tribe of Oklahoma v. United States*[167] where a decision of the Indian Claims Commission was cited with approval: *"Fair market value was defined by the Indian Claims Commission in the Osage Nation of Indians v. United States, 3 Ind. Cl. Comm. 231, as follow: Market price is the highest price in terms of money which land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all the uses and purposes to which it is best adapted and for which it is capable of being used."*.[168] This of course is analogous to the "market value" concept often used in compulsory

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165 *Fort Berthold Reservation v. United States*, *supra* note 159 at 698; *United States v. Cherokee Nation*, 474 F.2d 628 (Ct. Cl., 1973); *Pillager Bands of Chippewa Indians, Minn. v. United States*, 428 F.2d 1274 (Ct. Cl., 1970) at 1277; *Sac and Fox Tribes of Indians of Okla. v. United States*, 383 F.2d 991 (Ct. Cl., 1967) at 1001, cert. denied 389 U.S. 90.

166 *Creek Nation v. United States*, 302 U.S. 620 (1938); *United States v. Cherokee Nation, Ibid.* at 635.

167 *Miami Tribe of Oklahoma v. United States, supra* note 164.

168 *Ibid.* at 943.

taking cases unrelated to aboriginals land taking and which is discussed extensively in the previous chapter.

This notion of "market value" when assessing land subject to a "recognized" aboriginal interest was in part developed in opposition to the "subsistence" approach to valuation put forward by the government. The "subsistence" approach attempts to limit the value of the aboriginal interest in the land to what economic value could be ascribed to the traditional activities of the aboriginals. Thus, in *Otoe & Missouria Tribe of Indians v. United States*,[169] the government argued that, in light of the absence of a market value for the land there at issue, the compensation for the taking of the land should be based on a consideration of the value of the aboriginal subsistence activities on the land capitalized in order to ensure an equivalent economic value to the affected members of the concerned aboriginal nation. The U.S. Court of Claims rejected this approach and reiterated that even if no market existed for the lands, *"this does not mean that such land was worth no more than the value of the subsistence it provided for the Indians."*[170] In the absence of evidence of "market value" in the conventional sense, the Court there stated the method of valuation to be used in order to properly determine the value of the land subject to the aboriginal interest:

> "This method of valuation takes into consideration whatever sales of neighboring lands are of record. It considers the natural resources of the land ceded, including its climate, vegetation, including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession, or merely of potential value, water power, its then or potential use, markets and transportation – considering the ready market at that time and the potential market."[171]

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169 *Otoe & Missouria Tribe of Indians v. United States, supra* note 164.

170 *Ibid.* at 290.

171 *Ibid.* at 290.

Thus, in the determination of the "market value" of the land subject to "recognized" aboriginal interests, numerous factors need to be taken into account by the courts which go beyond a simple assessment of the economic value of the aboriginal activities carried out on the land. The fair value of the land is to be ascertained taking into account all pertinent factors including the mineral, timber, water power and agricultural potential of the land.[172]

The application of these factors remains somewhat problematic in each case, particularly when the courts are called upon to value land transactions sometimes over a century old. Such determinations of ancient land transactions were often mandated by the United States Congress, and many of the cases discussing proper valuation principles must be understood within the inherent difficulty of making such determinations on the basis of an often hypothetical historical economic record. The application of such factors to contemporary land transactions should be less problematic.

Indeed, these factors tend to increase considerably the value of the land at issue by ensuring that the potential economic value of the probable future uses of the land are taken into account in the determination of the value ascribed to the land. Of prime importance of course is the consideration given to the natural resources of the lands. Thus, compensation for the value of such resources is factored even though the concerned aboriginals may not be actively exploiting the resource at the time of taking. Insofar as the potential use of the land or its resources is sufficiently crystallized at the time of taking, these uses must be taken into account in ascertaining the proper level of compensation. As an example, compensation for standing timber and for minerals is made even if the concerned aboriginals have not

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172 See generally *United States v. Shoshone Tribe*, *supra* note 163; *Alcea Band of Tillamooks v. United States*, 89 F. Supp. 938 (Ct. Cl., 1950), reversed as to interest only 341 U.S. 48; *Rogue River Tribe of Indians v. United States*, 89 F. Supp. 798 (Ct. Cl., 1950), cert. denied 341 U.S. 902; *Osage Nation of Indians v. United States* 97 F. Supp. 381 (Ct. Cl., 1951), cert. denied, 342 U.S. 896 (1951); *Otoe & Missouria Tribe of Indians v. United States*, *supra* note 164; *Miami Tribe of Oklahoma v. United States*, *supra* note 164 at 943-944.

themselves been actively pursuing their commercial exploitation.[173] However the natural resources must be deemed as having some economic value at the time of taking, albeit that value may have been unrealized. The mere speculative chance of potential value is insufficient. Rather, a reasonable expectation of exploiting the resource must be present at the time of taking in order for its value to be taken into account.

Thus, in *Alcea Band of Tillamooks v. United States*,[174] the evidence showed that the timber on the concerned land was of good quality and the potentiality of its exploitation could be reasonably foreseen at the time of taking in 1855 in light of the state of the lumber industry in the United States at that time. Consequently, the U.S. Court of Claims there took into account the potential value of the timber in its valuation of the land. The same reasoning was applied by the Court in finding that the land also held agricultural value as well as potential mineral value. Similar reasoning was held in regard to the timber value of the land in *Rogue River Tribe of Indians v. United States*.[175]

Conversely, if the evidence discloses that the economic value of the natural resources of the land was highly speculative at the time of taking, this speculative value will not be considered. This rule applies even when reviewing historical land transactions with the full benefit of hindsight. Thus, even if a natural resource found on the land turns out to be of great value, this value will not normally be taken into account unless it was sufficiently crystallized at the time of taking in order to constitute an economic value at that time. Values attributable purely to hindsight are not normally considered in the absence of some fraud or other forms of sharp dealings. The application of this rule may however lead to injustice, particularly

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173 See *United States v. Klamath and Moadoc Tribe of Indians*, *supra* note 164.

174 *Alcea Band of Tillamooks v. United States*, *supra* note 172.

175 *Rogue River Tribe of Indians v. United States*, *supra* note 172.

when the actual dispossession of the aboriginals was carried out with the purpose of acquiring lands with great mineral potential albeit unrealized at the time of taking.[176]

As a final comment to this review of the experience with compensation for the taking of aboriginal land in the United States, it is appropriate to note that the "market value" approach used in valuing land compulsorily taken from aboriginals fails to include in the overall factors to be taken into account the spiritual, cultural and social values of the land for the concerned aboriginals. The "market value" approach thus perpetuates the dispossession of aboriginal peoples by limiting the value given to the land to those factors of interest to the dominant society and by ascribing little or no value to the factors of primary interest to the aboriginals. From this perspective, the "market value" approach is highly deficient and only considers one side of the equation.

Moreover, the overall experience with compensation in the United States in such circumstances tends to show that the rules of the game are stacked against aboriginal claimants who are confronted with a series of legal rules and precedents which render very difficult not only the access to the courts for the redress of claims, but also the actual prosecution of such claims.

A review of the case law leads to the conclusion that the prosecution of aboriginal compensation claims is an arduous and very long exercise requiring many years if not decades of sustained efforts. The actual resolution of such claims appears hampered by principles of compensation which often limit the debate to narrow "market value" concepts which are foreign to the aboriginal experience, which ignore the spiritual, cultural and social aspects of the forcible taking, and which in any event fail to provide the aboriginals with the full measure of the future economic value of their lands. The very notion of forcible taking implies that the aboriginal peoples are severed from the decision making process concerning

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176 See *Sioux Tribe of Indians v. United States*, 146 F. Supp. 229 (Ct. Cl., 1956).

their traditional lands and, consequently, are placed in a position which ensures that the true value of their aboriginal lands for uses unrelated to traditional aboriginal activities will be reaped by others.

Though the experience in the United States may be of limited use for the reasons stated above, the methods of compensation used in cases of taking of aboriginal lands constitute nevertheless a minimal bottom case scenario from which to compare the principles applicable in Canada.

CHAPTER 7

COMPENSATION PRINCIPLES

The previous chapters provide us with the appropriate background in order to discuss the general legal principles which are to guide the determination of compensation in cases of infringements to aboriginal or treaty rights. In this chapter, broad basic legal principles to determine compensation in such cases are discussed. Though certainly not exhaustive, these principles are those which are believed to be most pertinent to our discussion in that they set out sufficiently broad parameters to fit varied circumstances yet are specifically adapted to aboriginal and treaty rights infringement cases.

A. Compensation is to be determined in accordance with a methodology which takes into account fiduciary law principles

The first issue to be discussed in this regard is the general legal framework in which compensation principles are to be determined.

The framework of private law is inappropriate since infringements to aboriginal or treaty rights are not "wrongs" in a tort law sense and are not governed by private law principles. As we discussed above, the common law of aboriginal rights is largely related to public law and serves to govern the relationship between the Crown and aboriginal peoples. This relationship is tied to history and to the process of nation building. Infringements of aboriginal and treaty rights must thus be viewed in the context of this historic relationship and of the underlying public law concepts governing this relationship of the Crown with

aboriginal peoples. The application of private law rules in order to govern this relationship is inappropriate and this approach is to be discarded as simply inapplicable and wrong.[177]

In the context of infringements to aboriginal land rights, including aboriginal title, an argument can be sustained that expropriation law principles should govern the applicable compensation principles. As we discussed above, expropriation law has lead to the development of many principles which may be useful in discussing compensation in an aboriginal rights context, and to a large extent expropriation principles and attending "market value" concepts have influenced the determination of compensation levels in cases of taking of aboriginal land in the United States. However, though expropriation law is to some extent part of public law, at least in the sense that the expropriating authority is acting on Crown authority, the main thrust of expropriation law is to compensate private parties for the forcible taking of their property. Expropriation law is somewhat at a lost in dealing with property which is not used in a normal market environment. In this regard, expropriation law has attempted to address such cases through the concept of reinstatement. This concept is however difficult to transpose in the context of infringements of aboriginal and treaty rights since, in most aboriginal cases, reinstatement would be difficult to achieve, if not impossible, in light of the particularities of the concerned rights. This is especially true of infringements to aboriginal land where replacement of the land is at best difficult and, when physically feasible, cannot compensate for the spiritual, cultural and social impacts on the affected aboriginals which results from the interference with their relationship to the land. Likewise, it is difficult to argue that an aboriginal fishing right can be adequately compensated by providing the concerned group with an identical quantity of fish acquired at a fish market!

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177 See note 179 *infra*.

The whole social and spiritual dimension is lost in such absurd replacement and reinstatement concepts.[178]

Moreover, the collective dimension of aboriginal and treaty rights would be lost in the framework of expropriation law concepts. These concepts have been developed to deal essentially with individual property owners. It is somewhat difficult to conceive that aboriginal rights would be governed by the same principles as those applicable to private property which is expropriated. The collective dimension of aboriginal and treaty rights and the special *sui generis* nature of these rights would be lost if expropriation principles where simply applied in cases of infringements to such rights. As the Supreme Court of Canada has repeatedly stated, it is simply not possible to transpose to aboriginal title, and to aboriginal and treaty rights generally, normal property rights concepts.[179]

Expropriation law compensation principles should thus serve as appropriate reference points from which to consider the determination of compensation in cases of infringements to aboriginal or treaty rights, but they should not serve as the governing principles in such cases.

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178 In light of the concept of aboriginal rights as defined by the Supreme Court of Canada -- an integral practice, custom or tradition of the aboriginal culture of the concerned aboriginal community – the social or spiritual dimension would probably constitute a bar to most reinstatement schemes in relation to aboriginal rights. However, reinstatement may be contemplated in certain circumstances related to certain treaty rights, particularly commercial treaty rights, insofar as the concerned treaty right is clearly unrelated to any underlying aboriginal right and has no special social or spiritual aspects.

179 *R. v. Sundown*, *supra* note 48 at para. 35; *St. Mary's Indian Band v. Cranbrook*, *supra* note 39 at 666-667 (para. 14); *Delgamuukw v. B.C.*, *supra* note 1 at 1081 to 1083 and 1090 (para. 112 to 115, 117 and 130); *R. v. Van der Peet*, *supra* note 24 at 580 (para. 119); *Blueberry River Indian Band v. Canada*, *supra* note 93 at 358 and 387 (para. 6 and 72); *R. v. Badger*, *supra* note 48 at 813 (para. 78); *R. v. Sparrow*, *supra* note 5 at 1112; *Canadian Pacific v. Paul*, *supra* note 93 at 678; *Simon v. The Queen*, *supra* note 48 at 404; *Guerin v. The Queen*, *supra* note 21 at 379 and 382.

The courts have properly understood compensation in such circumstances to be largely governed by fiduciary law principles. Fiduciary and trust law principles are most appropriate in ensuring that the honour of the Crown is preserved when compensation is required to alleviate the consequences of infringements of aboriginal and treaty rights. As Justice La Forest stated in *Delgamuukw v. B.C.*:

> " 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.
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> In summary, in developing vast tracts of land, the government is expected to consider the economic well being of all Canadians. But the aboriginal peoples must not be forgotten in this equation. Their legal right to occupy and possess certain lands, as confirmed by s. 35(1) of the *Constitution Act, 1982*, mandates basic fairness commensurate with the honour and good faith of the Crown."[180]

This passage certainly confirms that normal expropriation law principles are inadequate to deal properly with infringements to aboriginal title, and, by extension, to all aboriginal and treaty rights. The words of Justice La Forest rather require that the compensation be determined in such circumstances in sociological and political terms which ensure that aboriginals are treated fairly when their lands or rights are required to be set aside for non traditional uses. The yardstick against which this concept of fairness is to be measured is the "honour and good faith of the Crown," a yardstick which can only be understood within the context of the special fiduciary relationship which binds the Crown and aboriginal peoples and which entails fiduciary duties on the Crown. As stated by then Chief Justice Dickson in *R. v. Sparrow*: *"The relationship between the Government and aboriginals*

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180 *Delgamuukw v. B.C., supra* note 1 at 1134 (para. 203 and 204) [emphasis added].

is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."[181]

This idea is also clearly expressed in the opinion of Chief Justice Lamer in *Delgamuukw* where, in discussing compensation in case of infringement to common law aboriginal title, the fiduciary relationship is emphasized: *"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."*[182]

In proceeding with or authorizing an infringement to such rights, the Crown is exercising a discretion which it alone has the authority to carry out, namely permitting the lawful and justifiable infringement to an aboriginal or treaty right without aboriginal consent. This discretion, which the Crown alone can exercise, transforms the fiduciary relationship of the Crown with the concerned aboriginal peoples into a judicially enforceable fiduciary duty to provide in appropriate circumstances just compensations for these infringements which satisfy the standards set out in *Guerin*. In that case, the standards which the Crown was called upon to answer where those of a fiduciary. The honour of the Crown will thus be measured against fiduciary or trust law standards in circumstances where compensation is owed for infringements to aboriginal or treaty rights, whether these infringements are justified or not. As stated by Justice Dickson (later Chief Justice) in *Guerin*:

> "The Crown's fiduciary obligation to the Indians is therefore not a trust. To say as much is not to deny that the obligation is trust-like in character. As would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering Band. The obligation is thus subject to principles very similar to those which govern

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181 *R. v. Sparrow*, *supra* note 5 at 1108.

182 *Delgamuukw v. B.C.*, *supra* note 1 at 1113-1114 (para. 169).

> the law of trusts concerning, for example, the measure of damages for breach."[183]

The use of fiduciary or trust law principles in order to govern the relationship between the Crown and aboriginal peoples when aboriginal lands are surrendered or when aboriginal title, other aboriginal rights or treaty rights are infringed upon, allows the courts to develop and enjoin remedies which are flexible and which can respond to the particular facts of a situation in order to ensure that the honour of the Crown is indeed preserved in each case. The number of remedies available in cases of breach of a fiduciary obligation and breach of trust are numerous, far wider and much more flexible than those normally available at common law or under the civil law. A spectrum of remedies are available in cases of particular breaches of fiduciary obligations, the remedies varying with the nature of the relationship and with the extent of the breach of the particular fiduciary duty[184]

In such cases, the courts are called upon to go beyond the narrow confines of the common law or of the civil law and must rather *"look to the harm suffered from the breach of the given duty, and apply the appropriate remedy."*[185] As L.I. Rotman notes:

> "The nature of the wrong and the nature of the loss, not the nature of the cause of action, will dictate the scope of the remedy.
>
> Potential remedies which may be invoked upon a finding of a breach of fiduciary obligation include restitutionary, personal, proprietary, and deterrent remedies. These may include equitable remedies – such as constructive trust, injunctions, declarations, prohibitions, rescission,

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183 *Guerin v. The Queen, supra* note 21 at 386-387. See also 390, where Dickson J. adds that, in his opinion, *"the quantum of damages is to be determined by analogy with the principles of trust law"*.

184 See generally *Lac Minerals v. International Corona Resources*, [1989] 2 S.C.R. 574 at 643 to 656 and 668 to 680; *Canson Enterprises Ltd. v. Broughton & Co.*, [1991] 3 S.C.R. 534; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 439 to 455.

185 *Hodgkinson v. Simms, Ibid.* at 444, La Forest J.

> accounting for profits, repayment of improperly used moneys (plus interest), equitable liens, equitable damages, and *in rem* restitution – and/or liability based on negligence, fraud, coercion, undue influence, profiteering, economic duress, negligent misrepresentation, or third party liability. A court may also grant interest on financial proceeds awarded to remedy a breach of fiduciary duty which is payable from the date of the breach. Interest awarded may be ordinary or compounded."[186]

This has important implications. Thus the nature of aboriginal and treaty rights as discussed in the first chapter above, the fiduciary relationship between the Crown and aboriginal peoples as discussed in the second chapter, the *sui generis* nature of the doctrine of aboriginal rights and its operation within the sphere of federal common law as discussed in the third chapter, all lead to the conclusion that the remedies available in cases of unlawful or unjustified violations of aboriginal or treaty rights include those available under fiduciary or trust law. These remedies are those developed under equity to properly address fiduciary breaches, including, *inter alia*, the remedies of restitution, specific execution, tracing and constructive trust. The determination of compensation in addition to or in lieu of restitution and constructive trust remedies in cases of unlawful or unjustifiable interference with aboriginal or treaty rights is also to be considered by taking into account the equitable principles applicable in cases of breach of fiduciary duties and which ensure, *inter alia*, compensation equivalent to full restitution, disgorgement of benefits, compensation for lost opportunities and compensation for injurious affection and consequential damages.

The application of these trust or fiduciary law remedies in cases of unlawful or unjustified interference with aboriginal rights is now well settled.[187] In cases where the infringements to aboriginal or treaty rights are carried out lawfully and, since 1982, are justified in accordance with the terms of section 35 of the *Constitution Act, 1982*, these

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186 L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: U. of T. Press, 1996) at 196.

187 See generally *Guerin v. The Queen, supra* note 21; *Delgamuukw v. B.C., supra* note 1 at 1113-1114 (para. 169) and 1133-1134 (para. 203); and *Semiahmoo Indian Band v. Canada, supra* note 59.

fiduciary or trust principles are also to be taken into account in determining the levels of compensation owed. Such compensation must meet the standards appropriate to ensure that the honour of the Crown is preserved.

As stated by Dickson J. (as he then was), *"[i]t is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary like those of negligence, should not be considered closed."*[188] Likewise, it is the nature of the relationship which will govern the remedies available in cases of breach of the relationship. Thus the special fiduciary relationship between the Crown and aboriginal peoples, the overall constitutional responsibility of the Crown towards aboriginal peoples and aboriginal lands, the large discretion afforded to the Crown in authorizing or tolerating lawful infringements to aboriginal or treaty rights, the lack of alternatives available to aboriginal peoples when the infringements to their rights are deemed lawful and justifiable, and the historic vulnerability of aboriginal peoples all militate in favour of applying fiduciary or trust principles to the determination of adequate compensation in cases involving lawful and justified infringements of aboriginal and treaty rights.

These principles need however to be adapted in order to take into consideration the fact that the infringements of aboriginal and treaty rights in such cases are being carried out in a lawful and justifiable manner. This does not mean that the fiduciary remedies are to be discarded in cases of lawful and justifiable infringements of aboriginal and treaty rights. These remedies are rather to be adapted in order to take into account the particular circumstances in which the lawful and justified infringements are being carried out.

Fiduciary and trust law compensation principles thus serve as a guide in determining appropriate compensation levels in circumstances of such lawful and justified infringements.

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188 *Guerin v. The Queen, supra* note 21 at 384. See also *Frame v. Smith*, [1987] 2 S.C.R 99 at 135-136; *Lac Minerals v. International Corona Resources, supra* note 184 at 643 to 656; *Hodgkinson v. Simms, supra* note 184 at 404 to 414.

Conversely, the full scheme of fiduciary and trust law remedies can be made use of when faced with an unlawful or unjustifiable infringement to an aboriginal or treaty right.

B. Compensation is to be determined in accordance with federal common law and will thus be governed by rules which apply uniformly throughout Canada

As extensively discussed in chapter three above, the doctrine of aboriginal rights is an integral component of federal common law. It is a body of law closely related to public law and it operates uniformly across Canada within the federal sphere of constitutional authority.[189]

This is particularly relevant when discussing compensation for infringements to aboriginal or treaty rights. The appropriate compensation to be provided in such cases is to be such as to ensure that the honour of the Crown is preserved. It is difficult to accommodate this notion of the honour of the Crown with compensation rules or principles which would vary in accordance with the province or territory in which the affected aboriginal peoples happen to reside in. Likewise, it is difficult to ensure that the honour of the Crown is preserved if the method of determination of compensation in cases of infringements to aboriginal or treaty rights were subject to the variations of provincial legislation, be it tort or civil liability compensation laws or expropriation laws. The honour of the Crown cannot be governed by different principles in British Columbia, New Brunswick or Quebec.[190] There is but one honour to which the Crown is bound, and the very concept of multiple and variable

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189 *Roberts v. Canada*, *supra* note 69; *R. v. Côté*, *supra* note 38 at 170 and 172-175 (para. 45, 46, and 49 to 54); *R. v. Adams*, *supra* note 28 at pp. 120 to 122 (para. 31 to 33); J.M. Evans & B. Slattery, "Federal Jurisdiction-Pendant Parties-Aboriginal Title and Federal Common Law-Charter Challenges-Reform Proposals: *Roberts v. Canada*", *supra* note 70 at 832; B. Slattery, "Understanding Aboriginal Rights", *supra* note 7 at 732, 736 to 741 and 777; Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-government and the Constitution*, *supra* note 70 at 20.

190 *R. v. Côté*, *supra* note 38 at 170 and 172-175 (para. 45, 46 and 49 to 54); *R. v. Adams*, *supra* note 28 at 120 to 122 (para. 31 to 33).

Crown honours is incongruous. Moreover, the provincial legislatures have no constitutional authority in the matter.[191]

The issue of infringements to aboriginal and treaty rights falls squarely at the very core of aboriginal and treaty rights. Consequently, provincial legislation of general application does not affect the rules governing the determination of compensation in cases of infringements to such rights. As we noted in our discussion under chapter three, laws of general application in a province do not displace the federal common law of aboriginal rights. A law which would displace federal common law in this regard would be in relation to "Indians" or to "Lands reserved for the Indians" and would consequently be beyond the constitutional powers of a province. Provincial laws which would purport to displace the common law of aboriginal rights are not contemplated by section 88 of the *Indian Act* since this section concerns laws which only have an incidental impact on "Indians". Provincial legislation cannot therefore purport to regulate infringements to aboriginal title or other aboriginal land rights.[192]

As we have already discussed, in certain circumstances, the provinces may infringe upon aboriginal rights, though not treaty rights, through the operation of section 88 of the *Indian Act* or through the operation of another appropriately drafted piece of federal legislation which incorporates the provincial legislation. However, when compensation is owed by the provinces, or by third parties acting under provincial authorization, in cases of lawful and justifiable infringements to aboriginal rights, the principles governing the determination of the level and type of compensation owed will be established in accordance with the federal common law of aboriginal rights. Likewise, in cases where treaty rights are

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191 See the discussion in chapter three above and the case law there referred to, and in particular *Delgamuukw v. B.C*, *supra* note 1 at 1121 (para. 181); *St. Catherine Milling and Lumber Co. v. The Queen*, *supra* note 16.

192 See the discussion in chapter three as well as B. Slattery, "Understanding Aboriginal Rights," *supra* note 7 at 777.

infringed upon by the provinces or pursuant to a provincial authorization, and in cases where aboriginal rights are infringed by the provinces or pursuant to provincial authorizations which are either unlawful or unjustifiable, then the principles which will govern the remedies available will also be those of the federal common law of aboriginal rights.

C. Compensation is to be assumed by the Crown but may be paid by third parties

As noted, the rules governing compensation in cases of infringements to aboriginal or treaty rights are rooted in the federal common law of aboriginal rights which incorporates for these purposes the general remedies and compensation principles applicable in cases of breach of fiduciary or trust obligations. The remedies available will vary in accordance with the nature of the infringement. In cases of unlawful or unjustified infringement to aboriginal or treaty rights, the full scheme of fiduciary or trust remedies is available in order to rectify the infringement. In cases of lawful and justifiable infringement to these rights, where compensation is appropriate, it will be determined in accordance with fiduciary or trust principles adapted to fit the particular circumstances in a manner which ensures that the honour of the Crown is preserved.

Our discussion to date may leave the impression that only the Crown would be liable to or responsible for compensation in cases of infringements of aboriginal and treaty rights. The fact that the compensation principles here discussed are dependent to a large extent on the concept of the fiduciary relationship between the Crown and aboriginal peoples can leave the impression that these principles do not find application where third parties infringe upon aboriginal or treaty rights. Indeed, if fiduciary remedies are available when a fiduciary relationship exists, how can these remedies be made applicable to third parties who are not bound by the relationship but who nevertheless infringe upon aboriginal or treaty rights? The answer to this question lies in the special constitutional and common law framework in which aboriginal and treaty rights evolve.

First, let us note that this question has little relevance in cases where the provincial Crown or a provincial Crown corporation acting for the provincial Crown infringes upon aboriginal or treaty rights. Indeed, the fiduciary relationship between the Crown and aboriginal peoples extends to the provincial Crown – at least as regards the application of section 35 of the *Constitution Act, 1982* and of the common law of aboriginal rights it encompasses – when the provincial Crown or one of its creatures interferes with or infringes upon aboriginal or treaty rights.[193] In light of the extension of the fiduciary relationship and attending fiduciary duties to the provincial Crown in circumstances involving infringements to aboriginal or treaty rights, there is no cogent reason to exclude the application of fiduciary or trust law remedies and compensation principles where such infringements are carried out by the provincial Crown or by a provincial Crown corporations acting for the provincial Crown.

Where the infringement is carried out by a third party, this action will normally stem from the activities of the third party authorized under some form of federal or provincial permit or approval. As an example, a private power producer using a river subject to aboriginal fishing rights for hydroelectric development in accordance with proper federal and provincial licences, or forestry activities being carried on lands subject to aboriginal title with proper government approvals.[194]

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193 In this regard, reference may be made to our discussion in the second chapter above and to the following cases: *R. v. Sparrow supra* note 5 at 1105; *Ontario (Attorney General) v. Bear Island Foundation, supra* note 62; *R. v. Côté, supra* note 38 at 185; *R. v. Badger, supra* note 48 at 820; *Côté v. R., supra* note 66 at 1371-1372; *Cree Regional Authority v. Canada, supra* note 63 at 470; *The Queen v. Secretary of State, supra* note 66 at 97 and 117.

194 These types of situations are illustrated in a number of cases such as *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.); *Stoney Creek Indian Band v. British Columbia, supra* note 87 at 201 to 210; *MacMillan Bloedel Limited v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.); *Saanichton Marina Ltd. v. Tsawout Indian Band, supra* note 49; *Gros Louis et al c. Société de développement de la Baie James et al.* [1974] R.P. 38; 8 C.N.L.C. 188 (Que. S.C.); reversed by *Société de Développement de la Baie James v. Kanatewat*, [1975] C.A. 166; 8 C.N.L.C. 373 (Que. C.A.).

In these cases, the legal position of aboriginal peoples remains to a large extent the same than if the infringement had been carried out by the Crown directly, except that where a third party carries out the infringement, that party will also assume the liability resulting from the infringement jointly and severally with the Crown authority which authorized the infringement through a deficient or negligent permit issuance or project approval process. This flows from the simple fact that aboriginal and treaty rights are legal rights and are recognized as such under the common law. Since 1982, these rights are also afforded constitutional affirmation and recognition. As would be the case where any third party interferes with any other right recognized at common law in the pursuit of an otherwise lawful purpose, that third party assumes the liability which results from that interference. As was noted by the Supreme Court of Canada in the seminal case of *R. v. Sparrow*, for many years the rights of the aboriginal peoples to their aboriginal lands were virtually ignored as legal rights even though these rights existed at common law.[195] In consequence, the treatment afforded aboriginal peoples in Canada cannot be the object of much pride.[196] It would be contrary to the very nature of these rights to ignore or tolerate third party interferences with them or not to hold third parties accountable for the infringements which they cause to these rights. This is particularly cogent when such rights are affirmed and recognized in the "supreme law" of the nation.[197] If aboriginal and treaty rights are to be taken seriously, then third party liability for the infringement of these rights must be seen as a necessary corollary to the existence of these rights at common law and to the affirmation and recognition of these rights by the Constitution.

However, should the third party be held to the same standards as the governments which authorizes it to proceed with the activities which result in the infringement of the aboriginal interests?

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195 *R. v. Sparrow, supra* note 5 at 1103.

196 *Ibid.* at 1103.

197 *Constitution Act, 1982*, s. 35 and 52, being Schedule B to the *Canada Act 1982* (U.K.) c. 11.

As already noted, the governments are required in appropriate cases to provide compensation where lawful and justified infringements to aboriginal or treaty rights are carried out. Governments are also held accountable in cases of unlawful or unjustified infringements, and in these circumstances the available remedies extend well beyond compensation determinations. Various equitable and common law remedies are thus available in order to seek and obtain appropriate redress from the governments, including compensation in cases where it is warranted. These remedies flow from the fiduciary relationship. Though third parties are not bound by this fiduciary relationship, it would seem logical that the rules governing their liability would be the same as those governing the liability of the Crown in such circumstances. This would be particularly the case in regard to the availability of fiduciary remedies generally and of compensation principles in particular. It seems unfair to burden the aboriginal peoples with different legal rules when the infringement results from the operations of a third party rather than those of the governments. From the aboriginal perspective, it makes little difference if the infringement results from direct government action or from a third party acting on a government authorization.[198] The fact that aboriginal and treaty rights receive constitutional affirmation and recognition reinforces the view that their infringement should be governed by one set of legal rules.

In circumstances where the infringement results from third party activities carried out pursuant to Crown authorization, there appears no reason not to hold the Crown and the third party jointly and severally liable for the infringement. This approach has the added advantage of fitting well into the ancient but always cogent rule which holds, both under the common

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198 The aboriginal perspective is to be afforded some importance in such matters. See by analogy *R. v. Van der Peet*, *supra* note 24 at 547 and 550-551 (para. 42, 49 and 50). See also *Delgamuukw v. B.C.*, *supra* note 1 at 1065 to 1067 (para. 81, 82 and 84).

law and the civil law, that plaintiffs need not attribute liability among joint wrongdoers.[199] Moreover, this approach is congruent with the concept recognized at common law that holds third parties subject to a constructive trust when they deal with trust property or assist in a breach of a trust duty.[200]

The issue of third party liability for unlawful interference with aboriginal lands was specifically dealt with in the recent decision of Campbell J. of the Ontario Superior Court of Justice in *Chippewas of Sarnia v. Canada (Attorney General)*[201]. In that case, the Chippewas of Sarnia were seeking the cancellation of a land transaction involving traditional aboriginal lands which were also reserved to them under a treaty. The transactions concerning the disputed lands dated back to the middle of the 19th century. The disputed lands had long since been sold to third parties and constituted in fact a large portion of modern urban Sarnia. In rejecting the Chippewas claim for restitution from the present land owners and confirming their claim for monetary compensation against the Crown, Justice Campbell specifically recognized that third party liability for infringement of aboriginal land rights – in that case the restitution of the land purchased – was to be enforced even against good faith purchasers of aboriginal lands. However, such liability, in the case of the landowners involved in the litigation, was covered by equitable limitation of claims principles which the Court there developed in light of the status afforded aboriginal land rights.

Justice Campbell squarely placed the issue of third party liability within the context of the reconciliation of aboriginal societies with the rest of Canadian society, an objective

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199 *Heydon's Case* (1613), 77 E.R. 1150 at 1151 and 1154; *London Association for Protection of Trade v. Greenlands Limited*, [1916] 2 A.C. 15 at 32 and 33; *Arneil v. Paterson*, [1931] A.C. 560 at 563-564; *Napierville Junction Railway Co. v. Dubois*, [1924] S.C.R. 375 at 384; *Deguire Avenue Ltd. v. Adler*, [1963] B.R. 101 (Que. C.A.) at 111-112; *Pappadia v. St-Cyr*, [1959] B.R. 639 (Que. C.A.) at 640-641

200 P.D. Maddaugh & J. McCamus, *The Law of Restitution* (Canada Law Book Inc., 1990) at 84-85 and the case law there listed under notes 43 and 51.

201 *Chippewas of Sarnia v. Canada (Attorney General), supra* note 101.

which is deemed of primary importance by the Supreme Court of Canada.[202] In this regard, Justice Campbell expressed the view that a proper reconciliation of aboriginal and mainstream Canadian societies requires the recognition of third party liability for infringements to aboriginal land rights. The liability of third parties is to be determined in a manner which does not offend a fundamental sense of justice for both the aboriginal and mainstream Canadian societies and which promotes the reconciliation of both societies. In the specific instance of the Sarnia land transactions, Justice Campbell determined that a limitation period of sixty years for the recovery of unlawfully transferred aboriginal land from third party purchasers who acquired in good faith satisfied the standards required to ensure both proper recognition of the aboriginal interests involved and the reconciliation of aboriginal and mainstream Canadian societies. This determination was made in the context where the monetary compensation claim of the aboriginals against the Crown for the unlawful taking of their lands in the 19th century could nevertheless proceed.

The recognition of third party liability has the added advantage of allowing the courts to provide restitution to the aboriginal peoples who have been deprived of their lands or of their rights contrary to the principles of the common law of aboriginal rights or in a manner which cannot be justified under section 35 of the *Constitution Act, 1982*. Full restitution can thus be achieved notwithstanding that the title to the concerned aboriginal lands may have been formally transferred to the third party or may have been otherwise formally burdened.

The consequences on third parties of having their liability governed by fiduciary rules, including fiduciary remedies and fiduciary compensation principles, are largely alleviated by the fact that third parties acting in good faith would have a recourse in indemnity against the government authorities which allowed them to proceed with the impugned activity which infringed aboriginal or treaty rights.

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202 See *R. v. Gladstone, supra* note 32 at 775; *R. v. Van der Peet, supra* note 24 at 547-548 and 550-551 (para. 42, 49 and 50); *Delgamuukw v. B.C., supra* note 1 at 1065 to 1067 (para. 81 to 84).

Moreover, the concept of third party liability is extremely useful in setting the standards for compensation in cases of lawful and justified infringements to aboriginal and treaty rights. Indeed, many major infringements to these rights occur in the context of forestry, mining, hydroelectric development and other similar economic activities. The burden of providing adequate compensation in such circumstances should not necessarily fall on the shoulders of all taxpayers, but should also be assumed by those who most benefit from the infringement to the concerned aboriginal or treaty right. Thus, in authorizing such infringements, the governments may impose conditions so that the infringements which result therefrom may be remedied through appropriate remedial measures and compensation schemes for the affected aboriginal peoples to be provided by those who promote the infringement or largely benefit from it. In assessing the justification of the infringements, the courts are to take into consideration these third party remedial measures and compensation schemes. When the remedial measures and compensation levels are inadequate, the application of fiduciary or trust principles allows the courts to have access to appropriate remedies which take into account both the underlying responsibilities of the Crown and the responsibilities of those who most benefited from the infringement. In this manner, a true reconciliation of aboriginal and mainstream Canadian societies can be achieved by laying at least part of the financial burdens for justified infringements to aboriginal or treaty rights on the shoulders of those who have most to benefit from these infringements.

D. Relevant factors in determining compensation include the impact on the affected aboriginal community and the benefits derived by the Crown and third parties from the infringement

Aboriginal rights require a special approach which ensures that the reconciliation of the aboriginal and mainstream Canadian societies can be achieved in a context of fairness and justice for both societies. Moreover, as already noted, the honour of the Crown must at all times be maintained when affecting aboriginal interests.

Aboriginal rights have been found to be unique *sui generis* rights which require a special approach to the treatment of evidence in aboriginal cases and a unique approach in determining the content of the aboriginal rights themselves.[203] This special approach extends to the measure of compensation in cases of infringements to aboriginal or treaty rights. However, the extent to which the approach needs to be unique in order to achieve the noble purposes of reconciliation and of preservation of Crown honour must not be such as to totally discard the legal concepts with which the Canadian legal system usually deals with. It must not strain the Canadian legal and constitutional structure.[204]

As we have already noted, this special approach is best served in cases of unlawful or unjustified infringements to aboriginal or treaty rights by applying remedies which find analogy with fiduciary or trust law. Likewise, in such cases, when compensation is appropriate, this compensation is to be determined in accordance with fiduciary or trust principles.

However, in cases of lawful and justified infringements, fiduciary and trust principles seem somewhat awkward to apply without some extensive adaption taking into account the fact that the infringements are permissible in such cases. Here, the principles related to compensation in cases of expropriation can become very useful in providing guidance as to how the fiduciary compensation principles are to be adapted to fit the particular circumstances. Thus, though it is impossible to ever properly compensate aboriginal peoples for the forcible infringements to their aboriginal lands or to their rights, a proper melding of compensation principles applicable in cases of breach of fiduciary duty with compensation principles applicable in forcible taking cases can at least lead to compensation schemes which afford the concerned aboriginals an acceptable measure of relief and which promote the reconciliation of both societies while preserving the honour of the Crown.

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203 *Delgamuukw v. B.C.*, *supra* note 1 at 1065 to 1067 (para. 81 to 84).

204 *R. v. Van der Peet*, *supra* note 24 at 550-551 (para. 49); *Delgamuukw v. B.C.*, *supra* note 1 at 1066 (para. 82).

In a nutshell, and as discussed in chapter five, in expropriation circumstances an attempt is made to fully compensate the affected party by providing for the money equivalent of the expropriated property calculated as of the time of taking. For this purpose compensation is calculated based on the market value of the expropriated property determined at the time of taking. This market value includes the value at the time of taking of the best uses which may be made of the property and of the adaptability of the property for special purposes. In special cases where market value is inappropriate, reinstatement costs can be substituted therefore. To this basic compensation is added compensation for the injurious affection to the remaining property, if any, and compensation for consequential damages including in appropriate circumstances, *inter alia*, compensation for the legal and other professional fees associated with the expropriation, for the costs of relocating, for business loss resulting from relocation, for general overall disturbance, as well as for stress and aggravation.

Fiduciary remedies rather attempt to fully compensate the aggrieved party by providing for full restitution in kind, thus ensuring that the remedy compensates for both the past breach and for the future consequences of the breach, or otherwise said, the remedy must ensure that the aggrieved party is placed in a situation such as if the breach of fiduciary duty had never occurred. In consequence, restitution in kind is favoured over equivalent monetary compensation when such restitution is possible. The remedies of restitution, specific execution, tracing and constructive trust are thus favoured when the circumstances allow them to be applied. When restitution is not possible, the full monetary value of the property subject of the breach must be provided as compensation, including any increases in value which occurred between the breach and the date on which compensation is actually made. In addition, in both cases where either restitution in kind is achieved or the monetary equivalent is provided, additional compensation must also be supplied to achieve the objective of full restitution, including in appropriate cases, *inter alia*, disgorgement of benefits, compensation for lost opportunities, for injurious affection and for all consequential damages including the costs of the legal and professional fees associated with correcting the breach.

The application of expropriation principles in cases where aboriginal or treaty rights are infringed upon cannot adequately compensate the affected aboriginal peoples for, amongst other, the reasons set out above in section a) of this chapter. Conversely, many of the fiduciary remedies, though appropriate and often necessary where the infringement is unlawful or unjustified, are clearly incompatible where the infringement is both lawful and justified. In this latter case, both fiduciary and expropriation compensation principles are to be melded in such a way as to capture both the present and future values of the affected rights or properties for the concerned aboriginal peoples, as well as a portion of the future value gained by others in proceeding with the infringement. The objective being to capture to a reasonable extent both the notion of the full present value found in expropriation cases and the notion of future value which is inherent to fiduciary remedies.

Where aboriginal or treaty rights are infringed, particularly in cases where land subject to aboriginal title or necessary for the exercise of an aboriginal right is taken, the issue of future value is particularly important. By their very nature, many aboriginal and treaty rights require a land base sufficient to ensure their proper exercise. The example of hunting, fishing and trapping readily comes to mind in this regard. The taking of the land base for other purposes often can result in a permanent and definitive diminution of the exercise of the right, and, in extreme cases, can lead to the demise of the aboriginal activity the right is intended to protect. Infringements affect in many cases not only those aboriginals exercising the right at the time the infringements are first carried out, but also all future generations of aboriginals who could have benefited from the exercise of the right. The *sui generis* character of aboriginal title and of aboriginal and treaty rights generally, and particularly the collective, cultural and historic nature of these rights, strongly suggest that the lost of the exercise of the right and the lost land base be compensated not only in present value terms but also in terms which take into account the loss of the future uses of the land and the consequential long term impacts on the affected aboriginal society.[205]

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[205] To some extent, this idea also finds expression in the concept of sustainable development.

In this context, expropriation law "market value at the time of taking" principles appear inappropriate to adequately compensate for the infringement of an aboriginal or treaty right. In the rare cases where reinstatement is possible, this alternative should be pursued. However, in most cases reinstatement will not be possible and it will be necessary to determine appropriate compensation in a manner which fully takes into account the loss of the future use of the concerned rights or lands. In such cases, fiduciary principles intervene to ensure that account is taken of all the impacts and all aspects of the infringement.

This can be achieved at least partially by taking into consideration three principal factors:

1) The present as well as the future impacts of the infringement on the affected aboriginal or treaty right and on of the concerned aboriginal peoples themselves, on their society, on their distinct culture and on their other rights and interests.

2) The present and reasonably foreseeable future benefits derived from the infringement by the Crown and by third parties generally.

3) In cases where land or property subject to aboriginal title or otherwise used or required in the pursuance of an aboriginal or treaty right is taken or otherwise infringed upon, the present and reasonably foreseeable future value of the land or property.

These three factors are to be assessed within a three pronged process.

In most cases, this process will first require ascertaining the "market value" of the right, land or property involved. However, contrary to what is applied in expropriation cases, this valuation exercise will not be limited to the value of the best uses at the time of taking.

Rather, a just reconciliation of aboriginal and mainstream Canadian societies must take fully into account the foreseeable future benefits derived from the infringement as well as the foreseeable future value the affected lands or property will gain through the infringement. In this manner, the interests of the affected aboriginal peoples will be to some extent taken into account in regard to both present and future beneficial economic impacts resulting from the infringement. Instead of being disenfranchised by the infringement, aboriginals will be viewed as potential participants in the benefits derived from the infringement.

This valuation, which must fully take into consideration both present market values as well as future benefits and additional future values attributable to the infringement, must then be compared to the value of the concerned right or land for the aboriginal peoples themselves. It is at this second stage that the present as well as the future impacts of the infringement not only on the aboriginal and treaty rights, but also on the concerned aboriginal peoples themselves, on their society, on their distinct culture and on their other rights and interests are taken into account. The past infringements upon the rights and lands of the concerned aboriginal peoples may also be taken into account at this stage. An infringement which in itself appears minor or insignificant can in fact have huge impacts when added to past encroachments. The impact of the infringement is thus to be assessed in light of the history of the relationship between the affected aboriginal peoples and the rest of Canadian society. Among other factors, compensation valuations thus include a consideration of the cumulative impacts resulting from a history of past infringements.

Throughout this exercise, the aboriginal perspective on these matters must be given full consideration. In most cases the value of the affected right or land for the aboriginals will be such as to render monetary valuations impossible. It is indeed futile in most cases to attempt to place monetary or market values on a way of life or on the spiritual, cultural and social dimensions of aboriginal and treaty rights. Nevertheless, the very exercise of considering these factors from an aboriginal and historic perspective will assist greatly in proceeding to the next stage of the valuation process.

This third stage is where the interests of the aboriginal and mainstream Canadian societies must be balanced in such a way as to ensure full and complete compensation for the affected aboriginal peoples in terms which ensure that the honour of the Crown is preserved and which favours the reconciliation of both societies. In most cases this will entail providing to the affected aboriginal peoples the "market value" of the right, land or property affected as determined in normal expropriation cases, to which is added a portion of the future benefits and of the additional future values derived from or attributable to the infringement. In *Delgamuukw*, the Chief Justice speaks of the need for *"governments* [to] *accommodate the participation of aboriginal peoples in the development of the resources"* of the provinces in cases of justified infringements to aboriginal title.[206] This additional value added to the base market value must be sufficient to ensure that the impact of the infringement is properly compensated not only for the present generation but also for the future generations of aboriginals which will enter the affected aboriginal society. Adequate additional value must be transferred to the aboriginal party in order to ensure that the affected aboriginals may pursue their collective existence as a society and grow as a distinct culture irrespective of the loss represented by the infringement. In some cases, this will entail providing a pure monetary award to which is added a sufficient portion of the estimated future benefits and future additional value to achieve the desired result. However, in appropriate cases, and particularly when the aboriginals themselves request it, this may rather be achieved not by providing for a one time monetary payment to the concerned aboriginals, but rather by establishing structured remedial measures and compensation packages that ensure to the aboriginal party a continuous stream of payments or other advantages based on the actual or estimated future benefits or future values derived from or attributable to the infringement. It is here that fiduciary restitution remedies can be useful, and the constructive trust appears in this regard to be a particularly well suited vehicle through which to achieve such structured remedial measures and compensation schemes.

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206 *Delgamuukw v. B.C., supra* note 1 at 1112 (para. 167).

When the infringement does not entail reasonably foreseeable future economic benefits, such as in the case where a military installation is required to be built on lands subject to aboriginal or treaty rights, or where a park is proposed to be created on such lands, then the comparative exercise described above is still to be carried out, though the economic component of this exercise becomes somewhat stale. In such cases, compensation will be determined in accordance with expropriation market valuation methods to which will be added remedial measures or an amount sufficient to ensure here also that the impact of the infringement is properly compensated not only for the present generation but also for the future generations of aboriginals which will enter the affected aboriginal society. In these cases, the cost of alternatives to using aboriginal lands may be taken into account for valuation purposes, thus ensuring that aboriginals are not shortchanged nor unduly victimized in the process. Provisions requiring the return of the lands to the affected aboriginals after their use for non economic purposes should also be part of the overall consideration, failing which additional value should be given to the land in order to take into account its reasonable potential future economic uses even though these future uses may seem remote.

In the determination of compensation levels, where feasible, one should consider the circumstances in which and the conditions upon which a reasonable but well informed and properly counselled aboriginal community would in good faith voluntarily agree to the infringement. In this regard, reference to contemporaneous agreements reached by other well informed and properly counselled aboriginal communities should be considered, taking always into account however that each situation is fact specific.

Once the basic compensation has been determined in accordance with the principles set out above, additional compensation will also be added in appropriate circumstances for injurious affection to the remaining aboriginal or treaty rights and, in cases involving land, to the remaining aboriginal lands. The determination of compensation for injurious affection would normally proceed in a manner similar to the process described above in order to

determine the basic compensation. This process must be however adapted to take into account the particular circumstances in which injurious affection arises.

In addition, in appropriate circumstances, consequential damages are also to be provided for as in cases of expropriation or breach of fiduciary duty, including compensation for the legal and other professional fees incurred as a result of the proposed infringement, compensation for general disturbance resulting from the infringement and, generally, compensation for any additional expense or loss which may be reasonably attributable to the infringement.

Compensation for lost opportunities is also to be considered in some instances, but only insofar as these lost opportunities have not been already captured in the determination of the basic compensation made in accordance with the above principles.

In closing, it is appropriate to stress once again that the special compensation principles discussed above concern cases where the infringement to aboriginal or treaty rights is both lawful and justified. In cases where the infringement is either unlawful or unjustified, the full scheme of fiduciary remedies is available and compensation in such cases is to be largely determined in accordance with fiduciary or trust principles.[207]

E. Compensation is to be provided though structured compensation schemes which need not meet mathematical accuracy tests

As noted above, structured remedial measures and compensation schemes are to be preferred in cases of lawful and justified infringements to aboriginal or treaty rights. Moreover, in cases of infringements to such rights which are neither lawful nor justified,

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[207] See generally *Guerin v. The Queen*, *supra* note 21; *Delgamuukw v. B.C.*, *supra* note 1 at 1113-1114 (para. 169) and 1133-1134 (para. 203); *Semiahmoo Indian Band v. Canada*, *supra* note 59.

fiduciary full restitution is to be preferred through various fiduciary remedies such as the constructive trust. However, when monetary compensation is the appropriate remedy, be it in lieu of or in addition to the above remedies, then this compensation is generally to be awarded as a global amount without need to distinguish among the various components which constitute the award. The amount of compensation must be just and reasonable in the circumstances but need not be determined with mathematical accuracy.

As an example, in the *Guerin* case, Justice Collier of the Federal Court, Trial Division awarded a global amount of $10 million to the aboriginal claimants in accordance with certain compensation guidelines he established and which were derived from equity and strongly influenced by trust and fiduciary law principles.[208] In the Supreme Court of Canada, the appropriateness of proceeding to a global award was questioned. In this regard both Justice Wilson and Justice Dickson (as he then was) approved of proceeding in this fashion and both reiterated that mathematical accuracy was not the objective being pursued in such an exercise. Rather, the principles of equity as understood in breaches of fiduciary duty cases had to be the prime considerations.[209]

In the case of *Semiahmoo Indian Band v. Canada*,[210] the Federal Court, Appeal Division used the remedy of constructive trust in order to return to the concerned aboriginals certain *Indian Act* reserve land which had been inappropriately taken by the Crown. The Court also ordered that additional compensation be provided to the aboriginals under fiduciary or trust law principles, including compensation for injurious affection and consequential damages. The compensation issue was returned for determination to the Trial Division, but the Federal Court, Appeal Division provided in the process certain guidelines

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208 *Guerin v. The Queen*, [1982] 2 F.C. 385 (T.D.) at 441.

209 *Guerin v. The Queen*, *supra* note 21 at 359 and 363 (Wilson J.), and 372-373, 390-391 (Dickson J.).

210 *Semiahmoo Indian Band v. Canada*, *supra* note 59.

under which such determination was to be carried out. These guidelines were essentially derived from fiduciary and trust law compensation principles. The Federal Court, Appeal Division emphasized that the objective pursued in determining compensation was not driven by mathematical formulas but rather by equity: *"There is no perfectly accurate formula for calculating the equitable damages required in order to provide full restitution to the Band in this case. Rather, it is a task which we can only ask the referee to perform the best that he or she can."*.[211]

This concept of a comprehensive award based on equity and not requiring mathematical accuracy or specific attribution to various heads of claims is consistent with the approach followed by the courts in expropriation and fiduciary cases, and there does not appear to be any cogent reason to discard this approach in aboriginal rights cases.[212]

F. Compensation is normally to be awarded for the benefit of the affected aboriginal community as a whole

As noted in the second chapter, aboriginal rights, including aboriginal title, are rights held collectively. This was explicitly recognized in regard to aboriginal title in the *Delgamuukw* case, where Chief Justice Lamer expressed himself as follows in this regard:

> "A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that

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211 *Ibid.* at 55-56 (para. 111). Reference in this regard can also be made to the decision of Justice Teitelbaum of the Federal Court, Trial Division in *Wewayakum Indian Band v. Canada and Wewayakai Indian Band* (1995), 99 F.T.R 1 at 192 (para. 600).

212 *Calder v. Attorney-General of British Columbia, supra* note 17 at 352; *Woods Manufacturing Co. Ltd. v. The King, supra* note 135 at 506-507 and 515; *Lac Minerals v. International Corona Resources, supra* note 184 at 623 to 656; *Hodgkinson v. Simms, supra* note 184 at 404 to 414.

> community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests."[213]

Likewise, by their very nature, other aboriginal rights are collective rights held by the members of the concerned aboriginal nation.[214] As a general rule, treaty rights are also collective rights, though the terms of a particular treaty may in certain circumstances provide for individual treaty entitlements.[215]

Insofar as aboriginal and treaty rights are collective rights, the compensations resulting from the infringements of such rights are thus normally to be paid to the collectivity which holds the rights. This issue was dealt with by the British Columbia Court of Appeal in *Oregon Jack Creek Indian Band et al v. Canadian National Railway*.[216] In that case, various aboriginal chiefs had initiated a claim requesting, amongst other remedies, monetary compensation for what was stated to be an unlawful infringement upon lands subject to aboriginal title. The action was subsequently amended to add as plaintiffs the concerned aboriginal nations and *Indian Act* Bands. In dealing with a preliminary motion concerning the appropriate parties which are entitled to pursue such a claim, the British Columbia Court of Appeal noted that any payment eventually made to compensate the loss *"will form a common fund or pool of money which will stand in place of the last rights. The common pool will be enjoyed by all the plaintiffs in the place of their enjoyment of the communal rights."*[217] This decision was confirmed in the Supreme Court of Canada, but in so doing the Court did

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213 *Delgamuukw v. B.C.*, *supra* note 1 at 1082-1083 (para. 115).

214 *R. v. Van der Peet*, *supra* note 24; *R. v. N.T.C. Smokehouse Ltd.*, *supra* note 31; *R. v. Gladstone*, *supra* note 32.

215 *R. v. Sundown*, *supra* note 48 at para. 35 and 36.

216 *Oregon Jack Creek Indian Band et al v. Canadian National Railway*, [1990] 2 C.N.L.R. 85. (B.C.C.A.)

217 *Ibid.* at 94.

not address directly the compensation issue.[218] The Court rather took the view that the issue of the personal entitlement of the members of the concerned aboriginal community in such claims was in large part to be determined through an analysis of the specific facts of each case and thus best left to be decided within the context of a full hearing.

The numerous aboriginal rights decisions rendered by the Supreme Court of Canada since the *Oregon Jack* case all lead to the conclusion that compensation for infringements to such rights would normally be provided to the collectivity of aboriginals which holds the rights rather than to the individual members of that collectivity. Indeed, if one is to follow the logic of *Delgamuukw*, if a right is collective, then the compensation for infringements to that right should also be provided to the collectivity. Likewise, if decisions relating to the concerned right can only be made by the collectivity holding the right, then decisions relating to the use or distribution of the compensation provided in cases of infringements to such a right should also logically be made by this collectivity.

However, though the rights are collective rights, they are exercised by individuals. It is therefore quite possible that certain individuals may be affected in a more serious fashion than others in cases where such rights are infringed. The collective nature of the rights commands that the issue of compensation as between the aboriginal community and the governments or third parties responsible for the infringement be dealt with on a collective basis. The matter of individual compensation for particular individualized impacts can be dealt with as an internal matter for the concerned aboriginal community in which the courts may however intervene in certain circumstances in order to ensure an equitable distribution or access to the compensation measures or compensation funds. Moreover, in cases where the collectivity of aboriginals unreasonably refuses or neglects to prosecute a claim resulting from an infringement to an aboriginal or treaty right, individual claims in this regard may be

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218 *Oregon Jack Creek Indian Band v. C.N.*, [1989] 2 S.C.R. 1069.

sustained. Thus, the *sui generis* nature of aboriginal and treaty rights commands a *sui generis* approach to compensation issues surrounding such rights.

The right to collective compensation is to some degree confirmed by the provisions of the *Indian Act* surrender arrangements which clearly stipulate that compensation received pursuant to the surrender of land "reserved" under that act must be held for the benefit of the "band" as a whole.[219]

The question of whether compensation moneys owed pursuant to the infringements of aboriginal and treaty rights should be held for the benefit of the concerned aboriginal group as a whole or rather distributed among the individual members of the community should be best left to be decided on a case by case basis. A case by case approach also appears appropriate as regards the rules which may be made applicable to the management of such collective compensation moneys or to the fair distribution of such moneys. In reviewing these matters, the wishes of the members of the aboriginal community should be given considerable weight but must also be balanced against the rights and needs of future generations. The management rules of any fund set up with the compensation payments and the issue of the distribution of such funds are thus to be dealt with by the courts as issues where the present and future interests of the affected aboriginal community as a whole are to be taken into account. In these matters, the only interested parties are the concerned aboriginal community and the individuals comprising that community.

One example in this regard can be found in the *Blueberry River Indian Band* case also known as *Apsassin*. Indeed, pursuant to the decision of the Supreme Court of Canada in *Blueberry River Indian Band v. Canada*,[220] Canada had been held responsible for various breaches of its fiduciary obligations in regard to certain *Indian Act* reserve land transactions.

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219 *Indian Act*, R.S.C. 1985 c. I-6, s. 62.

220 *Blueberry River Indian Band v. Canada, supra* note 93.

The Supreme Court of Canada remanded the case to the Federal Court for the assessment of compensation. A settlement was subsequently reached between the parties and, on March 2nd, 1998, Justice Hugessen of the Federal Court, Trial Division ordered that settlement proceeds of $147 million be paid to the concerned *Indian Act* Bands.[221] Of this amount, the Bands were required to set aside $12 million in trust in order to deal with individual claims for individualized compensation to be determined through a distribution process supervised by the Court. The *sui generis* nature of the rights involved required a *sui generis* solution in order to properly handle the compensation issues which subsequently flowed from the breach by Canada of its fiduciary duties in managing the concerned lands.

Thus, though the compensation in cases of infringements to aboriginal or treaty rights is normally to be provided to the collectivity holding the right, the courts may exercise a supervisory role in ensuring that the individual members of the affected aboriginal community are provided with a fair access to the funds. This will generally be achieved through structured compensation schemes of which the *Apsassin* case is but one model among many others available to the courts. Throughout this process, the courts must ensure that the uses of the compensation moneys, including any rules related to their distribution, are consistent with the preservation of the honour of the Crown and with the interests of both the present and future generations of affected aboriginals. The courts must give full consideration to the aboriginal perspective and strive to ensure that any decision made in regard to these matters is consistent with the long term interests of the concerned aboriginal community and with its survival as a viable distinct culture and society.

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221 *Apsassin et al v. Canada* (March 2nd, 1998), T-4178-78 (F.D.T.D.).

CONCLUSION

The issue of compensation in cases of infringements to aboriginal and treaty rights raises numerous and complex legal issues which go to the very heart of the common law.

This paper has attempted to provide simple but comprehensive legal principles for the determination of compensation in cases of infringements of aboriginal and treaty rights. This exercise was carried out through the epistemological and methodological premises of traditional legal discourse.

This study has resulted in identifying six basic principles applicable in such cases: a) compensation is to be determined in accordance with a methodology which takes into account fiduciary law principles; b) compensation is to be determined in accordance with federal common law and will thus be governed by rules which apply uniformly throughout Canada; c) compensation is to be assumed by the Crown but may be paid by third parties; d) relevant factors in determining compensation include the impact on the affected aboriginal community and the benefits derived by the Crown and third parties from the infringement; e) compensation is to be provided through structured compensation schemes which need not meet mathematical accuracy tests; f) compensation is normally to be awarded for the benefit of the affected aboriginal community as a whole.

The above discussion is but a first step in what will certainly be a complex process of sorting out the appropriate legal principles applicable in cases of infringements to aboriginal and treaty rights.

It has been a long and difficult struggle in order to achieve the full recognition of aboriginal and treaty rights. After such a long struggle for recognition, it is essential not to leave these rights simply sitting on a theoretical fence. The true content and impact of these

rights will only be ascertained through the treatment afforded to them in cases where they are infringed upon, particularly when such infringements are deemed "justified" in order to satisfy the economic development imperatives of mainstream Canadian society. It is in this context that Canadian society as a whole, and the judiciary specifically, will be called upon to make good on the promise to take these rights seriously. The methods used to determine compensation, the levels of compensation provided and the legal mechanisms through which compensation will be managed and distributed will all determine whether aboriginals in Canada will be afforded fair treatment and recognition in a manner which ensures the true reconciliation of aboriginal and mainstream Canadian societies.

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