

CHAPTER SEVEN: ABORIGINAL RIGHTS

KEY CONCEPTS FOR THE CHAPTER

- ABORIGINAL RIGHTS – BOTH COMMON LAW AND AS RECOGNIZED BY TREATY --ARE CONSTITUTIONALLY ENTRENCHED IN CANADA BUT NOT IN THE U.S. OR AUSTRALIA
- ABORIGINAL RIGHTS IN LAND ARE RECOGNIZED BY COMMON LAW OR TREATY IN CANADA, BY TREATY ONLY IN THE U.S., AND BY COMMON LAW ONLY IN AUSTRALIA
- NATIVE RIGHTS IN LAND IN THE U.S. ARE ONLY CONSTITUTIONALLY PROTECTED TO THE EXTENT THAT THE FIFTH AMENDMENT REQUIRES COMPENSATION IF THE GOVERNMENT BREACHES TREATY RIGHTS, AND IN AUSTRALIA ONLY TO THE EXTENT THAT §51(XXXI) OR STATE LAW REQUIRES COMPENSATION FOR RIGHTS RECOGNIZED UNDER THE COMMON LAW
- CANADIAN ABORIGINAL RIGHTS ARE NOT ABSOLUTE, BUT COURTS CAREFULLY REVIEW GOVERNMENT DECISIONS TO ENSURE THAT IMPAIRMENTS ARE JUSTIFIED AND THE "HONOUR OF THE CROWN" IS UPHOLD
- STATE/PROVINCIAL LEGISLATION RELATING TO ABORIGINALS IS SUBJECT TO PREEMPTION BY CONTRARY FEDERAL LAW IN EACH COUNTRY
- ALTHOUGH AUSTRALIAN COURTS HAVE REJECTED USE OF OTHER CONSTITUTIONAL PROVISIONS TO BLOCK GOVERNMENT ACTION HARMFUL TO ABORIGINALS, THE CONSTITUTION AUTHORIZES THE COMMONWEALTH PARLIAMENT TO PASS SPECIAL LEGISLATION IN REGARD TO ABORIGINALS

Introduction

A short chapter in a broader comparative study cannot possibly do justice to the complex historical and sociological inquiry necessary for an in-depth understanding of the similarities and differences in the ways that aboriginal peoples were treated by European settlers and their descendants in North America and Australia. For putting together these brief materials, our thanks to Professors Joseph Magnet of the University of Ottawa and Laurie Reynolds of the University of Illinois.

One major aspect of comparative aboriginal law involves questions of federalism and legislative competence. In each country, the federal legislature has been delegated the authority to legislate with regard to aboriginal peoples.¹ There is a vast and particularized

¹ The central government's power is derived from several provisions of the U.S. Constitution: Art. I, §8 (power to regulate commerce with Indian tribes); Art. II, §2 (President and Senate power to make

body of law in each country on this topic, but the general principle is similar: the supremacy/paramountcy clauses of each nation's constitution means that federal legislation will trump localized efforts to regulate aboriginals.

These brief materials focus on two aspects of legal protection for aboriginals where formal and real differences exist: the way in which aboriginal peoples are recognized, and the legal recognition of rights in land. Aboriginal rights are an interesting case study itself, in terms of reflection of a nation's values and history; they also reflect themes seen throughout these materials, distinguishing between the Canadian approach of entrenching constitutional rights and the Australian approach of use of federal legislation. In a variety of settings, natives have sought to resist adverse governmental action, or affirmatively prohibit adverse action by private parties, based on claims that the challenged conduct adversely affects rights that native communities should enjoy and warrant judicial protection. Some claims are based on rights claimed under treaties ("treaty rights"); other claims are based on rights that native communities have always enjoyed and should be formally protected ("aboriginal rights"); other claims relate to generally established individual rights.

I. The Structure of Recognition of Aboriginal Peoples

A. United States

JOHNSON v. M'INTOSH.

SUPREME COURT OF THE UNITED STATES 21 U.S. 543; 5 L. Ed. 681 (1823)

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

[The plaintiffs brought an action for ejectment for lands in Illinois to which both parties claimed title. Plaintiffs' title was based on a grant by native tribes of land they occupied and with regard to title they had sold to investors including the plaintiffs' ancestor for \$31,000 in 1775. After the Americans occupied Illinois during the Revolutionary War, Virginia claimed the new area, later transferring the property to the United States under the Articles of Confederation. Congress refused to recognize the grant to Johnson's ancestors, selling much of it to M'Intosh in 1818.]⁺⁺

treaties); Art. IV, §3 (power to enact "all needful rules and regulations respecting the territory or other property belonging to the United States"). The power is even more explicit in the *British North America Act*: s.91(24) delegates to Parliament exclusive legislative power with regard to "Indians, and Lands reserved for the Indians." The Australian Constitution (s51(xxvi)) originally empowered the Commonwealth to make laws respecting "the people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws." In 1967, this provision was amended (with over 90% of voters approving) to strike out the italicized words, thus empowering special legislation with regard to aboriginals. This is discussed in detail below.

⁺⁺ [Ed. note: Recent scholarship has suggested that the case was manufactured. See Eric Kades, "History and Interpretation of the Great Case of Johnson v. M'Intosh," *Law and History Review* Spring 2001 <<http://www.historycooperative.org/journals/lhr/19.1/kades.html>> (5 Sep. 2005).

The facts, as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.

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 ascendancy. The potentates of the old world found no difficulty in convincing themselves 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 consequent war with each other, to establish a principle, which all should 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 was 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 with 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 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 whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission, is confined to countries "then unknown to all Christian people;" and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.

Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting lands, and of dismembering the government at his will. The grants made out of the two original colonies, after the resumption of their charters by the crown, are examples of this. The governments of New-England, New-York, New-Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. In some instances, the soil was conveyed by the crown unaccompanied by the powers of government, as in the case of the northern neck of Virginia. It has never been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

Between France and Great Britain, whose discoveries as well as settlements were nearly contemporaneous, contests for the country, actually covered by the Indians, began as soon as their settlements approached each other, and were continued until finally settled in the year 1763, by the treaty of Paris. [**Ed. note:** This treaty concluded the French and Indian War and ceded Quebec to the English.]

[Each nation had granted and partially settled the country, denominated by the French, Acadie, and by the English, Nova Scotia. A dispute arose over the interpretation of a provision the 1703 Treaty of Utrecht ceding to Great Britain "all Nova Scotia or Acadie, with its ancient boundaries." Diplomatic efforts to resolve the dispute centered on arguments relying on the title given by discovery to lands remaining in the possession of Indians. Further diplomatic discussions concerned not only Nova Scotia but New England, adjoining portions of Canada, and the western territory from American colonies. France contended not only that the St. Lawrence was to be considered as the centre of Canada, but that the Ohio was within that colony. She founded this claim on discovery, and on having used that river for the transportation of troops, in a war with some southern Indians. England claimed all the lands to the Pacific ocean, because she had discovered the country washed by the Atlantic.]

These conflicting claims produced a long and bloody war, which was terminated by the conquest of the whole country east of the Mississippi. In the treaty of 1763, France ceded and guaranteed to Great Britain, all Nova Scotia, or Acadie, and Canada, with their dependencies; and it was agreed, that the boundaries between the territories of the two nations, in America, should be irrevocably fixed by a line drawn from the source of the Mississippi, through the middle of that river and the lakes Maurepas and Ponchartrain, to the sea. This treaty expressly cedes, and has always been understood to cede, the whole country, on the English side of the dividing line, between the two nations, although a great and valuable part of it was occupied by the Indians. Great Britain, on her part, surrendered to France all her pretensions to the country west of the Mississippi. It has never been supposed that she surrendered nothing, although she was not in actual possession of a foot of land. She surrendered all right to acquire the country; and any after attempt to purchase it from the Indians, would have been considered and treated as an invasion of the territories of France.

Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States," whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

The States, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country northwest of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that "all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation," &c. "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever."

The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been

successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law which regulates, and ought to regulate in general, the relations between the conqueror and

conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

Another view has been taken of this question, which deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.

As such a grant could not separate the Indian from his nation, nor give a title which our Courts could distinguish from the title of his tribe, as it might still be conquered from, or ceded by his tribe, we can perceive no legal principle which will authorize a Court to say, that different consequences are attached to this purchase, because it was made by a stranger. By the treaties concluded [*594] between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption, that they considered it as of no validity. They ceded to the United States this very property, after having used it in common with other lands, as their own, from the date of their deeds to the time of cession; and the attempt now made, is to set up their title against that of the United States.

The proclamation issued by the King of Great Britain, in 1763, has been considered, and, we think, with reason, as constituting an additional objection to the title of the plaintiffs.

By that proclamation, the crown reserved under its own dominion and protection, for the use of the Indians, "all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest," and strictly forbade all British subjects from making any purchases or settlements whatever, or taking possession of the reserved lands.

It has been contended, that, in this proclamation, the king transcended his constitutional powers; and the case of *Campbell v. Hall*, (reported by Cowper,) is relied on to support this position. [*595] It is supposed to be a principle of universal law, that, if an uninhabited country be discovered by a number of individuals, who acknowledge no connexion with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parcelled out according to the will of the society, expressed by the whole body, or by that organ which is authorized by the whole to express it.

According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown, that this principle was as fully recognised in America as in the island of Great Britain. All the lands we hold were originally granted by the crown; and the establishment of a regal government has never been considered as [*596] impairing its right to grant lands within the chartered limits of such colony. In addition to the proof of this principle, furnished by the immense grants, already mentioned, of lands lying within the chartered limits of Virginia, the continuing right of the crown to grant lands lying within that colony was always admitted. A title might be obtained, either by making an entry with the surveyor of a county, in pursuance of law, or by an order of the governor in council, who was the deputy of the king, or by an immediate grant from the crown. In Virginia, therefore, as well as elsewhere in the British dominions, the complete title of the crown to vacant lands was acknowledged.

So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.

According to the theory of the British constitution, the royal prerogative is very extensive, so far as respects the political relations between Great Britain and foreign nations. The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for the preservation of peace; and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites; and the power to do this was never, we believe, denied by the colonies to the crown.

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the Court is decidedly of opinion, that the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States; and that there is no error in the judgment which was rendered against them in the District Court of Illinois.



Another major opinion from that era, *THE CHEROKEE NATION V. GEORGIA*, 30 U.S. 1 (1831), is archetypical of attitudes toward Native Americans of that era. White settlers continually encroached and settled on vast portions of unsettled lands expressly reserved by treaty to

native tribes, particularly in the southern United States. As early as 1789, Secretary of War Henry Knox accepted that “the disposition of the people of the states to emigrate into the Indian country cannot be effectively prevented” and proposed the removal of all native Americans to west of the Mississippi River. In part, Knox’ view was based on his experience as War Secretary for the government under the Articles of Confederation, when a congressional resolution calling for the military expulsion of whites on Cherokee lands in violation of a treaty was met with a refusal by southern states to provide the necessary troops.

The Cherokee Nation held fast to their well-established society in Georgia. The State of Georgia responded with a series of laws abolishing the Cherokee government and distributing Cherokee lands. In 1830, Congress acted by enacting the Removal Act, authorizing President Jackson to exchange lands west of the Mississippi (modern-day Oklahoma) for current tribal lands. The Cherokee sought judicial enforcement of its rights under treaties, presenting the Court with a constitutional crisis, as it was well known that Georgia officials - with tacit approval of President Jackson - were prepared to defy an judicial declaration to prevent the forced removal of the Cherokees from Georgia. (To illustrate the point, while the case was pending Chief Justice John Marshall had granted a writ of habeas corpus to challenge the conviction of a Cherokee for murdering another Native American on Cherokee land; the Georgia legislature passed a resolution condemning Marshall’s interference and the petitioner was hung five days later.)

Chief Justice Marshall’s opinion rejecting the Cherokee claim avoided a confrontation with elected officials. As in *Marbury v. Madison* (discussed below in Chapter 9), the Court avoided a merits resolution by finding that it lacked jurisdiction. The Cherokees filed the claim as a foreign nation, but the Court held that “the relations of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.” They were not foreign nations but “domestic dependent nations,” with a relationship to the United States akin to “that of a ward to his guardian.” Thus, the Court concluded that the Constitution’s grant of federal authority to resolve suits between states and foreign nations did not apply.

The Court’s conclusion that the framers did not intend to give native tribes access to federal courts was bolstered by its assertion that the tribes’ “appeal was to the tomahawk.” The Court also invoked a textual analysis, noting that the Commerce Clause granted Congress separate authority to regulate commerce “with foreign nations, and among the several states, and with Indian tribes.”

A related case showed the depth of anti-native popular opinion and the precarious position of courts and the rule of law. In *WORCESTER V. GEORGIA*, 31 US. 515, 8 L.Ed 483 (1832), the Supreme Court reversed a conviction of a missionary for violating a Georgia statute requiring a license from the governor for non-Indians to reside in Cherokee territory, holding that state laws did not govern Indian territory. The state defied the Court’s decision, and the end of the Court’s Term and various other arcane procedural hurdles prevented a confrontation with federal marshals (who today would be ordered to forcibly enforce a federal judicial writ). The matter was resolved in 1833 when the case became a political embarrassment to President Andrew Jackson, who persuaded Georgia’s governor to pardon Worcester. (This was the case where myth claims that Jackson had remarked that “John Marshall has made his

decision; now let him enforce it.”)

B. Australia

Australia's constitution does not recognise aboriginal rights, or native title. In the past, it made two mentions only of the “aboriginal natives” of Australia, both as limitations. The first, in s 51 (xxvi), was a provision which empowered the Commonwealth to make laws respecting “the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.” In 1967, with overwhelming support (more than 90% in favour) the Constitution was amended, to strike out the words “other than the aboriginal race in any State.” The precise rationale for the Races power is not clear; legislation dealing with racial issues (such as immigration) were supported by other heads of power and there are no leading constitutional cases litigation this issue. An educated surmise is that it was included for anticipated future needs involving internal regulation of races, falling outside other heads of power. Other than post-1967 legislation regarding aboriginals, though, we don't really know what such “special laws” might look like. The other mention was found in s 127, which stated that “In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.” This entire section was expunged in 1967. Henceforth, ironically, there is no mention at all of the indigenous people, or the “first Australians”.

There is much misunderstanding about the 1967 referendum, and its effect. Many -- including journalists and even (!) lawyers -- continue to believe that the referendum “gave” the aboriginal people the right to vote (the confusion is no doubt aided by the rhetoric of “citizenship” that surrounded the referendum campaign). This is doubly confused - since the Constitution does not provide for the right to vote (and therefore no constitutional change was needed) and secondly, the aboriginal people were enfranchised at that time (they voted in the referendum). Still the myth persists. Since 1967, the Commonwealth has been empowered to pass special laws for the Aboriginal people: Native Title legislation is the most significant example. Because a generalised federal power to make laws for the Aboriginal people only post-dates 1967, there is relatively little case law in Australian constitutional history. There have been, in addition, relatively few Commonwealth laws that rely on this provision.

Legislation in particular regarding the Northern Territory, which has the highest percentage of aboriginal population (out of its total population) of any state or territory, is based on the Territories power (s 122). The Commonwealth has also drawn on the external affairs power (s 51 (xxix)) to pass laws such as the Racial Discrimination Act 1975, giving effect to international treaties. Further legislative action could follow the Commonwealth's recent signature on the United Nations Declaration on the Rights of Indigenous People (drawing on the executive power, s 61). As we explore below, the latter is relevant in providing the basis for federal statutes that can grant aboriginals' rights as against infringement by state governments.

The High Court of Australia significantly developed aboriginal rights law in a landmark

decision, *Mabo v Queensland (No.2)* (1992) 175 CLR 1. The decision is much celebrated (and equally misunderstood); it is, however, only indirectly a constitutional case, primarily dealing with common law title. Excerpted in Part II, below, the HCA held that, where continuous association with land could be demonstrated and no supervening title found, indigenous people living on their land could claim legal title to it. Following this decision, the Commonwealth Parliament exercised its Race power to enact the *Native Title Act* (1993), which created tribunals and substantive standards to recognize native title. (This is distinct from, and supplementary to, prior legislation, such as the *Aboriginal Land Rights Act* (1986), where the Commonwealth established a means by which aboriginals in the Northern Territory could claim rights based on traditional occupation.)

Nonetheless, Mason CJ has explicitly rejected any notion that *Mabo* permits a reassessment of aboriginal sovereignty. He read *Mabo* to deny "that the Crown's acquisition of sovereignty over Australia can be challenged in the municipal courts of this country" and that land was held "by means of native title under the paramount sovereignty of the Crown."

A recent decision, *Wurridjal v The Commonwealth* [2009] HCA 2, established that the "just terms" requirement of s 51 (xxxi) applied to the Territories power (s 122). Thus, the federal government was limited in its ability to expunge aboriginal title. However, it found that the impugned law (parts of the so-called "Northern Territory Intervention") did not breach s 51 (xxxi) because the law provided compensation for acquired property. Justice Kirby in one of his last dissents implied that the rest of the Court was less concerned about loss of aboriginal property than they would have been if the plaintiffs were white. Chief Justice French called this remark "gratuitous"!

C. Canada

THE ROYAL PROCLAMATION**October 7, 1763.**

[...] And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.

And, We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose; And we do, by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the

Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:

And we do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

And we do further expressly enjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper guard to the Colony where the Crime was committed of which they stand accused, in order to take their Trial for the same.

Given at our Court at St. James's the 7th Day of October 1763, in the Third Year of our Reign.

GOD SAVE THE KING George R.

"Indian" peoples in Canada today prefer to be known as First Nations. This includes aboriginal peoples who crossed over from Asia thousands of years ago, as well as the Inuit, people who also inhabit the northern tier of other Arctic countries, and the Métis, descendants of Aboriginal peoples who intermarried with European fur traders and settlers.⁺

Anglo-French competition in North America, facilitated in 1670 by a British royal grant to the Hudson's Bay Company of all lands draining into that bay, focused on fur competition. First Nations engaging in trade became increasingly dependent on manufactured goods, while firearms and disease took their toll on human and animal life as intertribal rivalries flared. When Montréal fell to the British in 1760, ending French rule in Canada, the terms of surrender stated that the former First Nations allies of the French should be neither penalized nor disturbed in their possession of lands. Three years later, in the Royal Proclamation setting out the boundaries of the newly acquired province of Quebec and those of the American colonies, First Nations' rights were more clearly defined.

The Royal Proclamation of 1763 ceased to have any bearing on relations between First Nations and Americans after the American Revolution, but in Canada the proclamation established the framework for future settlements of First Nations lands. Thereafter, it was accepted policy that while title to the land mass of Canada was vested in the Crown, the Aboriginal peoples maintained an underlying title to use and occupy the land. Because settlement could not be undertaken without a surrender of aboriginal rights to occupation and use, between 1763 and 1800, 24 treaties were signed with different groups of First Nations, most of them covering the fertile agricultural lands along the north shore of Lake Ontario. At

⁺ The following summarizes a government publication by the Department of Indian Affairs and Northern Development, *First Nations in Canada* (1997).

first, lump sum cash payments were made for these land surrenders. Later, however, the Crown undertook to set aside reserves and provide annuities and other benefits for First Nations surrendering title to their land.

To clear title for railroad and settlement as Canada expanded to the west coast, a series of treaties were consummated for land between Lake Superior and the Rocky Mountains. With a few subtle differences, all the Western treaties provided for reserve lands, monetary payments, suits of clothing every three years to chiefs and headmen, yearly ammunition and twine payments, and some allowances for schooling. Many historians speculate that while the commissioners saw the treaties in one way, First Nations had a different perspective. First Nations sought protection from invading land-hungry settlers and the disruptions they sensed would follow these newcomers. They sought wide ranges which they could call their own and where they could live as they had in the past. The commissioners, on the other hand, saw reserves as places where Aboriginal peoples could learn to be settlers and farmers. For this and other reasons, the treaties left hanging many questions that are yet to be resolved.

In 1876 the Canadian Parliament passed its first consolidated *Indian Act*. Although there have been several major revisions, many of its provisions remain to this day. The *Indian Act* gave great powers to government to control First Nations living on reserves. It was during this period that the distinction between "Status" and "non-Status Indians" was first formulated.⁺ The Act and later amendments explicitly forbade the selling, alienation or leasing of any reserve land unless it was first surrendered or leased to the Crown, and then permitted the Crown to override aboriginal reluctance to lease land.

Beginning in the late 1940s, aboriginal leaders emerged to forcefully express their people's desire for equality with other Canadians while maintaining their cultural heritage. Political support was nurtured by focusing public attention on the heroism of aboriginal soldiers in World War II and the disadvantaged condition of First Nations peoples back in Canada. In response, Parliament established a joint Senate-House committee that exposed poor living standards, lack of education, and problems with efforts at cultural assimilation.

The modern era's focus on Native claims began with legal proceedings brought by the Nisga'a of British Columbia after consistent denials of any enforceable claim by the British Columbia government. Although *Calder v. Attorney General (British Columbia)*, [1973] S.C.R. 313, was dismissed on a technicality, six of the seven judges acknowledged the existence of Aboriginal title in Canadian law. But the six split evenly on the issue of whether Aboriginal title continued to exist in British Columbia. The seventh judge ruled against the Nisga'a on a technical point of law.

The decision led the federal government to announce its willingness to negotiate land claims based on outstanding Aboriginal title. Its policy was to recognize two broad classes of claims - comprehensive and specific. Comprehensive claims are based on the recognition that there are continuing Aboriginal rights to lands and natural resources. Such claims arise in

⁺ Status Indians are those who are registered with the federal government as Indians according to the terms of the *Indian Act*. Non-Status Indians are those who are not registered.

those parts of Canada where Aboriginal title has not previously been dealt with by treaty and other legal means. Comprehensive land claims are currently under negotiation in the Yukon, Labrador, most of British Columbia, Northern Quebec, Ontario and the Northwest Territories. The claims are termed "comprehensive" because of their wide scope. Comprehensive claims include such things as land title, fishing and trapping rights, financial compensation and other social and economic benefits. Specific claims, on the other hand, deal with specific grievances that First Nations may have regarding the fulfilment of treaties. Specific claims also cover grievances relating to the administration of First Nations lands and other assets under the Indian Act.

From the early 1970s to March 1996, the government provided Aboriginal groups with approximately \$380 million for work on their claims. This money enabled Aboriginal peoples to conduct research into treaties and Aboriginal rights and to research, develop and negotiate their claims. In 1986 the federal government announced a new comprehensive claims policy in answer to one of Aboriginal peoples' main concerns, the abolition of their rights and title to land. Historically, this was a problem with the treaty-making process. In the past, the federal government would only negotiate treaties if Aboriginal peoples accepted "extinguishment" of their Aboriginal rights and title. The new claims policy provided other options to this total extinguishment of rights and title. It also widened the scope of comprehensive claims negotiations to include crucial issues raised by Aboriginal peoples. Negotiations could now include offshore wildlife harvesting rights, the sharing of resource revenues and Aboriginal peoples' participation in environmental decision making. Negotiations could also include a federal government commitment to negotiate self-government with the First Nation. Another big change in the process of negotiating comprehensive claims came in 1990. Up until then, the federal government would negotiate no more than six claims at one time. After the new 1990 policy, there was no longer any limit on the number of claims the federal government was willing to negotiate with First Nations.

In his article "Making Sense of Aboriginal and Treaty Rights" (2000), 79 Can. Bar Rev. 196, Professor Brian Slattery outlines the origins and content of aboriginal rights. It is a body of Canadian common law that defines the constitutional links between aboriginal peoples and the Crown and governs the interplay between indigenous systems of law, rights and government (based on aboriginal customary law) and standard systems of law, rights and government (based on English and French law).

Aboriginal rights have their origins in ancient custom:

When the Crown gained suzerainty over a North American territory, the doctrine of aboriginal rights provided that the local customary laws of the indigenous peoples would presumptively continue in force, except insofar as they were unconscionable or incompatible with the Crown's suzerainty. For example, in the Québec case of *Connolly v. Woolrich* (1867), the courts upheld a marriage contracted in the Canadian North-West under Cree customary law between an Indian woman and a European man, despite the fact that the man subsequently married another woman in a Christian ceremony under Québec law. The second wife argued that the first marriage was invalid because the marriage customs of the Cree could not be recognized by the courts. However, this argument did not persuade the trial judge.

The modern result was the SCC's recognition of aboriginal title as a legal right derived from indigenous peoples' historic occupation of lands. It thus has an independent basis in Canadian common law from its recognition in the Royal Proclamation of 1763. It creates a "special relationship with the Crown" (as the exclusive grantee of lands ceded) giving rise to a "distinct fiduciary duty on the part of the Crown," the breach of which renders the government liable in damages. This distinctive fiduciary role has been encapsulated in the phrase "the honour of the Crown," rooted in basic principles of justice.

The "honour of the Crown" avoids technicalities. Thus, the Crown's argument that aboriginal rights did not survive in Quebec because they were extinguished by the French assertion of sovereignty was rejected because it would create an "awkward patchwork of constitutional protection for aboriginal rights across Canada."

When land is ceded to the Crown pursuant to a treaty, the honour of the Crown requires that terms should be interpreted generously, in a manner that is favourable to the aboriginal parties and takes full account of their concerns and perspectives. Prior to 1982, while Parliament could lawfully enact a statute infringing a treaty, subsequent statutes were construed with the premise that Parliament would not disregard promises made to an aboriginal group to which it owed fiduciary obligations. (After 1982, treaty rights are entrenched in s. 35.)

Aboriginal rights can be usefully placed in several categories. As Slattery explained:

The first category comprises site-specific rights -- rights that relate to a definite tract of land but do not amount to aboriginal title. For example, where an aboriginal people regularly hunted on certain lands adjoining its ancestral territory but never occupied them on a permanent basis, it may nevertheless hold a site-specific hunting right in those lands. The second category consists of land-based rights that are not tied to any particular tract of land -- what may be called floating rights. A floating right is the right to engage in certain land-related activities on any lands to which members of the group have access, whether as aboriginal people or as ordinary members of the public. Consider the case where an aboriginal group has traditionally gathered certain wild plants for medicinal purposes. These plants are not found in any particular place but grow freely in various

locations, which change from year to year. Here the aboriginal right would be a "floating right" because, although it involves a use of land, it is not tied to any specific tract of land. In the third category we find specific aboriginal rights that are not necessarily linked with the land at all -- cultural rights for short. For example, a group might have an aboriginal right to perform certain traditional dances that are not connected with any particular location and do not involve "using" the land in a way that transcends the normal effects of human activity.

In addition to these rights in land, an ongoing issue concerns the right to self-government. Because aboriginal title is a collective right, the SCC has suggested that decisions with respect to that land must be made by the aboriginal community.

Proving specific rights is always a matter of evidence. To qualify, an activity must (i) have been integral to the culture of the aboriginal group, and (ii) must have continuity with the practices, customs, or traditions prior to European contact.

Some rights are exclusive, resulting in the aboriginal group's sole right to engage in certain activities, use and occupy a parcel of land, to exploit a particular resource, etc. Other rights are non-exclusive. A non-exclusive right to fish might result in ensuring certain privileges for aboriginal people. The non-exclusive right to hold potlatches, as part of aboriginal cultural heritage, does not preclude members of the public from also holding potlatches.

Some rights are depletable. Because aboriginal rights are communal, there is no right to act in a manner that will result in the abridgement of rights for future generations. Thus, an aboriginal right to fish might be subject to an inherent limit to ensure enough fish remain for the stock to reproduce.

II. Establishing Aboriginal Property and other Rights

A. United States

As established in *Johnson v. M'Intosh*, *supra*, Native Americans enjoyed occupancy rights in land at the sufferance of the government. However, in spite of the Court's finding that Native tribes were not foreign nations, treaties signed with these tribes did have the full force and effect of federal law. Federal treaty grants provide the principal source of property rights for native Americans, as the following cases illustrate.

UNITED STATES *v.* WINANSSUPREME COURT OF THE UNITED STATES
198 U.S. 371; 25 S. Ct. 662; 49 L. Ed. 1089 (1905)

[Before Fuller, C.J., and Harlan, Brewer, Brown, White, Peckham, McKenna, Holmes, Day, JJ.]

MR. JUSTICE McKENNA delivered the opinion of the court.

This suit was brought to enjoin the respondents from obstructing certain Indians of the Yakima Nation in the State of Washington from exercising fishing rights and privileges on the Columbia River in that State, claimed under the provisions of the treaty between the United States and the Indians, made in 1859.

[The treaty conveyed all rights to the lands occupied and claimed by the Yakima to the United States, reserving “for the use and occupation of the aforesaid confederated tribes and bands of Indians,” a designated tract of land with boundaries specified in the treaty, which

shall be set apart ... for the exclusive use and benefit of said confederated tribes and bands of Indians as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Moreover, the Treaty provided that

The exclusive right of taking fish in all the streams where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

This case arose because of the practice of the respondents, who own land bordering the Columbia River, and possessing licenses from the state of Washington to fish using devices called “fish wheels,” were so aggressive in their catch as to deprive the Yakima of their ability to fish themselves.]

*** The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words “the right of taking fish at all usual and accustomed places *in common* with the citizens of the Territory” confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the State, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership. ***

[The trial court found that the defendants had excluded natives from land owned by the defendants in fee simple, and sustained the defendant’s arguments that the Yakima had no greater right to access across defendants’ land to fish in the Columbia as any other citizen of the United States.] In other words, it was

decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more. And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right without regard to technical rules." How the treaty in question was understood may be gathered from the circumstances.

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for -- in other words, the Indians were given a right in the land -- the right of crossing it to the river -- the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.

It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the State upon its admission into the Union. In other words, it is contended that the State acquired, by its admission into the Union "upon an equal footing with the original States," the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the [*383] paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain rights in the shore or to the lands under water.

The elements of this contention and the answer to it are expressed in *Shively v. Bowlby*, 152 U.S. 1, 38 L. Ed. 331, 14 S. Ct. 548. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the States in and over shore lands were carefully defined, but the power of the United States, while it held the country as a Territory, to create rights which would be binding on the States was also announced, opposing the dicta scattered through the cases, which seemed to assert a contrary view. It was said by the court, through Mr. Justice Gray:

Notwithstanding the dicta contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a Territory of the United States, it is evident that this is not strictly true.

* * * * *

By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition.

Many cases were cited. And it was further said:

We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international [*384] obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

The license from the State, which respondents plead to maintain a fishing wheel, gives no power to them to exclude the Indians, nor was it intended to give such power. It was the permission of the State to use a particular device. What rights the Indians had were not determined or limited. This was a matter for judicial determination regarding the rights of the Indians and rights of the respondents. ***

MR. JUSTICE WHITE dissents.

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UNITED STATES v. SHOSHONE TRIBE OF INDIANS

SUPREME COURT OF THE UNITED STATES

304 U.S. 111; 58 S. Ct. 794; 82 L. Ed. 1213 (1938)

[Before Hughes, C.J., and McReynolds, Brandeis, Butler, Roberts, Black, Reed, JJ.]

MR. JUSTICE BUTLER delivered the opinion of the Court.

[In 1863, the United States by treaty set aside almost 45 million acres of land in Colorado, Utah, Idaho, and Wyoming for the Shoshone. Five years later, the Shoshone ceded all this land back to the United States, in return for 3 million acres to be "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians." The treaty further provided that an individual Shoshone could select a tract within the reservation which would then cease to be held in common, but rather for his exclusive possession while he and his family continued to cultivate it. The treaty also provided that the United States could enact laws related to alienation and descent of property, and subjects connected with the government of Indians on the reservation. A key treaty provision provided basic and technical education

for the tribe, and stipulated that no treaty ceding lands held in common would be valid against the tribe unless signed by a majority, and that the tribe could not by cession deprive a member of his rights to lands selected by him. The land reserved for the Shoshone was known to contain valuable deposits of gold, oil, coal, and gypsum.

Notwithstanding this second treaty, in 1878 the United States took a 50% interest in most of the land, for the benefit of the Northern Arapahoe Tribe. The Court of Claims found that the fair and reasonable value of the interest taken was \$1.5 million.]

The substance of the Government's point is that in fixing the value of the tribe's right, the lower court included as belonging to the tribe substantial elements of value, ascribable to mineral and timber resources, which in fact belonged to the United States.

It contends that the Shoshones' right to use and occupy the lands of the reservation did not include the ownership of the timber and minerals and that the *opinion* of the court below departs from the general principles of law regarding Indian land tenure and the uniform policy of the Government in dealing with Indian tribes. It asks for reversal with "directions to determine the value of the Indians' right of use and occupancy but to exclude therefrom 'the net value of the lands' and 'the net value of any timber or minerals.'"

[In prior proceedings, the Court held] that the tribe had the right of occupancy with all its beneficial incidents; that, the right of occupancy being the primary one and as sacred as the fee, division by the United States of the Shoshones' right with the Arapahoes was an appropriation of the land *pro tanto*; that although the United States always had legal title to the land and power to control and manage the affairs of the Indians, it did not have power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, [*116] for that would be, not the exercise of guardianship or management, but confiscation.

It was not then necessary to consider, but we are now called upon to decide, whether, by the treaty, the tribe acquired beneficial ownership of the minerals and timber on the reservation. The phrase "absolute and undisturbed use and occupation" is to be read, with other parts of the document, having regard to the purpose of the arrangement made, the relation between the parties, and the settled policy of the United States fairly to deal with Indian tribes. In treaties made with them the United States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them. *Worcester v. Georgia*, 6 Pet. 515, 582. *Jones v. Meehan*, 175 U.S. 1, 11. *Starr v. Long Jim*, 227 U.S. 613, 622-623.

The principal purpose of the treaty was that the Shoshones should have, and permanently dwell in, the defined district of country. To that end the United States granted and assured to the tribe peaceable and unqualified possession of the land in perpetuity. Minerals and standing timber are constituent elements of the land itself. For all practical purposes, the tribe owned the land. Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer no beneficial interest. The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee.

The treaty, though made with knowledge that there were mineral deposits and standing timber in the reservation, contains nothing to suggest that the United States intended to retain for itself any beneficial

interest in them. The words of the grant, coupled with the Government's agreement to exclude strangers, negative the idea that the United States retained beneficial ownership. The grant of right to members of the tribe severally to select and hold tracts on which to establish homes for themselves and families, and the restraint upon cession of land held in common or individually, suggest beneficial ownership in the tribe. As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals or timber would be resolved in favor of the tribe. The cession in 1904 by the tribe to the United States in trust reflects a construction by the parties that supports the tribe's claim, for if it did not own, creation of a trust to sell or lease for its benefit would have been unnecessary and inconsistent with the rights of the parties.

Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. *Cherokee Nation v. Georgia*, 5 Pet. 1, 48. *Worcester v. Georgia*, *supra*, 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial. Provisions in aid of teaching children and of adult education in farming, and to secure for the tribe medical and mechanical service, to safeguard tribal and individual titles, when taken with other parts of the [*118] treaty, plainly evidence purpose on the part of the United States to help to create an independent permanent farming community upon the reservation. Ownership of the land would further that purpose. In the absence of definite expression of intention so to do, the United States will not be held to have kept it from them. The authority of the United States to prescribe title by which individual Indians may hold tracts selected by them within the reservation, to pass laws regulating alienation and descent and for the government of the tribe and its people upon the reservation detracts nothing from the tribe's ownership, but was reserved for the more convenient discharge of the duties of the United States as guardian and sovereign.



UNITED STATES v. DION

SUPREME COURT OF THE UNITED STATES
476 U.S. 734; 106 S. Ct. 2216; 90 L. Ed. 2d 767 (1986)

JUSTICE MARSHALL delivered the opinion of the Court.

Respondent Dwight Dion, Sr., a member of the Yankton Sioux Tribe, was convicted of shooting four bald eagles on the Yankton Sioux Reservation in South Dakota in violation of the Endangered Species Act, 87 Stat. 884, as amended, 16 U. S. C. § 1531 *et seq.* (1982 ed. and *Supp. II*). [The Court reversed the court of appeals judgment that Dion's conviction was inconsistent with his exercise of treaty rights to hunt and fish.]

I

The Court of Appeals relied on an 1858 treaty signed by the United States and by representatives of the Yankton Tribe. 11 Stat. 743. Under that treaty, the Yankton ceded to the United States all but 400,000 acres of the land then held by the Tribe. The treaty bound the Yanktons to remove to, and settle on, their reserved land within one year. The United States in turn agreed to guarantee the Yanktons quiet and

undisturbed possession of their reserved land, and to pay to the Yanktons, or expend for their benefit, various moneys in the years to come. ***

All parties to this litigation agree that the treaty rights reserved by the Yankton included the exclusive right to hunt and fish on their land. As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. F. Cohen, *Handbook of Federal Indian Law* 449 (1982) (hereinafter Cohen). These rights need not be expressly mentioned in the treaty. See *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). Those treaty rights, however, little avail Dion if, as the Solicitor General argues, they were subsequently abrogated by Congress. We find that they were.

II

It is long settled that "the provisions of an act of Congress, passed in the exercise of its constitutional authority, . . . if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty" with a foreign power. *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893); cf. *Goldwater v. Carter*, 444 U.S. 996 (1979). This Court applied that rule to congressional abrogation of Indian treaties in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). Congress, the Court concluded, has the power "to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so." *Ibid*.

We have required that Congress' intention to abrogate Indian treaty rights be clear and plain. Cohen 223; see also [*739] *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353 (1941). "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . ." *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979). We do not construe statutes as abrogating treaty rights in "a backhanded way," *Menominee Tribe v. United States*, 391 U.S., at 412; in the absence of explicit statement, "the intention to abrogate or modify a [***774] treaty is not to be lightly imputed to the Congress." *Id.*, at 413, quoting *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934). Indian treaty rights are too fundamental to be easily cast aside.

We have enunciated, however, different standards over the years for determining how such a clear and plain intent must be demonstrated. In some cases, we have required that Congress make "express declaration" of its intent to abrogate treaty rights. See *Leavenworth, L., & G. R. Co. v. United States*, 92 U.S. 733, 741-742 (1876); see also *Wilkinson & Volkman* 627-630, 645-659. In other cases, we have looked to the statute's "legislative history" and "surrounding circumstances" as well as to "the face of the Act." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977), quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). Explicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights, cf. *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). We have not rigidly interpreted that preference, however, as a *per se* rule; where the evidence of congressional intent to abrogate is sufficiently compelling, "the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute." Cohen 223. What is [*740] essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.

A

The Eagle Protection Act renders it a federal crime to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, [**2221] nest, or egg thereof." 16 U. S. C. § 668(a). The prohibition is "sweepingly framed"; the enumeration of forbidden acts is "exhaustive and careful." *Andrus v. Allard*, 444 U.S. 51, 56 (1979). The Act, however, authorizes the Secretary of the Interior to permit the taking, possession, and transportation of eagles "for the religious purposes of Indian tribes," and for certain other narrow purposes, upon a determination that such taking, possession, or transportation is compatible with the preservation of the bald eagle or the golden eagle. 16 U. S. C. § 668a.

Congressional intent to abrogate Indian treaty rights to hunt bald and golden eagles is certainly strongly suggested on the face of the Eagle Protection Act. The provision allowing taking of eagles under permit for the religious purposes of Indian tribes is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians, a recognition that such a prohibition would cause hardship for the Indians, and a decision that that problem should be solved not by exempting Indians from the coverage of the statute, but by authorizing the Secretary to issue permits to Indians where appropriate.

The legislative history of the statute supports that view. The Eagle Protection Act was originally passed in 1940, and did not contain any explicit reference to Indians. Its prohibitions related only to bald eagles; it cast no shadow on hunting [*741] of the more plentiful golden eagle. In 1962, however, Congress considered amendments to the Eagle Protection Act extending its ban to the golden eagle as well. As originally drafted by the staff of the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, the amendments simply would have added the words "or any golden eagle" at two places in the Act where prohibitions relating to the bald eagle were described. [The opinion recounts the modifications made after an Interior Department official wrote Congress about the importance of hunting golden eagles to Native religious practices.]

It seems plain to us, upon reading the legislative history as a whole, that Congress in 1962 believed that it was abrogating the rights of Indians to take eagles. Indeed, the House Report cited the demand for eagle feathers for Indian religious ceremonies as one of the threats to the continued survival of the golden eagle that necessitated passage of the bill. See *supra*, at 742. Congress expressly chose to set in place a regime in which the Secretary of the Interior had control over Indian hunting, rather than one in which Indian on-reservation hunting was unrestricted. Congress thus considered the special cultural and religious interests of Indians, balanced those needs against the conservation purposes of the statute, and provided a specific, narrow exception that delineated the extent to which Indians would be permitted to hunt the bald and golden eagle.

Respondent argues, and the Eighth Circuit agreed, that the provision of the statute granting permit authority is not necessarily inconsistent with an intention that Indians would have unrestricted ability to hunt eagles while on reservations. Respondent construes that provision to allow the Secretary to issue permits to *non*-Indians to hunt eagles "for Indian religious purposes," and supports this interpretation by pointing out testimony during the hearings to the effect that large-scale eagle bounty hunters sometimes sold eagle feathers to Indian tribes. We do not find respondent's argument credible. Congress could have felt such a provision necessary only if it believed that Indians, if left free to hunt eagles on reservations, would nonetheless be unable to satisfy their own needs and would be forced to call on non-Indians to hunt on their behalf. Yet there is nothing in the legislative history that even remotely supports that patronizing

and strained view. Indeed, the Interior Department immediately after the passage of the 1962 amendments adopted regulations authorizing permits *only* to "individual Indians who are authentic, bona fide practitioners of such religion." 28 *Fed. Reg.* 976 (1963).

B

[Because the Eagle Protection Act had abrogated Native hunting rights under the treaty, whether Congress intended a similar result from the later-enacted Endangered Species Act was irrelevant.]



However, the U.S. Supreme Court has continued to reaffirm that, absent a treaty grant, it will not enforce aboriginal property rights, even if such rights are arguably implied in legislation.

TEE-HIT-TON INDIANS v. UNITED STATES

SUPREME COURT OF THE UNITED STATES

348 U.S. 272; 75 S. Ct. 313; 99 L. Ed. 314 (1955)

[Before: Warren, C.J., and Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton, Harlan, JJ.]

MR. JUSTICE REED delivered the opinion of the Court.

This case rests upon a claim under the Fifth Amendment by petitioner, an identifiable group of American Indians of between 60 and 70 individuals residing in Alaska, for compensation for a taking by the United States of certain timber from Alaskan lands allegedly belonging to the group. The area claimed is said to contain over 350,000 acres of land and 150 square miles of water. The Tee-Hit-Tons, a clan of the Tlingit Tribe, brought this suit in the Court of Claims under 28 U. S. C. § 1505. The compensation claimed does not arise from any statutory direction to pay. Payment, if it can be compelled, must be based upon a constitutional right of the Indians to recover. This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force, and to grant payments [*274] from the public purse to needy descendants of exploited Indians. The legislation in support of that policy has received consistent interpretation from this Court in sympathy with its compassionate purpose.

[The Court of Claims found] that petitioner was an identifiable group of American Indians residing in Alaska; that its interest in the lands prior to purchase of Alaska by the United States in 1867 was "original Indian title" or "Indian right of occupancy." It was further held that if such original Indian title survived the Treaty of 1867, 15 Stat. 539, Arts. III and VI, by which Russia conveyed Alaska to the United States, such title was not sufficient basis to maintain this suit as there had been no recognition by Congress of any legal rights in petitioner to the land in question. The court said that no rights inured to plaintiff by virtue of legislation by Congress. ***

The Alaskan area in which petitioner claims a compensable interest is located near and within the exterior lines of the Tongass National Forest. By Joint Resolution of August 8, 1947, 61 Stat. 920, the

Secretary of Agriculture was authorized to contract for the sale of national forest timber located within this National Forest "notwithstanding any claim of possessory rights." The Resolution defines "possessory rights"⁷ and provides for all receipts from the sale of timber to be maintained in a special account in the Treasury until the timber and land rights are finally determined. Section 3 (b) of the Resolution provides:

Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights to lands or timber within the exterior boundaries of the Tongass National Forest."

The Secretary of Agriculture, on August 20, 1951, pursuant to this authority contracted for sale to a private company of all merchantable timber in the area claimed by petitioner. This is the sale of timber which petitioner [*277] alleges constitutes a compensable taking by the United States of a portion of its proprietary interest in the land.

The problem presented is the nature of the petitioner's interest in the land, if any. Petitioner claims a "full proprietary ownership" of the land; or, in the alternative, at least a "recognized" right to unrestricted possession, occupation and use. Either ownership or recognized possession, petitioner asserts, is compensable. If it has a fee simple interest in the entire tract, it has an interest in the timber and its sale is a partial taking of its right to "possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378. It is petitioner's contention that its tribal predecessors have continually claimed, occupied and used the land from time immemorial; that when Russia took Alaska, the Tlingits had a well-developed social order which included a concept of property ownership; that Russia while it possessed Alaska in no manner interfered with their claim to the land; that Congress has by subsequent acts confirmed and recognized petitioner's right to occupy the land permanently and therefore the sale of the timber off such lands constitutes a taking *pro tanto* of its asserted rights in the area.

The Government denies that petitioner has any compensable interest. It asserts that the Tee-Hit-Tons' property interest, if any, is merely that of the right to the use of the land at the Government's will; that Congress has never recognized any legal interest of petitioner in the land and therefore without such recognition no compensation is due the petitioner for any taking by the United States.

⁷ § 1: "That 'possessory rights' as used in this resolution shall mean all rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), whether claimed by native tribes, native villages, native individuals, or other persons, and which have not been confirmed by patent or court decision or included within any reservation."

I. *Recognition*. -- The question of recognition may be disposed of shortly. Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid [*278] for subsequent taking.⁹ The petitioner contends that Congress has sufficiently "recognized" its possessory rights in the land in question so as to make its interest compensable. Petitioner points specifically to two statutes to sustain this contention. The first is § 8 of the Organic Act for Alaska of May 17, 1884, 23 Stat. 24.¹⁰ The second is § 27 of the Act of June 6, 1900, which was to provide for a civil government for Alaska, 31 Stat. 321, 330.¹¹ The Court of Appeals in the *Miller* case, *supra*, felt that these Acts constituted recognition of Indian ownership. 159 F.2d 997, 1002-1003.

We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken. There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be [*279] the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 101.

This policy of Congress toward the Alaskan Indian lands was maintained and reflected by its expression in the Joint Resolution of 1947 under which the timber contracts were made.

II. *Indian Title*. -- (a) The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. [The Court summarized the *Johnson* case above, as well as *Beecher v. Wetherby*, 95 U.S. 517, where the Court affirmed that the

⁹ *United States v. Creek Nation*, 295 U.S. 1003, 109-110; *Shoshone Tribe v. United States*, 299 U.S. 476, 497; *Chippewa Indians v. United States*, 301 U.S. 358, 375-376; *United States v. Klamath Indians*, 304 U.S. 119; *Sioux Tribe v. United States*, 316 U.S. 317, 326.

¹⁰ ". . . That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress:"

¹¹ "The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation,"

federal government, which had expressly allowed Indians to occupy a tract of land in Wisconsin, then granted the fee the state. It noted *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 347, where the power of Congress to extinguish Indian title based on aboriginal possession was held to be "supreme." The Court concluded that Indians had no basis for compensation for land taken "because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law."]

[The Court rejected the Tee-Hit-Ton argument that cases involving Native Americans from the prairie differed from their circumstance.]

The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not [*289] specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.²¹ Every American schoolboy knows that the savage tribes of this continent were deprived [*290] of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land. The duty that rests on this Nation was adequately phrased by Mr. Justice Jackson in his concurrence, MR. JUSTICE BLACK joining, in *Shoshone Indians v. United States*, 324 U.S. 335, at 355, a case that differentiated "recognized" from "unrecognized" Indian title, and held the former only compensable. *Id.*, at 339-340. His words will be found at 354-358. He ends thus:

We agree with MR. JUSTICE REED that no legal rights are today to be recognized in the Shoshones by reason of this treaty. We agree with MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY as to their moral deserts. We do not mean to leave the impression that the two have any relation to each other. The finding that the treaty creates no legal obligations does not restrict Congress from such appropriations as its judgment dictates 'for the health, education, and industrial advancement of said Indians,' which is the position in which Congress would find itself if we found that it did create legal obligations and tried to put a value on them." *Id.*, at 358.

In the 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 [*291] does not uphold harshness as against tenderness toward the Indians, but it leaves

²¹ The Departments of Interior, Agriculture and Justice agree with this conclusion. See Committee Print No. 12, Supplemental Reports dated January 11, 1954, on H. R. 1921, 83d Cong., 2d Sess. Department of Interior: "That the Indian right of occupancy is not a property right in the accepted legal sense was clearly indicated when *United States v. Alcea Band of Tillamooks*, 341 U.S. 48 (1951), was reargued. The Supreme Court stated, in a per curiam decision, that the taking of lands to which Indians had a right of occupancy was not a taking within the meaning of the fifth amendment entitling the dispossessed to just compensation. Since possessory rights based solely upon aboriginal occupancy or use are thus of an unusual nature, subject to the whim of the sovereign owner of the land who can give good title to third parties by extinguishing such rights, they cannot be regarded as clouds upon title in the ordinary sense of the word. Therefore, we suggest the deletion, in section 3 (c) of the bill, of the words 'upon aboriginal occupancy or title, or.'" P. 3. Department of Agriculture: "We also concur in the belief which we understand is being expressed by the Department of the Interior that no rights presently exist on the basis of aboriginal occupancy or title. We believe that this is equally true with respect to lands within the Tongass National Forest just as it is with respect to lands elsewhere in Alaska." P. 7. Department of Justice: "Thus, there is no legal or equitable basis for claims or rights allegedly arising from 'aboriginal occupancy or title.'" P. 11.

with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE FRANKFURTER concur, dissenting.

It is said that since § 8 [of the Organic Act for Alaska] contemplates the possible future acquisition of "title," it expressly negates any idea that the Indians have any "title." That is the argument; and that apparently is the conclusion of the Court.

There are, it seems to me, two answers to that proposition.

First. The first turns on the words of the Act. The general land laws of the United States were not made applicable to Alaska. § 8. No provision was made for opening up the lands to settlement, for clearing titles, for issuing patents, all as explained in Gruening, *The State of Alaska* (1954), p. 47 *et seq.* There were, however, at least two classes of claimants to Alaskan lands -- one, the Indians; the other, those who had mining claims. Section 8 of the Act did not recognize the "title" of either. Rather, it provided that one group, the miners, should be allowed to "perfect their title"; while the others, the Indians, were to acquire "title" only as provided by future legislation. Obviously the word "title" was used in the conveyancer's sense; and § 8 did service in opening the door to perfection of "title" in the case of miners, and in deferring the perfection of "title" in the case of the Indians.

Second. The second proposition turns on the legislative history of § 8. Section 8 of the Act commands that the Indians "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them." The words "or now claimed by them" were added by an amendment offered during the debates by Senator Plumb of Kansas. 15 Cong. Rec. 627-628. Senator Benjamin Harrison, in accepting the amendment, said, ". . . it was the intention of the committee to protect to the fullest extent all the rights of the Indians in Alaska and of any residents who had settled there, but [*293] at the same time to allow the development of the mineral resources" *Id.*

***Senator Plumb went on to say, "I propose that the Indian shall at least have as many rights after the passage of this bill as he had before." *Id.*, at 531. Senator Harrison replied that it was the intention of the committee "to save from all possible invasion the rights of the Indian residents of Alaska." *Id.*, at 531. He gave emphasis to the point by this addition:

It was the object of the committee absolutely to save the rights of all occupying Indians in that Territory until the report which is provided for in another section of the bill could be made, when the Secretary of the Interior could ascertain what their claims were and could definitely define any reservations that were necessary to be set apart for their use. We did not intend to allow any invasion of the Territory by which private rights could be acquired by any person except in so far as it was necessary in order to establish title to mining claims in the Territory. Believing that that would occupy but the smallest portion of the territory here and there, isolated and detached [*294] and small quantities of ground, we thought the reservation of lands occupied by the Indians or by anybody else was a sufficient guard against any serious invasion of their rights." *Id.*, at 531.

The conclusion seems clear that Congress in the 1884 Act recognized the claims of these Indians to their Alaskan lands. What those lands were was not known. Where they were located, what were their metes and bounds, were also unknown. Senator Plumb thought they probably were small and restricted. But all

agreed that the Indians were to keep them, wherever they lay. It must be remembered that the Congress was legislating about a Territory concerning which little was known. No report was available showing the nature and extent of any claims to the land. No Indian was present to point out his tribe's domain. Therefore, Congress did the humane thing of saving to the Indians all rights claimed; it let them keep what they had prior to the new Act. The future course of action was made clear -- conflicting claims would be reconciled and the Indian lands would be put into reservations.

That purpose is wholly at war with the one now attributed to the Congress of reserving for some future day the question whether the Indians were to have any rights to the land. ***

[*295] There remains the question what kind of "title" the right of use and occupancy embraces. Some Indian rights concern fishing alone. Others may include only hunting or grazing or other limited uses. Whether the rights recognized in 1884 embraced rights to timber, litigated here, has not been determined by the finders of fact. The case should be remanded for those findings. It is sufficient now only to determine that under the jurisdictional Act the Court of Claims is empowered to entertain the complaint by reason of the recognition afforded the Indian rights by the Act of 1884.

B. Canada

Unlike the U.S. or Australia, Canada expressly and constitutionally has "recognized and affirmed" the existence of aboriginal rights in s. 35 of the *Constitution Act, 1982*. This has led to extensive litigation with many cases decided by the Supreme Court of Canada defining the scope of aboriginal rights. These excerpts highlight some of the key issues:

- what constitutes an "existing" right?
- what governmental acts prior to 1982 were sufficient to extinguish a right?
- how should courts define the scope of rights to fish, hunt, occupy land, use resources, etc.?
- what reasonable limits can government impose on aboriginal rights?
- what evidence is admissible to prove aboriginal title? what does aboriginal title have in common with common law concepts like adverse possession, and how does it differ?

R. v. SPARROW

SUPREME COURT OF CANADA

[1990] 1 S.C.R. 1075

[The appellant, a member of the Musqueam Indian Band, was charged under s. 61(1) of the *Fisheries Act* of the offence of fishing with a drift net longer than that permitted by the terms of the Band's Indian food fishing licence. The fishing which gave rise to the charge took place on May 25, 1984 in Canoe Passage⁺ which is part of the area subject to the Band's licence. He has throughout admitted the facts alleged to constitute the offence, but has defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence is inconsistent with s. 35(1) of the *Constitution Act, 1982* and therefore invalid.]

⁺ [Ed. note: Canoe Passage is the body of water between Ladner, BC and Westham Island. Non-BC residents can locate it by going to www.maps.google.com and typing in Ladner, BC.

Appellant was convicted. The trial judge found that an aboriginal right could not be claimed unless it was supported by a special treaty and that s. 35(1) of the Constitution Act, 1982 accordingly had no application.

THE CHIEF JUSTICE AND LA FOREST J. [for the Court]: --

The context of this appeal is the alleged violation of the terms of the Musqueam food fishing licence which are dictated by the *Fisheries Act*, R.S.C. 1970, c. F-14, and the regulations under that Act. The issue is whether Parliament's power to regulate fishing is now limited by s. 35(1) of the *Constitution Act, 1982*, and, more specifically, whether the net length restriction in the licence is inconsistent with that provision.

Analysis

We will address first the meaning of "existing" aboriginal rights and the content and scope of the Musqueam right to fish. We will then turn to the meaning of "recognized and affirmed", and the impact of s. 35(1) on the regulatory power of Parliament.

"Existing"

The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect. This means that extinguished rights are not revived by the Constitution Act, 1982. A number of courts have taken the position that "existing" means "being in actuality in 1982.":

Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations. * * *

The unsuitability of the approach can also be seen from another perspective. Ninety-one other tribes of Indians, comprising over 20,000 people (compared with 540 Musqueam on the reserve and 100 others off the reserve) obtain their food fish from the Fraser River. Some or all of these bands may have an aboriginal right to fish there. A constitutional patchwork quilt would be created if the constitutional right of these bands were to be determined by the specific regime available to each of those bands in 1982.

Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," supra, at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.

The Aboriginal Right

[...] The evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day. [...] What the Crown really insisted on, both in this Court and the courts below, was that the Musqueam Band's aboriginal right to fish had been extinguished by regulations under the *Fisheries Act*.

The history of the regulation of fisheries in British Columbia is set out in *Jack v. The Queen*, [1980] 1 S.C.R. 294, especially at pp. 308 et seq. and we need only summarize it here. Before the province's entry into Confederation in 1871 the fisheries were not regulated in any significant way, whether in respect of Indians or other people. The Indians were not only permitted but encouraged to continue fishing for their own food requirements. Commercial and sport fishing were not then of any great importance. The federal *Fisheries Act* was only proclaimed in force in the province in 1876 and the first Salmon Fishery Regulations for British Columbia were adopted in 1878 and were minimal.

The 1878 regulations were the first to mention Indians. They simply provided that the Indians were at all times at liberty, by any means other than drift nets or spearing, to fish for food for themselves, but not for sale or barter. The Indian right or liberty to fish was thereby restricted, and more stringent restrictions were added over the years. As noted in, *Jack v. The Queen supra*, at p. 310:

The federal Regulations became increasingly strict in regard to the Indian fishery over time, as first the commercial fishery developed and then sport fishing became common. What we can see is an increasing subjection of the Indian fishery to regulatory control. First, the regulation of the use of drift nets, then the restriction of fishing to food purposes, then the requirement of permission from the Inspector and, ultimately, in 1917, the power to regulate even food fishing by means of conditions attached to the permit.

The 1917 regulations were intended to make still stronger the provisions against commercial fishing in the exercise of the Indian right to fish for food; see P.C. 2539 of Sept. 11, 1917. The Indian food fishing provisions remained essentially the same from 1917 to 1977. The regulations of 1977 retained the general principles of the previous sixty years. An Indian could fish for food under a "special licence" specifying method, locale and times of fishing. Following an experimental program to be discussed later, the 1981 regulations provided for the entirely new concept of a Band food fishing licence, while retaining comprehensive specification of conditions for the exercise of licences.

It is this progressive restriction and detailed regulation of the fisheries which, respondent's counsel maintained, have had the effect of extinguishing any aboriginal right to fish. The extinguishment need not be express, he argued, but may take place where the sovereign authority is exercised in a manner "necessarily inconsistent" with the continued enjoyment of aboriginal rights. *** The consent to its extinguishment before the *Constitution Act, 1982* was not required; the intent of the Sovereign could be effected not only by statute but by valid regulations. Here, in his view, the regulations had entirely displaced any aboriginal right. There is, he submitted, a fundamental inconsistency between the communal right to fish embodied in the aboriginal right, and fishing under a special licence or permit issued to individual Indians (as was the case until 1977) in the discretion of the Minister and subject to terms and conditions which, if breached, may result in cancellation of the licence. The *Fisheries Act* and its regulations were, he argued, intended to constitute a complete code inconsistent with the continued

existence of an aboriginal right.

At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished. The distinction to be drawn was carefully explained, in the context of federalism, in the first fisheries case, *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700. There, the Privy Council had to deal with the interrelationship between, on the one hand, provincial property, which by s. 109 of the *Constitution Act, 1867* is vested in the provinces (and so falls to be regulated qua property exclusively by the provinces) and, on the other hand, the federal power to legislate respecting the fisheries thereon under s. 91(12) of that Act. The Privy Council said the following in relation to the federal regulation (at pp. 712-13):

[...] the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise or proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used: if it is, the only remedy is an appeal to those by whom the Legislature is elected.

In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute. As Mahoney J. stated in *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.); at p. 568:

Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right. *** The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.

The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner. [...] In relation to this submission, it was contended before this Court that the aboriginal right extends to

commercial fishing. While no commercial fishery existed prior to the arrival of European settlers, it is contended that the Musqueam practice of bartering in early society may be revived as a modern right to fish for commercial purposes. The presence of numerous interveners representing commercial fishing interests, and the suggestion on the facts that the net length restriction is at least in part related to the probable commercial use of fish caught under the Musqueam food fishing licence, indicate the possibility of conflict between aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon. We recognize the existence of this conflict and the probability of its intensification as fish availability drops, demand rises and tensions increase.

Government regulations governing the exercise of the Musqueam right to fish, as described above, have only recognized the right to fish for food for over a hundred years. This may have reflected the existing position. However, historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can however regulate the exercise of that right, but such regulation must be in keeping with s. 35(1).

In the courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's food fishing licence. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes.

"Recognized and Affirmed"

In *Nowegijick v. R.*, at p. 36 the following principle that should govern the interpretation of Indian treaties and statutes was set out: “[...] treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.”

In *R. v. Agawa*, *supra*, Blair J.A. stated that the above principle should apply to the interpretation of s. 35(1). He added the following principle to be equally applied, at pp. 215-16: [Here, the decision in *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, was cited as authority that in Indian treaty interpretation, “the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned.”] This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 55 N.R. 161, 13 D.L.R. (4th) 321.

In *Guerin*, *supra*, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. [Ed. note: This is the Shaughnessy Heights Golf & Country Club just south of the UBC campus on South Marine Drive.] The terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. 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.

We agree with both the British Columbia Court of Appeal below and the Ontario Court of Appeal that the principles outlined above, derived from *Nowegijick*, *Taylor and Williams* and *Guerin* should guide the interpretation of s. 35(1). As commentators have noted, s. 35(1) is a solemn commitment that must be given meaningful content.

In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the Charter, it is true that s. 35(1) is not subject to s. 1 of the Charter. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the Constitution Act, 1982. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, *supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, *supra*. [...]

Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

The constitutional recognition afforded by the provision 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).

In these reasons, we will outline the appropriate analysis under s. 35(1) in the context of a regulation made pursuant to the *Fisheries Act*. We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision and especially in light

of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

Section 35(1) and the Regulation of the Fisheries

Taking the above framework as guidance we propose to set out the test for prima facie interference with an existing aboriginal right and for the justification of such an interference. [...] The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a prima facie infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin, supra*, at p. 382, referred to as the "*sui generis*" nature of aboriginal rights. (See also Little Bear, "A Concept of Native Title," [1982] 5 Can. Legal Aid Bul. 99.)

While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.

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. In relation to the facts of this appeal, the regulation would be found to be a prima facie interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

The Court of Appeal below held, at p. 331, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource or in the public interest". (Emphasis added.) We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights. [...]

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin, supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified. [...]

In *Eninew*, Hall J.A. found, at p. 368, that "the treaty rights can be limited by such regulations as are reasonable". As we have pointed out, management and conservation of resources is indeed an important and valid legislative objective. Yet, the fact that the objective is of a "reasonable" nature cannot suffice as constitutional recognition and affirmation of aboriginal rights. Rather, the regulations enforced pursuant to a conservation or management objective may be scrutinized according to the justificatory standard outlined above.

We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implement. The aboriginal peoples, with their history of conservation-consciousness and inter-dependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

Application to this Case -- Net Length Restriction Valid?

The Court of Appeal below found that there was not sufficient evidence in this case to proceed with an analysis of s. 35(1) with respect to the right to fish for food. In reviewing the competing expert evidence, and recognizing that fish stock management is an uncertain science, it decided that the issues at stake in this appeal were not well adapted to being resolved at the appellate court level.

[On remand, the court held that the appellant would bear the burden of showing that the net length restriction constituted a prima facie infringement of the collective aboriginal right to fish for food. If an infringement were found, the onus would shift to the Crown to demonstrate that the regulation is justifiable, based on general resource conservation goals and not an impermissible objective such as shifting more of the resource to a user group that ranks below the Musqueam.]



DELGAMUUKW v. BRITISH COLUMBIA

SUPREME COURT OF CANADA
[1997] 3 S.C.R. 1010; 1997 S.C.R. LEXIS 2822

Lamer C.J. and La Forest, L'Heureux-Dube, Cory, McLachlin and Major JJ.

[The appellants, all Gitksan or Wet'suwet'en hereditary chiefs, both individually and on behalf of their "Houses", claimed separate portions of 58,000 square kilometres in British Columbia. Their claim was originally for "ownership" of the territory and "jurisdiction" over it. On this appeal, the appellants transformed their claim into one for aboriginal title. British Columbia counterclaimed for a declaration that the appellants have no right or interest in and to the territory or alternatively, that the appellants' cause of action ought to be for compensation from the Government of Canada.

At trial, the appellants' claim was based on their historical use and "ownership" of one or more of the territories. As evidence to support their claim, they introduced collections of sacred oral traditions, spiritual songs and performances, which was rejected by the trial judge. The trial judge dismissed the plaintiffs' claims for ownership and jurisdiction and for aboriginal rights in the territory, granted a declaration that the plaintiffs were entitled to use unoccupied or vacant land subject to the general law of the province, dismissed the claim for damages and dismissed the province's counterclaim. The appeal was dismissed by a majority of the Court of Appeal.

The principal issues on the appeal, some of which raised a number of sub-issues, were as follows: (1) whether the pleadings precluded the Court from entertaining claims for aboriginal title and self-government; (2) what was the ability of this Court to interfere with the factual findings made by the trial judge; (3) what is the content of aboriginal title, how is it protected by s. 35(1) of the Constitution Act, 1982, and what is required for its proof; (4) whether the appellants made out a claim to self-government; and, (5) whether the province had the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the Indian Act.

The Supreme Court allowed the appeal in part. The Court held preliminarily that (1) a new trial was necessary because of a defect in the pleadings and (2) the appellate courts can properly assure that oral histories be correctly assessed.]

The judgment of Lamer C.J. and Cory and Major JJ. was delivered by

THE CHIEF JUSTICE --

V. Analysis

C. What is the content of aboriginal title, how is it protected by s. 35(1) of the Constitution Act, 1982, and what is required for its proof?

(1) Introduction

*** Aboriginal title has been described as *sui generis* in order to distinguish it from "normal" proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.

[113] The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its inalienability. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties. ***

[114] Another dimension of aboriginal title is its source. It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*. However, it is now clear that although aboriginal title was recognized by the Proclamation, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law: see Kent McNeil, *Common Law Aboriginal Title* (1989), at p. 7. Thus, in *Guerin, supra*, Dickson J. described aboriginal title, at p. 376, as a "legal right derived from the Indians' historic occupation and possession of their tribal lands". What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward: see Kent McNeil, "The Meaning of Aboriginal Title", in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (1997), 135, at p. 144. This idea has been further developed in *Roberts v. Canada*, [1989] 1 S.C.R. 322, where this Court unanimously held at p. 340 that "aboriginal title pre-dated colonization by the British and survived British claims of sovereignty" (also see *Guerin*, at p. 378). What this suggests is a second source for aboriginal title -- the relationship between common law and pre-existing systems of aboriginal law.

[115] 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 [*1083] land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.

(b) The Content of Aboriginal Title

[117] Although the courts have been less than forthcoming, 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. [The Court's analysis here expressly relies on Professor McNeil's article, "The Meaning of Aboriginal Title", *supra*.]

[128] Accordingly, in my view, lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place. As discussed below, one of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot). [*1090]

[129] It is for this reason also that lands held by virtue of aboriginal title may not be alienated. ***

[130] I am cognizant that the *sui generis* nature of aboriginal title precludes the application of "traditional real property rules" to elucidate the content of that title. Nevertheless, a useful analogy can be drawn between the limit on aboriginal title and the concept of equitable waste at common law. Under that doctrine, persons who hold a life estate in real property cannot commit "wanton or extravagant acts of destruction" (E. H. Burn, *Cheshire and Burn's Modern Law of Real Property* (14th ed. 1988), at p. 264) or "ruin the property" (Robert E. Megarry and H. W. R. Wade, *The Law of Real Property* (4th ed. 1975), at p. 105). This description of the limits [*1091] imposed by the doctrine of equitable waste capture the kind of limit I have in mind here.

[131] Finally, what I have just said regarding the importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. On the contrary, the idea of surrender reinforces the conclusion that aboriginal title is limited in the way I have described. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.

(d) Aboriginal Title under s. 35(1) of the Constitution Act, 1982

[133] Aboriginal title at common law is protected in its full form by s. 35(1). This conclusion flows from the express language of s. 35(1) itself, which states in full: "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" (emphasis added). On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were "existing" in 1982. The provision, at the very least, constitutionalized those rights which aboriginal [*1092] peoples possessed at common law, since those rights existed at the time s. 35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before 1982 (e.g., *Calder, supra*), s. 35(1) has constitutionalized it in its full form.

[138] The picture which emerges from *[R. v. Adams, [1996] 3 S.C.R. 101]*, is that the aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree [***134]

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. I put the point this way in *Adams*, at para. 30:

"Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, [*1095] the right to hunt on the specific tract of land." [Emphasis added.]

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.

[139] Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities. As I explained in *Adams*, this may occur in the case of nomadic peoples who varied "the location of their settlements with the season and changing circumstances." The fact that aboriginal peoples were non-sedentary, however (at para. 27)

"does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures."

(e) Proof of Aboriginal Title

[144] In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title. [In contrast, *Van der Peet* had held that establishment of aboriginal rights to engage in specific activities required proof that the activities were integral to the aboriginal community at time of European contact.]

[With regard to proof of occupancy, the claim could be established under common law principles, but in addition could be established by evidence with regard to the aboriginal perspective on land – whether aboriginal groups would have recognized a band's rights to the land.]

[155] Finally, at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. ***

[In this regard, as well, an aboriginal perspective is required. Common law concepts of exclusion may not reflect aboriginal practices.]

(f) Infringements of Aboriginal Title: the Test of Justification

(i) Introduction

* * *

(ii) General Principles

[161] The test of justification has two parts, which I shall consider in turn. First, the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial. I explained in *[R. v. Gladstone, [1996] 2 S.C.R. 672]*, that compelling and substantial objectives were those which were directed at either one of the purposes underlying the recognition and affirmation of aboriginal rights by s. 35(1), which are (at para. 72):

"... the recognition of the prior occupation of North America by aboriginal peoples or ... the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown."

I noted that the latter purpose will often "be most relevant" (at para. 72) at the stage of justification. I think it important to repeat why (at para. 73) that is so:

Because ... distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact [*1108] that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation (Emphasis added; "equally" emphasized in original.)

The conservation of fisheries, which was accepted as a compelling and substantial objective in *Sparrow*, furthers both of these purposes, because it simultaneously recognizes that fishing is integral to many aboriginal cultures, and also seeks to reconcile aboriginal societies with the broader community by ensuring that there are fish enough for all. But legitimate government objectives also include "the pursuit of economic and regional fairness" and "the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups" (para. 75). By contrast, measures enacted for relatively unimportant reasons, such as sports fishing without a significant economic component (*Adams, supra*) would fail this aspect of the test of justification.

[162] [The Court clarified prior language requiring an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples that suggested that this required that conflicts be resolved in favour of aboriginal interests, rejecting this as a strict requirement. Rather, the Court cited the discussion in *Sparrow*, excerpted *supra*, calling for an analysis "depending on the circumstances of the inquiry." For example, when the aboriginal right was to hunt and fish for their own uses, precedents required that this be given priority only second to reasonable conservation measures. When the aboriginal right was unlimited commercial fishing, then a more balanced appropriate reasonably accommodating aboriginal interests was appropriate.]

(iii) Justification and Aboriginal Title

[165] The general principles governing justification laid down in *Sparrow*, and embellished by

Gladstone, operate with respect to infringements of aboriginal title. In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the 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 the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.

[There is a procedural as well as substantive component to Crown justification of infringement of aboriginal title. Both "the process by which it allocated the resource and the actual allocation of the resource which results from that process" must reflect the prior interest of the holders of aboriginal title in the land. To develop the resources of British Columbia, this might, for example, include that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflecting the prior occupation of aboriginal title lands, and that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced.] This list is illustrative and not exhaustive. This is an issue that may involve an assessment of the various interests at stake in the resources in question. No doubt, there will be difficulties in determining the precise value of the aboriginal interest in the land and any grants, leases or licences given for its exploitation. These difficult economic considerations obviously cannot be solved here.]

[The Court also noted that the degree of consultation with aboriginal interests was relevant. Although good faith is always required, in some cases full consent of the aboriginal nation might be required. When considering those aspects of aboriginal title with a primarily economic aspect, then the degree of compensation is relevant to justification as well.]

D. Has a claim to self-government been made out by the appellants?

[The Court determined that it would not decide this question, which was best resolved initially by the trial judge after a new trial.]

E. Did the province have the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*?

(1) Introduction

[172] For aboriginal rights to be recognized and affirmed by s. 35(1), they must have existed in 1982. Rights which were extinguished by the sovereign before that time are not revived by the provision. In a federal system such as Canada's, the need to determine whether aboriginal rights have been extinguished raises the question of which level of government has jurisdiction to do so. In the context of this appeal, that general question becomes three specific ones. First, there is the question whether the province of British Columbia, from the time it joined Confederation in 1871, until the entrenchment of s. 35(1) in 1982, had the [*1116] jurisdiction to extinguish the rights of aboriginal peoples, including aboriginal title, in that province. Second, if the province was without such jurisdiction, another question arises -- whether provincial laws which were not in pith and substance aimed at the extinguishment of aboriginal

rights could have done so nevertheless if they were laws of general application. The third and final question is whether a provincial law, which could otherwise not extinguish aboriginal rights, be given that effect through referential incorporation by s. 88 of the *Indian Act*.

(2) Primary Jurisdiction

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

[The court rejected provincial counsel's arguments that "Lands reserved for Indians" limited the federal power, and that provincial granting of fee simples operated to extinguish aboriginal title. The Court reasoned that early Privy Council cases had construed s.91(24) broadly, and that to accept the provincial argument would "have a most unfortunate result -- the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples would find itself unable to safeguard one of the most central of native interests -- their interest in their lands." Likewise, although provincial laws of general jurisdiction do apply to aboriginal peoples living within the province, this principle could not be extended to allow laws of general jurisdiction to extinguish aboriginal title.]

[The reasons of La Forest and L'Heureux-Dube JJ. are omitted.]



A case that illustrates the Supreme Court of Canada's approach is *R. v. Marshall*, [2005] 2 S.C.R. 220. Various Mi'kmaq were accused of illegally logging on Crown land in New Brunswick. The primary defense was that the accused had an aboriginal right to log for commercial purposes. The SCC rejected several alternative arguments to support the claim.

The claim was first based on Peace and Friendship treaties signed by the Mi'kmaq and the British after the French had been driven from Nova Scotia and New Brunswick. Given the military and business alliance between the French and native peoples, this was an important British goal. The British agreed to set up trading posts, or "truckhouses", and the Mi'kmaq agreed to trade only at those posts, instead of with others, like their former allies, the French. In the crucial clause, the Mi'kmaq Chiefs agreed that "that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor..." As the Court explained:

To do this the Mi'kmaq needed to trade for European goods, as they had been doing for more than two centuries. The English wanted the Mi'kmaq to do this with them, and not with the French. For their part, the Mi'kmaq wanted assurance that the English would provide trading posts where they could barter their goods and obtain necessities.

Thus, in a prior decision involving the same accused, the Court found that the Mi'kmaq had traded in fish at the time of the treaties, and the conduct for which the defendant stood accused "could be characterized as fishing in order to obtain a moderate livelihood." As "the

logical evolution of an aboriginal activity protected by the treaties," he was acquitted.

However, while there was evidence that Mi'kmaqs had engaged in logging for subsistence purposes at the time of the treaties (making canoes, toboggans, etc.), there was no evidence that they traded in logged goods. Logging was a European, not a traditional Mi'kmaq activity, experts found. Thus, the treaty could not support the defendant's logging for commercial purposes.

The claim was next based on a claim of aboriginal title. The Court explained the relevant doctrine:

The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. The question is whether the aboriginal practice at the time of assertion of European sovereignty (not, unlike treaties, when a document was signed) translates into a modern legal right, and if so, what right? This exercise involves both aboriginal and European perspectives. The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed.⁺

[Aboriginal title] is established by aboriginal practices that indicate possession similar to that associated with title at common law. In matching common law property rules to aboriginal practice we must be sensitive to the context-specific nature of common law title, as well as the aboriginal perspective. The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed: For example, where marshy land is virtually useless except for shooting, shooting over it may amount to adverse possession. The common law also recognizes that a person with adequate possession for title may choose to use it intermittently. Finally, the common law recognizes that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land.

⁺ [Ed. note: This can be a difficult challenge where, as here, aboriginal concepts differ so sharply from our own. For example, the trial court detailed the Mi'kmaq perspective on legal interests in possession and use of land. A Mi'kmaq chief testified at the trial that there "is no word in our language that denotes a proprietary ownership," but there is a word - *alsosit* - that means that, akin to a bear scratching a tree, a band would designate to outsiders that they camped around or tried to survive in a particular area. This did not preclude others - traditional Mi'kmaqs would find strange the U.S. Supreme Court's notion (see Chapter 6) that the essential element of a property right is the right to exclude - from "entering into that area and utilizing whatever resources there are for their survival," provided that such entry "does not disturb the way of life of those individuals within that territory."]

The Court concluded that the trial judges had applied the correct test: "proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of assertion of sovereignty." The Court agreed with the trial judges' assessment that the evidence did not support a claim of aboriginal title. The judges' emphasized that the native population was too small to exercise exclusive claims over the area at issue. Moreover, the admission by a current Mi'kmaq chief that his ancestors did not intend to exercise exclusive control was "fatal" to the claim for aboriginal title.

The third argument was that aboriginal title was specifically based on the Royal Proclamation of 1763. Although the Proclamation "must be interpreted liberally, and any matters of doubt resolved in favour of aboriginal peoples: *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36," and that it must also "be interpreted in light of its status as the "Magna Carta" of Indian rights in North America and Indian "Bill of Rights": *R. v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] 1 Q.B. 892 (C.A.), at p. 912," the Court found the text of the Proclamation did not grant title. Instead, it reserved title to the Crown and barred those subject to British rule from disturbing or alienating *Crown* lands reserved for native peoples. Moreover, the claim that the Proclamation intended to grant title to natives when the government was planning on significant English settlement was counter-historical.

In addition to the constitutional protection provided by these cases interpreting s. 35 of the Canadian Constitution, the Supreme Court of Canada has also imposed non-constitutional limits on government treatment of aboriginals. This is illustrated in the recent decision in **HAIDA NATION V. BRITISH COLUMBIA (MINISTER OF FORESTS)**, [2004] 3 S.C.R. 511. The issue concerned the B.C. government's determination to continue licensing Weyerhaeuser to harvest trees on Queen Charlotte Island, the entirety of which is claimed as aboriginal title by the Haida Nation. Pending the litigation, the Haida sought an injunction to prevent continued foresting. Although the Court rejected the desired relief, it did require the B.C. government to consult with the Haida before transferring the license to Weyerhaeuser from its corporate predecessor, MacMillan Bloedel.

The Court began its analysis by noting that "the government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples." *Id.* at 524. Assuming control over the Queen Charlottes (or "Haida Gwai'i) imposes some fiduciary responsibilities upon the Crown. Because aboriginal title had not yet been proven, it did not rise to a level where the Crown was required to act solely in the best interest of the Haida as a beneficiary. Thus, good faith negotiations were required (these are ongoing and have taken years already). However,

[27] *** The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of

the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

What is required is good faith negotiations. "Sharp dealing is not permitted. However, there is no duty to agree." In the case, the Court found that the B.C. government had not meaningfully consulted the Haida with regard to the extent of harvestation.

C. Australia

In its ground-breaking judgment in *Mabo v Queensland (No.2)* (1992) 175 CLR 1, the High Court of Australia held that "native title" existed in, and must be recognised under, Australian property law. Six Justice of the Court agreed that "the common law of [Australia] recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands". The immediate question concerned whether the Meriam People of the Murray Islands, of whom Eddie Mabo was a member, retained title to their traditional lands. The Court affirmed that the Meriam people's title had subsisted from before British occupation and settlement in Australia (and the annexation of surrounding islands), and that it had not been extinguished by the reception of British law in New South Wales in 1788.

The judgment, however, had wider application. The principle of *terra nullius* - land belonging to, and governed by, nobody - that had been thought to apply to the land of Australia prior to 1788 was not valid for Australia, the Court held. As Justice Brennan stated [citations omitted]:

According to Blackstone, English law would become the law of a country outside England either upon first settlement by English colonists of a "desert uninhabited" country or by the exercise of the Sovereign's legislative power over a conquered or ceded country... In the case of a conquered country, the general rule was that the laws of the country continued after the conquest until those laws were altered by the conqueror. The Crown had a prerogative power to make new laws for a conquered country although that power was subject to laws enacted by the Imperial Parliament. The same rule applied to ceded colonies, though the prerogative may have been limited by the treaty of cession. When "desert uninhabited countries" [such as Australia was thought to be] were colonized by English settlers, however, they brought with them "so much of the English law as (was) applicable to their own situation and the condition of an infant colony". That law was not amenable to alteration by exercise of the prerogative. The tender concern of the common law of England for British settlers in foreign parts led to the recognition that such settlers should be regarded as living under the law of England if the local law was unsuitable for Christian Europeans... When British colonists went out to other inhabited parts of the world, including New South Wales, and settled there under the protection of the forces of the Crown, so that the Crown acquired sovereignty recognized by the European family of nations under the enlarged notion of *terra nullius*, it was necessary for the common law to prescribe a doctrine relating to the law to be applied in such colonies, for sovereignty imports supreme internal legal authority. The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion

of terra nullius, for the purposes of the municipal law that territory (though inhabited) could be treated as a "desert uninhabited" country. The hypothesis being that there was no local law already in existence in the territory, the law of England became the law of the territory (and not merely the personal law of the colonists). Colonies of this kind were called "settled colonies". *Ex hypothesi*, the indigenous inhabitants of a settled colony had no recognized sovereign, else the territory could have been acquired only by conquest or cession. The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organization.

However, he concluded, anthropological and historical evidence demonstrated otherwise:

It is one thing for our contemporary law to accept that the laws of England, so far as applicable, became the laws of New South Wales and of the other Australian colonies. It is another thing for our contemporary law to accept that, when the common law of England became the common law of the several colonies, the theory which was advanced to support the introduction of the common law of England accords with our present knowledge and appreciation of the facts. When it was sought to apply Lord Watson's assumption in *Cooper v. Stuart* [(1889) 14 App Cas 286] that the colony of New South Wales was "without settled inhabitants or settled law" to Aboriginal society in the Northern Territory, the assumption proved false... The facts as we know them today do not fit the "absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory. It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands.

As Garth Nettheim, writing in the *Oxford Companion to the High Court of Australia* (2001, p. 447) summarised it, "where the Crown has not exercised its sovereign power" to acquire land, there was no reason land should not be subject to native title. But, he noted:

... native title is a more limited and vulnerable form of title than titles granted by government. The holders of native title cannot transfer or otherwise dispose of their title, except by surrender to the Crown: it is 'inalienable'. More importantly, a sovereign government has the power effectively to 'extinguish' native title, as decisions of the United States Supreme Court had recognised since the early nineteenth century. A government may exercise this power either by making grants of interests in land, or by allocating land to public purposes... To the extent that such acts are inconsistent with the continued exercise and enjoyment of native title rights and interests, those rights and interests are extinguished. It was on this basis that the Court was able to recognise native title without disturbing two centuries of land grants.

Although *Mabo* was a common law case, it did raise a matter constitutional law. In 1982, Eddie Mabo (and others) commenced proceedings, seeking declarations that native title in the Murray Islands had not been extinguished when the Islands were annexed in 1879. While the case was proceeding, the Queensland Parliament enacted the *Queensland Coast Islands Declaratory Act* (1985), which declared retrospectively that the Parliament's intention in 1879 had been to extinguish any pre-existing property rights, without compensation. In 1988, in *Mabo v Queensland (No. 1)* (1988) 166 CLR 186, the High Court held that the Queensland law

was inconsistent with the Commonwealth's *Racial Discrimination Act* (1975) and therefore invalid to the extent of the inconsistency, under s 109 of the Constitution (the "supremacy" provision). Likewise, in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 264, the HCA struck down a discriminatory Queensland law that restricted the right of indigenous people to buy land as inconsistent with a federal statute by force of s 109 - the supremacy provision - it was rendered invalid.

In *Wik Peoples v Queensland* (1996) 187 CLR 1, the Court considered whether Native Title might be extinguished by a grant of title falling short of full freehold interest. The issue here concerned pastoral leases. Four Justices held that pastoral leases did not of themselves extinguish native title. Justice Toohey stated:

... [T]he pastoral lease is a creature of statute. Accordingly, the rights it confers and the obligations it imposes must be determined by reference to the applicable statutory provisions ... [T]he authorities point to exclusive possession as a normal incident of a lease. They do not exclude, however, an inquiry whether exclusive possession is in truth an incident of every arrangement which bears the title of lease... [I]t is unlikely that the intention of the legislature in authorising the grant of pastoral leases was to confer possession on the lessees to the exclusion of Aboriginal people even for their traditional rights of hunting and gathering ... As has been seen, each lease contained a number of reservations of rights of entry, both specific and general. The lessee's right to possession must yield to those reservations. There is nothing in the statute which authorised the lease, or in the lease itself, which conferred on the grantee rights to exclusive possession, in particular possession exclusive of all rights and interests of the indigenous inhabitants, whose occupation derived from their traditional title...

The political response to these decisions was dramatic. Following *Wik*, the Howard government criticised the High Court Justices, with the Deputy Prime Minister going as far as to call for the appointment of a "Capital C Conservative" on the Court. This level of politicization and open criticism is unusual in the Australian context.

Since 1992, many cases have come before the Courts (and the national and State Native Title Tribunals which were established to hear initial claims on their merits) in which indigenous owners have sought to demonstrate continuous, unbroken title to the land. While the concept of Native Title was firmly entrenched, governments sought to wind back the broad scope of such judgments. The High Court has also been relatively reluctant to expand the law. In 2002, in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 - a decision much criticized by Aboriginal leaders, among others - the Court (Gleeson CJ, Gummow and Hayne JJ) set the parameters for for the establishment of a native title claim:

[N]one of the questions posed in connection with "recognition" of native title rights and interests by the common law of Australia can be examined properly without taking into account some fundamental principles: principles to which we now turn.

First, it follows from *Mabo [No 2]* that the Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court. Secondly, upon acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to

the land in that part, but native title to that land survived the Crown's acquisition of sovereignty and radical title. What survived were rights and interests in relation to land or waters. Those rights and interests owed their origin to a normative system other than the legal system of the new sovereign power; they owed their origin to the traditional laws acknowledged and the traditional customs observed by the indigenous peoples concerned.

When it is recognised that the subject matter of the inquiry is rights and interests (in fact rights and interests in relation to land or waters) it is clear that the laws or customs in which those rights or interests find their origins must be laws or customs having a normative content and deriving, therefore, from a body of norms or normative system - the body of norms or normative system that existed before sovereignty. Thus, to continue the metaphor of intersection, the relevant intersection, concerning as it does rights and interests in land, is an intersection of two sets of norms. That intersection is sometimes expressed by saying that the radical title of the Crown was "burdened" by native title rights but, as was pointed out in *Commonwealth v Yarmirr*, undue emphasis should not be given to this form of expression. Radical title is a useful tool of legal analysis but it is not to be given some controlling role.

...

Nonetheless, the fundamental premise from which the decision in *Mabo [No 2]* proceeded is that the laws and customs of the indigenous peoples of this country constituted bodies of normative rules which could give rise to, and had in fact given rise to, rights and interests in relation to land or waters. And of more immediate significance, the fundamental premise from which the *Native Title Act* proceeds is that the rights and interests with which it deals (and to which it refers as "native title") can be possessed under traditional laws and customs. Of course, those rights and interests may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer. The rights and interests under traditional laws and customs will often reflect a different conception of "property" or "belonging". But none of those considerations denies the normative quality of the laws and customs of the indigenous societies. It is only if the rich complexity of indigenous societies is denied that reference to traditional laws and customs as a normative system jars the ear of the listener.

...

[I]t is important to bear steadily in mind that the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.

For exactly the same reasons, acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned. That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land as the body of laws and customs which, for each of those generations of that society, was the body of laws and customs which in fact regulated

and defined the rights and interests which those peoples had and could exercise in relation to the land or waters concerned. They would be a body of laws and customs originating in the common acceptance by or agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society.

To return to a jurisprudential analysis, continuity in acknowledgment and observance of the normative rules in which the claimed rights and interests are said to find their foundations before sovereignty is essential because it is the normative quality of those rules which rendered the Crown's radical title acquired at sovereignty subject to the rights and interests then existing and which now are identified as native title.

In the proposition that acknowledgment and observance must have continued substantially uninterrupted, the qualification "substantially" is not unimportant. It is a qualification that must be made in order to recognise that proof of continuous acknowledgment and observance, over the many years that have elapsed since sovereignty, of traditions that are oral traditions is very difficult. It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement. Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society. To that end it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs

An important and still undecided constitutional issue concerns whether the Race power authorizes the enactment of laws detrimental to aboriginal peoples. The issue arises because s 51(xxvi) grants the power to legislation with regard to "the people of any race *for whom* it is deemed necessary to make special laws." (Although, s 92 to the contrary notwithstanding, the HCA does not usually delve into the original intent of the framers of a constitutional provision, the 1967 amendments were clearly designed to permit federal legislation to assist aboriginals, not to discriminate against them.) The issue emerged in *dicta* in *WA v Commonwealth* (1995) 183 CLR 373 ("*Native Title Act* case"), where the Court upheld federal legislation defining native title and protecting it against inconsistent state laws. Although the justices found that the statute was in fact beneficial for aboriginals, a majority opined (at 460) equivocated on the extent to which s 51(xxvi) limits Parliament:

If, as this passage suggests, the requirement that a law enacted under s 51(xxvi) be special were held to evoke a judicial evaluation of the needs of the people of a race or of the threats or problems that confronted them in order to determine whether the law was, or could be deemed to be, "necessary", the court would be required to form a political value judgment. Yet it is clear that that judgment is for the parliament, not for the court. If the court retains some supervisory jurisdiction to examine the question of necessity against the possibility of a manifest abuse of the races power, this case is not the occasion for an examination of that jurisdiction.

KARTINYERI v THE COMMONWEALTH OF AUSTRALIA

HIGH COURT OF AUSTRALIA
(1998) 195 CLR 337

[This complex case, popularly known as the “Hindmarsh Island case,” involves litigation by aboriginals to block the construction of a bridge from the South Australian mainland to Hindmarsh Island, designed to facilitate access to a tourist facility. Construction would allegedly have desecrated sacred aboriginal sites. After numerous administrative law challenges to various ministerial and commission rulings, the newly elected centre-right Howard government enacted the *Hindmarsh Island Bridge Act 1997* (Cth), allowing the bridge to go forward by exempting the project from the requirements of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), a statute originally enacted under the Race power. The Court upheld the constitutionality of the statute (only Kirby J dissented), but with varying rationales.

Three justices viewed the Commonwealth legislation as a whole. Since the *Heritage Protection Act* was validly enacted under the Race power, a partial repeal was permissible. Brennan CJ and McHugh J stated (at 356): “it is clear that the power which supports a valid Act supports an Act repealing it.”⁺]

GAUDRON J:

Much of the argument directed to the proposition that s51(xxvi) only authorises beneficial laws was based on the fact that the words “other than the aboriginal race in any State” were deleted in 1967 by a vote of the people in accordance with s128 of the Constitution. In this regard, it was said that, by 1967, Australian values had so changed that it is to be taken that the amendment disclosed a constitutional intention that, thereafter, the power should extend only to beneficial laws. In the alternative, it was put that the amendment disclosed an intention to that effect in relation to laws with respect to Aboriginal Australians.

The 1967 amendment was one that might fairly be described in today's terms as a “minimalist amendment”. As a matter of language and syntax, it did no more than remove the then existing exception or limitation on Commonwealth power with respect to the people of the Aboriginal race. And unless something other than language and syntax is to be taken into account, it operated to place them in precisely the same constitutional position as the people of other races.

The “Yes” case for the 1967 referendum identified two purposes attending the proposed law, which upon its approval in accordance with s128 of the Constitution, deleted the words “other than the aboriginal race in any State” from s51(xxvi) of the Constitution. The first was to “remove any ground for the belief that, as at present worded, the Constitution discriminates in some ways against people of the aboriginal race”. The other was “to make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live”.***

⁺ [Ed. Note: this reasoning is quite similar to the holding of the Ontario Court of Appeal in *Ferrell*, discussed in Chapter Four, upholding the repeal by a Conservative provincial government of a statute enacted by a previous New Democratic Party government mandating affirmative action in private employment.]

Whatever the international standards and community values in 1967 and whatever the intention of those voting in the 1967 referendum, the bare deletion of an exception or limitation on power is not, in my view, capable of effecting a curtailment of power. On the contrary, the consequence of an amendment of that kind is to augment power. Accordingly, if, prior to 1967, s51(xxvi) authorised special laws which were not for the benefit of the people of a particular race, the referendum did not, in my view, alter that position.

There are two matters with respect to s51(xxvi) which are beyond controversy. The first is that the debates of the Constitutional Conventions relevant to the provision which ultimately became s51(xxvi) reveal an understanding that it would authorise laws which discriminated against people of "coloured races" and "alien races". The second is that s51(xxvi) does not simply confer power to legislate with respect to "the people of any race". It confers power to legislate with respect to "the people of any race for whom it is deemed necessary to make special laws".

Were s51(xxvi) simply a power to legislate with respect to "the people of any race", there would, in my view, be no doubt that Parliament might legislate in any way it chose so long as the law in question differentiated in some way with respect to the people of a particular race or dealt with some matter of "special significance or importance to the[m]". However, the words "for whom it is deemed necessary to make special laws" must be given some operation. And they can only operate to impose some limit on what would otherwise be the scope of s51(xxvi).

In the main, the view that s51(xxvi) is not simply a power to pass laws with respect to "the people of any race" has found expression in terms reflected in the argument in this case, namely, that s51(xxvi) is confined to laws for the benefit of the people of the race for whom those laws are enacted. Thus, for example, in *Koowarta v Bjelke-Petersen*, Murphy J expressed the view that "[i]n para(xxvi) 'for' means 'for the benefit of' ... not ... 'with respect to'"⁵². And in *The Commonwealth v Tasmania (The Tasmanian Dam Case)*, [(1983) 158 CLR 1 at 242] Brennan J referred to the 1967 amendment of s51(xxvi) and said that it was "an affirmation of the will of the Australian people ... that the primary object of the power is beneficial".

[However, Gaudron J concluded that the interpretation that "for" means "for the benefit of" cannot be maintained in the face of the constitutional debates earlier referred to. Even so, the words "for whom it is deemed necessary to make special laws" must be given some operation and, as already indicated, they can only operate as a limit to the power conferred by s51(xxvi).

[Although the *Native Title Act* case equivocated as to judicial review of Parliament's "political value judgment" concerning whether a law was special for the purposes of s51(xxvi)], that question may be put

⁵² (1982) 153 CLR 168 at 242. Murphy J expressed the same view of the scope of s51(xxvi) in *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 180 stating that "[s51(xxvi)] ... authorizes any law for the benefit, physical or mental, of the people of the race for whom Parliament deems it necessary to pass special laws". Similarly, at 245-246 Brennan J adverted to "the high purpose which the Australian people intended when the people of the Aboriginal race were brought within the scope of [s51(xxvi)]'s] beneficial exercise" (emphasis added). At 273 Deane J said that "[s]ince 1967, [s51(xxvi)] has included a power to make laws benefiting the people of the Aboriginal race" (emphasis added); cf also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 56 per Gaudron J. However, the contrary view, that s51(xxvi) supports the enactment either of beneficial or detrimental laws in relation to Aboriginal people, has also been expressed: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186 per Gibbs CJ, 209 per Stephen J, 245 per Wilson J; *The Tasmanian Dam Case* (1983) 158 CLR 1 at 110 per Gibbs CJ.

to one side. It is sufficient to observe that, if the question arises, it is for this Court to determine whether a law is one that is properly characterised as a law with respect to "the people of any race for whom it is deemed necessary to make special laws".

The criterion for the exercise of power under s51(xxvi) is that it be deemed necessary - not expedient or appropriate - to make a law which provides differently for the people of a particular race or, if it is a law of general application, one which deals with something of "special significance or importance to the people of [that] particular race". Clearly, it is for the Parliament to deem it necessary to make a law of that kind. To form a view as to that necessity, however, there must be some difference pertaining to the people of the race involved or their circumstances or, at least, some material upon which the Parliament might reasonably form a political judgment that there is a difference of that kind. Were it otherwise, the words "for whom it is deemed necessary to make special laws" would have no operation and s51(xxvi) would simply be a power to make laws for the people of any race. Once it is accepted that the power conferred by s51(xxvi) may only be exercised if there is some material upon which the Parliament might reasonably form a judgment that there is a difference necessitating some special legislative measure, two things follow. The first is that s51(xxvi) does not authorise special laws affecting rights and obligations in areas in which there is no relevant difference between the people of the race to whom the law is directed and the people of other races. A simple example will suffice. Rights deriving from citizenship inhere in the individual by reason of his or her membership of the Australian body politic and not by reason of any other consideration, including race. To put the matter in terms which reflect the jurisprudence that has developed with respect to anti-discrimination law, race is simply irrelevant to the existence or exercise of rights associated with citizenship. So, too, it is irrelevant to the question of continued membership of the Australian body politic. Consequently, s51(xxvi) will not support a law depriving people of a particular racial group of their citizenship or their rights as citizens. And race is equally irrelevant to the enjoyment of those rights which are generally described as human rights and which are taken to inhere in each and every person by reason of his or her membership of the human race.

The second matter which flows from the requirement that there be some matter or circumstance upon which the Parliament might reasonably form the judgment that there is some difference pertaining to the people of a particular race which necessitates some special law is that the law must be reasonably capable of being viewed as appropriate and adapted to the difference asserted. A similar view was expressed by Deane and Toohey JJ in *Leeth v The Commonwealth* [(1992) 174 CLR 455 at 489], it being said by their Honours that s51(xxvi) authorises "discriminatory treatment of members of [a particular race] to the extent which is reasonably capable of being seen as appropriate and adapted to the circumstance of that membership". Although they did not explain why that was so, the requirement flows, in my view, from the need for there to be some material or circumstance from which it might reasonably be concluded by the Parliament that there is some difference necessitating a special law. Unless the law in question is reasonably capable of being viewed as appropriate and adapted to the difference which is claimed, it could not be concluded that the Parliament formed the view that there was such a difference. I have attempted to explain the need for a law to be reasonably capable of being viewed as appropriate and adapted to some difference which the Parliament might reasonably judge to exist by reference to the language of s51(xxvi). However, the matter may also be expressed in terms used in the *Native Title Act Case*. A law which deals differently with the people of a particular race and which is not reasonably capable of being viewed as appropriate and adapted to a difference of the kind indicated has no rational basis and is, thus, a "manifest abuse of the races power". So, too, it would be irrational and, thus, a manifest abuse of the races power if Parliament were to enact a law requiring or providing for the different treatment of the people of a particular race if it could not reasonably form the view that there was some difference requiring their different treatment. Because the power conferred by s51(xxvi) of the

Constitution is premised on there being some matter or circumstance pertaining to the people of a particular race upon which the Parliament might reasonably conclude that there is a real and relevant difference necessitating the making of a special law, its scope necessarily varies according to circumstances as they exist from time to time. In this respect the power conferred by para(xxvi) is not unlike the power conferred by s51(vi) to legislate with respect to defence. And as with the defence power, a law that is authorised by reference to circumstances existing at one time may lose its constitutional support if circumstances change.

Although the power conferred by s51(xxvi) is, in terms, wide enough to authorise laws which operate either to the advantage or disadvantage of the people of a particular race, it is difficult to conceive of circumstances in which a law presently operating to the disadvantage of a racial minority would be valid. It is even more difficult to conceive of a present circumstance pertaining to Aboriginal Australians which could support a law operating to their disadvantage. To put the matter another way, prima facie, at least, the circumstances which presently pertain to Aboriginal Australians are circumstances of serious disadvantage, which disadvantages include their material circumstances and the vulnerability of their culture. And prima facie, at least, only laws directed to remedying their disadvantage could reasonably be viewed as appropriate and adapted to their different circumstances.

[Nonetheless, Gaudron J found the *Bridge Act* to be constitutional because “a plenary power to legislate on some topic or with respect to some subject-matter carries with it the power to repeal or amend existing laws on that topic or with respect to that subject-matter.”]

GUMMOW and HAYNE JJ:

Validity of the Bridge Act

The question then is whether the *Bridge Act*, characterised in this way, so operates that it can be said to be connected to the head of power in s51(xxvi). If a connection exists, then the law will be "with respect to" that head of power unless the connection is so insubstantial, tenuous or distant that the law cannot sensibly be described as a law with respect to that head of power.⁸⁶ The first submission by the plaintiffs was that the *Bridge Act* lacked "a sufficient level of generality" to found support by s51(xxvi). This was because, whilst the Ngarrindjeri people are members of the Aboriginal race, they do not constitute the entirety of that race, and s51(xxvi) requires a law to answer the description "with respect to ... [t]he people of any race", not with respect to some only of the people of any race.

The construction of s51(xxvi) for which the plaintiffs contend would cripple the reach of the legislative power to deal with social, economic or other conditions which particularly afflicted certain members or groups of Aboriginals. It also would imperil the validity of the Heritage Protection Act itself. In that statute, the central definition of "Aboriginal tradition" has the consequence that the purpose of the statute spelled out in s4 is to preserve and protect the body of traditions, observances, customs and beliefs not only of Aboriginals generally but also of a particular community or group of Aboriginals which relate to particular areas.

The legislative power is to be construed with all the generality of which the phrase "the people of any

⁸⁶ *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 314; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369; *Leask v The Commonwealth* (1996) 187 CLR 579 at 601-602, 621, 634.

race" admits. That being so, why should the phrase "the people ..." be read as if limited to "all the people", rather than as including within the reach of the power any members of that class identified by the expression "the people of" the race in question?

The state of authority in this Court affirms that the phrase is "apposite to refer to any identifiable racial sub-group among Australian Aboriginals". The *Native Title Act Case* was determined on the basis that those for whom the Native Title Act (1993) (Cth) was a "special" law were those Aboriginal and Torres Strait Islanders who were holders of native title n90, and that it was not essential to determine whether the statute conferred a benefit upon all the people of those races. The first submission by the plaintiffs should not be accepted.

The plaintiffs further submitted that the word "special" gave to s51(xxvi) a "fluctuating content" and a "purposive aspect" like the defence power. This meant that the permissible purpose of the Bridge Act must be one which did not "discriminate against" the Aboriginal race. The plaintiffs eschewed the suggestion that the benefits conferred by the *Heritage Protection Act*, once conferred upon them, were "constitutionalised" and unsusceptible of any repeal. However, they contended that the *Bridge Act* inflicted upon the Ngarrindjeri people a discriminatory detriment by loss of the opportunity to obtain the declaration under s10 of the *Heritage Protection Act* which was sought by the plaintiffs' application. The plaintiffs were supported by the Attorney-General for New South Wales. He submitted that the federal concurrent legislative power was limited such that the exclusion by the *Bridge Act* of some members of the Aboriginal race from the benefits of the earlier statute would be invalid unless there was "a rational and proportionate connection between that exclusion and [some] legitimate governmental purpose".

These submissions should be rejected.

It is true that "unlike the aliens power or the corporations power", s51(xxvi) "is not expressed to be a power to make laws simply with respect to persons of a designated character"⁹¹. A law will only answer the constitutional description in s51(xxvi) if it (i) is "deemed necessary" (ii) that "special laws" (iii) be made for "the people of any race". The term "deem" may mean "to judge or reach a conclusion about something". Here, the judgment as to what is "deemed necessary" is that of the Parliament n93. Nevertheless, it may be that the character of a law purportedly based upon s51(xxvi) will be denied to a law enacted in "manifest abuse" of that power of judgment. Even if such a restraint (in addition to those stated or implied elsewhere in the Constitution, such as in s51(xxxi)) exists there is no occasion for its application to the *Bridge Act*. The scope of the *Heritage Protection Act* was such that, if the various conditions required by that law were satisfied, the Minister might, upon application, have made declarations under s10 and s12 with respect to the Hindmarsh Island bridge area and the pit area. Such a declaration would have been subject to disallowance by either legislative chamber, as s15 contemplated. There is no "manifest abuse" of its power of legislative judgment for the Parliament to accelerate matters by determining that, in respect of particular areas, the Ministerial power of declaration was withdrawn. It was for the Parliament to make its assessment of the circumstances which led it to deem it necessary to enact the Bridge Act.⁹⁵ The requirement that the Bridge Act be "special" does not relate to the matter of necessity. The presence of the special quality of the Bridge Act is to be ascertained "by reference to its differential operation upon the people of a particular race"⁹⁶. Here, "the people of a particular race" are

⁹¹ Native Title Act Case (1995) 183 CLR 373 at 460.

⁹⁵ The circumstances were set out in the Second Reading Speech in the House of Representatives, Parliamentary Debates (Hansard), 17 October 1996 at 5802-5803.

⁹⁶ Native Title Act Case (1995) 183 CLR 373 at 460-461 citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186, 245, 261.

those spoken of in s4 of the *Heritage Protection Act*. They are those Aboriginals and particular communities or groups of Aboriginals for whom areas or objects to which the *Heritage Protection Act* applied were of particular significance in accordance with Aboriginal tradition. In respect of areas and objects within the Hindmarsh Island bridge area and the pit area, the *Bridge Act* withdrew the potentiality of that special protection which would flow from declarations by the Minister and would continue for the life of such declarations. As just indicated, "differential operation" is that which gives to any law based upon s51(xxvi) its character as a "special" law. Once it is accepted, as it has been, that a law may make provision for some only of a particular race, it follows that a valid law may operate differentially between members of that race. That is the situation with the *Bridge Act*. Moreover, as was said in the joint judgment in the *Native Title Act Case*:⁹⁷ "A special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race."

Here, the *Bridge Act* imposes a disadvantage, of the nature identified above, with respect to areas and objects within the Hindmarsh Island bridge area and the pit area. The disadvantage is in the contraction of the field of operation of the *Heritage Protection Act*, itself a law which is to be taken as supported by s51(xxvi).

Although they disclaimed any such submission, the position assumed by the plaintiffs in denying the validity of the *Bridge Act* would deny to the Parliament the competence to limit the scope of a special law by a subsequent legislative determination that something less than the original measure was necessary. The Parliament might make that judgment for various reasons, including changes in the circumstances which had led it to enact that original special law.

It is true, but not to the point, that the differential treatment of those upon whom the law operates by conferral of a right or benefit may also impose an obligation or disadvantage upon others. In various provisions of the Constitution, notably s51(ii), s102 and s117, the terms "discriminate" and "discrimination" appear. Further, it was settled in *Cole v Whitfield* [(1988) 165 CLR 360] that the general hallmark of measures which contravene s92 is their effect as discriminatory, in a protectionist sense, against interstate trade and commerce. The judicial exegis in this Court upon "discrimination" in constitutional law largely has been concerned with its meaning as a restriction, in one or other of the above senses, upon legislative power. S51(xxvi) stands in a different position. The requirement of differential operation, spelled out from the use of the phrase "special laws", is a criterion of validity not a cause of invalidity. It is "of the essence of" a law supported by s51(xxvi) "that it discriminates between the people of the race for whom the special laws are made and other people"¹⁰⁰ The differential operation of the one law may, upon its obverse and reverse, withdraw or create benefits. That which is to the advantage of some members of a race may be to the disadvantage of other members of that race or of another race. Extreme examples, given particularly the lessons of history (including that of this country), may be imagined. But such apprehensions cannot, in accordance with received doctrine, control what otherwise is the meaning to be given today to heads of federal legislative power.

Thus, in the *Territorial Senators Case*¹⁰¹, Mason J spoke of "the grim spectre conjured up by the

⁹⁷ (1995) 183 CLR 373 at 461.

¹⁰⁰ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 261.

¹⁰¹ *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 271. [Ed. Note: This case involved a challenge to federal legislation authorizing the election of Senators from Australian territories. Although s 7 of the Constitution states that "The Senate shall be composed of Senators for each State," the HCA upheld the statute under the authority of s 122, providing that Parliament "may allow the representation of [Territories] in either House of Parliament to the extent and on terms which it thinks fit."]

plaintiffs of a Parliament swamping the Senate with senators from the Territories, thereby reducing the representation of the States disproportionately to that of an ineffective minority in the chamber". This was to disregard the assumption "which we should now make, that Parliament will act responsibly in the exercise of its powers". In the same case, Jacobs J [at 275] spoke against the construction of the words of the Constitution "by some distorting possibility". However, three further points may briefly be made. First, as a matter of construction, a legislative intention to interfere with fundamental common law rights, freedoms and immunities must be "clearly manifested by unmistakable and unambiguous language"¹⁰³ Secondly, the doctrine of *Marbury v Madison* [1 Cranch 137 (1803) [5 US 87]] ensures that courts exercising the judicial power of the Commonwealth determine whether the legislature and the executive act within their constitutional powers¹⁰⁵ Thirdly, the occasion has yet to arise for consideration of all that may follow from Dixon J's statement [in the *Communist Party* case, at 193] that the Constitution: "is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption."

The 1967 Act

It was submitted that the circumstances surrounding the passage of the 1967 Act and its submission to the electors under s128 of the Constitution favoured, if they did not require, a construction of s51(xxvi) in its amended form which would support only those special laws which were for the "benefit" of the indigenous races. Reliance was placed, in particular, upon the statement by Deane J in *The Tasmanian Dam Case* [(1983) 158 CLR 1 at 273]: "The power conferred by s51(xxvi) remains a general power to pass laws discriminating against or benefiting the people of any race. Since 1967, that power has included a power to make laws benefiting the people of the Aboriginal race."

Another interpretation of the events of 1967 is that, whilst the purpose of the 1967 Act was to ensure that the Parliament could legislate beneficially in respect of the indigenous races, this was implemented by including them within the generality of the power in s51(xxvi). Moreover, it is as well to recall that it is the constitutional text which must always be controlling.

The text is not limited by any implication such as that contended for by the plaintiffs. This is so whether one has regard alone to the terms of the Constitution after the 1967 Act took effect or also to that statute. The circumstances surrounding the enactment of the 1967 Act, assuming regard may properly be had to them, may indicate an aspiration of the legislature and the electors to provide federal legislative powers to advance the situation of persons of the Aboriginal race. But it does not follow that this was implemented by a change to the constitutional text which was hedged by limitations unexpressed therein.

The bill for the 1967 Act did not attract any opposition in Parliament so as to lead to the distribution to each elector of an argument against the proposed law by the Chief Electoral Officer. S6A of the Referendum Act provided for the distribution of "yes" and "no" cases authorised by a majority of those members of both Houses of Parliament who voted for and against the proposed law. Only a "yes" case was authorised and distributed to each elector. It stated that the proposed alteration of s51(xxvi) would do

¹⁰³ *Coco v The Queen* (1994) 179 CLR 427 at 437. See also *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 467-468; *R v Home Secretary; Ex parte Pierson* [1997] 3 WLR 492 at 506-507; [1997] 3 All ER 577 at 592.

¹⁰⁵ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262-263; *Attorney-General (NSW) v Quin* (1990) 170 LR 1 at 35; *Harris v Caladine* (1991) 172 CLR 84 at 134-135.

two things and continued¹⁰⁹:

First, it will remove words from our Constitution that many people think are discriminatory against the Aboriginal people.

Second, it will make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Parliament considers it necessary.

This cannot be done at present because, as the Constitution stands, the Commonwealth Parliament has no power, except in the Territories, to make laws with respect to people of the Aboriginal race as such.

This would not mean that the States would automatically lose their existing powers. What is intended is that the National Parliament could make laws, if it thought fit, relating to Aboriginals - as it can about many other matters on which the States also have power to legislate. The Commonwealth's object will be to co-operate with the States to ensure that together we act in the best interests of the Aboriginal people of Australia."

The treatment in the "yes" case of the proposed alteration to the power of the Commonwealth legislature emphasised considerations of federalism. It did not speak of other limitations upon the nature of the special laws beyond confirming that they might apply to the people of the Aboriginal race "wherever they may live" rather than be limited to the Territories. Further, the proposed law took its form after the expression of learned opinion that complete repeal of s51(xxvi) would have been preferable to any amendment intended to extend to the Aboriginals "its possible benefits"¹¹⁰. The omission in the 1967 Act of any limitation, making specific reference to the provision of "benefits" to persons of the Aboriginal race, upon the operation of the amended s51(xxvi), is consistent with a wish of the Parliament to avoid later definitional argument in the legislature and the courts as to the scope of its legislative power. That is the effect of what was achieved.

KIRBY, J:

Thirdly, a crucial element in the history of the constitutional text is the amendment of para(xxvi) in 1967. Because there have been so few amendments to the Australian Constitution, it has not hitherto been necessary to develop a theory of the approach to be taken to the meaning of the text where a provision is altered. In deriving the meaning of the altered provision, conventional rules of statutory construction permit a court to take into account the legislative change. But this is much more important in elucidating a constitutional text. This is especially so in Australia because of the necessity, exceptionally, to involve the electors of the Commonwealth in the law-making process. That step requires that this Court, to understand the amendment, should appreciate, and give weight to, the purpose of the change. The stated purpose here was to remove two provisions in the Constitution which, it had ultimately been concluded, discriminated against Australian Aboriginals. Whatever the initial object of the original exception to para(xxvi), by the time that the words were removed, the amendment did not simply lump the Aboriginal people of Australia in with other races as potential targets for detrimental or adversely discriminatory laws. It was the will of the Australian Parliament and people that the race power should be significantly altered. If the Constitution were not to be changed to provide the power to make laws with respect to the

¹⁰⁹ Chief Electoral Officer Commonwealth, *The Arguments For and Against the Proposed Alterations Together with a Statement Showing the Proposed Alterations*, 6 April 1967 at 11.

¹¹⁰ Sawer, "The Australian Constitution and the Australian Aborigine", (1966) 2 *Federal Law Review* 17 at 35.

advancement of Aboriginal people and to forbid discrimination on racial grounds (as Mr Wentworth had proposed), it was to be altered, at least, to remove their exclusion from the Parliament's law-making power in order that the Parliament might have the power to make special laws with respect to them. To construe the resulting power in para(xxvi) as authorising the making of laws detrimental to, and discriminatory against, people on the ground of race, and specifically Aboriginal race, would be a complete denial of the clear and unanimous object of the Parliament in proposing the amendment to para(xxvi). It would amount to a refusal to acknowledge the unprecedented support for the change, evident in the vote of the electors of Australia. This Court should take notice of the history of the amendment and the circumstances surrounding it in giving meaning to the amended paragraph.

Fourthly, although the source and application of the protection from adverse discrimination on the ground of race differs in the United States of America it is helpful to consider the approach of that country's Supreme Court to such laws. There, legislation that enacts detrimental discrimination on such grounds is considered "constitutionally suspect" Such enactments will therefore be subject to the "most rigid scrutiny", and held to be "justifiable only by the weightiest of considerations". The Court will not simply rely on the view of the relevant legislature as to the purpose or effect of the challenged law²⁷⁵. Arguments of inconvenience and potential political embarrassment for the Court fall on deaf judicial ears in that country. It is no different in Australia although the constitutional foundations are different. This Court, of its function, often finds itself required to make difficult decisions which have large economic, social and political consequences.

Unworkability of the "manifest abuse" test

In order to explain why the Australian Parliament could not, under the Constitution, enact racist laws such as those made in Germany during the Third Reich and in South Africa during apartheid - a result by inference accepted as totally alien to the character and meaning of our Constitution - counsel for the Commonwealth argued that it was enough that this Court retained a supervisory jurisdiction although one limited to invalidity of laws in cases where the Parliament's reliance upon para(xxvi) was a "manifest abuse" of that power. Such a test has found favour with some of the Justices in this case. As I understand the test of "manifest abuse", it is to be confined to legislation which the Court considers to be "extreme", "outrageous" or "completely unacceptable". In evaluating whether such a test is a legally viable, and therefore an acceptable, one, it is instructive to examine how, in practice, a law that has an adverse discriminatory effect may not at first appear, on its face, to constitute a "manifest abuse" or an "outrageous" exercise of the enabling power.

Take first the former laws of South Africa, which illustrate this point most clearly. The principal legislative manifestation of apartheid was the *Group Areas Act*. It categorised the population according to racial "groups" [designated as "white," "Bantu", and "coloured."]. It provided for the proclamation of "controlled areas" in relation to a particular. It forbade members of other groups owning or occupying land within them. However, the legislation did not, on its face, actually differentiate between particular groups. All three groups were prohibited from acquiring land in certain areas. Yet, in effect, whilst the legislation obliged major relocation of "Bantus" and "coloureds", it had very few consequences for "whites". How could such a law, or one having similarities to it, be said to be, on its face, a "manifest

²⁷⁵ See also *McLaughlin v Florida* 379 US 184 at 191-192 (1964); *Loving v Virginia* 388 US 1 at 9 (1967); *Richmond v J A Croson Co* 488 US 469 at 500 (1989); Scalia "Federal Constitutional Guarantees of Individual Rights in the United States of America" in Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (1994) 57 at 86-88; Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991* (1997) at 100; cf *Canada (A G) v Mossop* [1993] 1 SCR 554 at 645-646 per L'Heureux-Dube J.

abuse"? Doubtless it did have, and its equivalent would have, persuasive defenders arguing that it was open to the Parliament to deem such a special law to be necessary.

Likewise, it is difficult to be sure that some of the early legislation enacted by the Third Reich would be struck down under the "manifest abuse" test. For example, the first anti-Semitic law enacted by the regime, the *Law for the Restoration of the Professional Civil Service 1933* (Ger), provided that civil servants of "non-Aryan" descent were to be retired. Arguably, on its face, this would be insufficient to amount to a "manifest abuse". Australian employment laws have frequently contained provisions requiring certain public servants to be Australian citizens or British subjects - most of those being of the Caucasian race. Yet in Germany this power was immediately used to dismiss thousands of Germans of the Jewish race from their posts. Such statutes, beginning with apparently innocuous provisions, laid the ground for worse to follow. They formed the precursors for more abhorrent legislation during the subsequent decade.

Laws such as those set out above would, now, be expressly forbidden by the constitutions of both Germany²⁹⁴ and South Africa²⁹⁵. Yet, in Australia, if s51(xxvi) of the Constitution permits all discriminatory legislation on the grounds of race excepting that which amounts to a "manifest abuse", many of the provisions which would be universally condemned as intolerably racist in character would be perfectly valid under the Commonwealth's propositions. The criterion of "manifest abuse" is inherently unstable. The experience of racist laws in Germany under the Third Reich and South Africa under apartheid was that of gradually escalating discrimination. Such has also been the experience of other places where adverse racial discrimination has been achieved with the help of the law. By the time a stage of "manifest abuse" and "outrage" is reached, courts have generally lost the capacity to influence or check such laws. A more stable and effective criterion is required for validity under para(xxvi). It should be one apt to the words and character of the Australian Constitution; but also to the shared experience of the Australian people that lay behind the amendment of para(xxvi) in 1967.

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KRUGER and OTHERS v COMMONWEALTH OF AUSTRALIA

HIGH COURT OF AUSTRALIA
(1997) 190 CLR 1, 144 ALR 126

[This is the so-called *Stolen Generations* case. The (NT) *Aboriginals Ordinance 1918* appointed the Chief Protector of Aborigines as the legal guardian of every Aboriginal child in the Northern Territory. The Ordinance gave the Chief Protector discretion to undertake the care, custody and control of any Aborigine. Further, the Ordinance authorised the Chief Protector to cause an Aborigine to be kept within the boundaries of any reserve or Aboriginal institution. The Ordinance was repealed in 1957.

The plaintiffs were Aborigines from the Northern Territory, who had been removed from their parents and families when they were young children. They had then been detained in Aboriginal institutions or

²⁹⁴ Basic Law of the Federal Republic of Germany, Article 3.3 ["Nobody shall be prejudiced or favoured because of their sex, birth, race, language, national or social origin, faith, religion or political opinions."]

²⁹⁵ Constitution of the Republic of South Africa, s9(3) ["The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."]

reserves. The removals had occurred between 1925 and 1949 and the last detention had ended in 1960. The plaintiffs commenced proceedings, seeking damages and declaratory relief, alleging that their removal and detention amounted to wrongful imprisonment and a deprivation of liberty. They sought a declaration that the Aboriginals Ordinance was not a valid exercise of the Territories power contained in s 122 of the Constitution.]

BRENNAN CJ:

The plaintiffs are Aboriginal Australians. All but one of them were children of tender years living in the Northern Territory when they were allegedly "removed into and detained and kept in the care, custody and/or control" of the Chief Protector of Aborigines (or of his successor in function, the Director of Native Affairs) "and thereafter detained and kept away from his [or her] mother and family in Aboriginal institutions and/or reserves". The other plaintiff, Rosie Napangardi McClary, is the mother of a child who, without the mother's consent, allegedly suffered the same fate as the other plaintiffs. The plaintiffs seek, *inter alia*, a declaration that the provisions of the Ordinances of the Northern Territory under which these alleged actions were taken were invalid and that the Acts of the Commonwealth under which those provisions were enacted were invalid in so far as they might be found to have authorised the impugned provisions of the Ordinances.

Of course, a power which is to be exercised in the interests of another may be misused. Revelation of the ways in which the powers conferred by the Ordinance were exercised in many cases has profoundly distressed the nation, but the susceptibility of a power to its misuse is not an indicium of its invalidity. It may be that in the cases of the plaintiff children, the Chief Protector or the Director formed an opinion about their interests which would not be accepted today as a reasonable opinion having regard to contemporary community standards and the interests of those children in being kept together with their families. The practice of enforced separations is now seen to be unacceptable as a general policy. However, the erroneous formation of an opinion by the Chief Protector which purported to enliven the exercise of the power conferred by s 6 or by the removal regulations does not deny the validity of s 6 or of those regulations, though it may deny the validity of the exercise of the power.

Moreover, when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised. Reasonableness can be determined only by reference to the community standards at the time of the exercise of the discretion and that must be taken to be the legislative intention. Therefore, it would be erroneous in point of law to hold that a step taken in purported exercise of a discretionary power was taken unreasonably and therefore without authority if the unreasonableness appears only from a change in community standards that has occurred since the step was taken. However that may be, even if the powers conferred by s 6 of the Ordinance and by the removal regulations were misused in the cases of the plaintiff children, the fact of misuse would not affect the validity of those provisions.

[Plaintiffs claimed that the Ordinance exceeded the scope of the Territories Power granted in s 122 of the Constitution, in a number of respects, including: (1) as "contrary to an implied constitutional right to freedom from and/or immunity from removal and subsequent detention without due process of law"; (2) the grant of removal power to the Chief Protector was an unconstitutional grant of judicial power to a non-judge; (3) as "contrary to an implied constitutional right to and/or guarantee of legal equality including equality before and under, and equal protection of, the law"; (4) as "contrary to an implied constitutional right to and/or guarantee of freedom of movement and association"; (5) as contrary to an implied constitutional right to and/or freedom from laws having the purpose or effect of the destruction of

a racial or ethnic group; (6) as contrary to an implied constitutional right to and/or freedom from laws constituting the crime against humanity of genocide; (7) as “a law for prohibiting the free exercise of a religion contrary to s 116 of the Constitution.”]

[Brennan, CJ construed the legislation as designed to effect the removal of children only when it was thought to be in their best interest, thus rejecting due process claims. Likewise, the laws did not violate religious rights under s 116 because this was not the purpose of the legislation.

[Next, he observed that the s 122 grant] section confers on the parliament a legislative power that has been described in the broadest terms: Isaacs J in *R v Bernasconi* [(1915) 19 CLR 629 at 637] described it as "an unqualified grant complete in itself"; Barwick CJ in *Spratt v Hermes* [(1965) 114 CLR 226 at 242] described it as a legislative power "as large and universal . . . as can be granted" and the court described it in *Teori Tau v Commonwealth* [(1969) 119 CLR 564 at 570] as "unlimited and unqualified in point of subject matter". ***

[The exclusive judicial power set forth in Chapter III of the Constitution applies only to *federal* judicial power. The] Privy Council said in *Attorney-General (Cth) v R ("Boilermakers' Case")* [(1957) 95 CLR 529 at 545; [1957] AC 288 at 320] that Ch III is regarded as exhaustively describing the federal judicature and its functions in reference only to the federal system of which the Territories do not form part. There appears to be no reason why the parliament having plenary power under s 122 should not invest the High Court or any other court with appellate jurisdiction from the courts of the Territories. The legislative power in respect of the Territories is a disparate and non-federal matter.

[Brennan CJ next rejected the equality argument.] Whatever may be said of the policy which underlay the impugned provisions, it is impossible to derive a restriction of substantive equality to control the legislative power conferred by s 122. Even in the federal provisions of the Constitution, some legislative inequality is contemplated by s 51(xix) and (xxvi). *** In any event, there is nothing in the text or structure of the Constitution which purports so to restrict the power conferred by s 122 as to require substantive equality in the treatment of all persons within the territory. Indeed, prior to 1967, s 127 of the Constitution expressly discriminated against "aboriginal natives" in the taking of the census. ***

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DAWSON J

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The 1918 Ordinance was made under legislation which was reliant upon s 122 for its validity. The plaintiffs claim that, to the extent that it authorised the making of the 1918 Ordinance, or at least those parts of it of which they complain, the legislation did not constitute a law "for the government of any territory" within the meaning of s 122 and was invalid. The basis upon which they make that submission is that for a law to be for the government of a territory it must be reasonably capable of being seen as appropriate and adapted to the end of governing the territory. The plaintiffs argue that the 1918 Ordinance constituted an extraordinary intrusion upon fundamental rights and common law liberties, exhibiting "such callous disregard for familial unity and cultural cohesion in the Aboriginal community" that its purpose can only be seen as the arbitrary executive detention of Aboriginal citizens and the cultural and physical extinguishment or disintegration of that racial minority. The plaintiffs submit that such a law cannot be seen as appropriate and adapted to the government of the Northern Territory and for that reason is outside the scope of s 122.

That submission must be rejected. I have elsewhere [See *Leask v Commonwealth* (1996) 140 ALR 1] expressed my view that no real assistance is to be gained by asking whether legislation is appropriate and adapted to some end when testing its validity under s 51 of the Constitution, at all events where a non-

purposive power under that section is involved. That test can have even less application where the power in question is, like s 122, a power to legislate for the government of a territory and where, unlike the powers conferred by s 51, the power is not confined by reference to subject matter. In *Teori Tau v Commonwealth* [(1969) 119 CLR 564 at 570] the court described the legislative power conferred by s 122 as "plenary in quality and unlimited and unqualified in point of subject matter". ***

Section 122 gives to the parliament legislative power of a different order to those given by s 51. That power is not only plenary but is unlimited by reference to subject matter. It is a complete power to make laws for the peace, order and good government of the territory -- an expression condensed in s 122 to "for the government of the Territory". This is as large and universal a power of legislation as can be granted. It is non-federal in character in the sense that the total legislative power to make laws to operate in and for a territory is not shared in any wise with the States.

** **

The Commonwealth Parliament is, with respect to the territories, a completely sovereign legislature. ***

Whether or not one or two of the miscellaneous provisions in Ch V apply to the territories -- ss 116 and 118 have been suggested, though further consideration has made me more doubtful than I was about them -- it seems clear enough that the limitations which Ch I puts upon legislative power in the working of the federal system, anxiously contrived as they are with the object of keeping the parliament to the course intended for it, are thrown aside as irrelevant when the point is reached of enabling laws to be made for the government of territories which stand outside that system; for s 122 uses terms apt to authorise the parliament to make what provision it will for every aspect and every organ of territory government.

Section 116

When one comes to s 116 different considerations apply. That section provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

[Dawson J noted various prior opinions, but no binding precedent as to the application of s 116 to the Territories power.]

The explanation why s 116, unlike the other sections in Ch V, is directed to the Commonwealth is that ultimately the matter with which those responsible for its drafting were concerned was the possibility that, because of the reference to "Almighty God" in the preamble to the Constitution, there might be a perception that the Commonwealth had the power to interfere in matters of religion. The clause which eventually became s 116 was originally drafted to include the States, but in order to emphasise the prohibition imposed upon the Commonwealth, the States were excluded. ***

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For these reasons, I am of the opinion that the power of the Commonwealth Parliament to legislate under s 122 for the government of the territories is not restricted by s 116. I should add that, if I am wrong in that conclusion, I would agree with Gummow J, for the reasons given by him, that the 1918 Ordinance contains nothing which would enable it to be said that it is a law for prohibiting the free exercise of any religion.

Due process of law and the judicial power of the Commonwealth

In a number of recent cases it has been pointed out that the Australian Constitution, with few exceptions and in contrast with its American model, does not seek to establish personal liberty by placing restrictions upon the exercise of governmental power. Those who framed the Australian Constitution accepted the view that individual rights were on the whole best left to the protection of the common law and the supremacy of parliament. Thus the Constitution deals, almost without exception, with the structure and relationship of government rather than with individual rights. The fetters which are placed upon legislative action are, for the most part, for the purpose of distributing power between the federal government on the one hand and State governments on the other, rather than for the purpose of placing certain matters beyond the reach of any parliament. The Constitution does not contain a Bill of Rights. Indeed, the 1898 Constitutional Convention rejected a proposal to include an express guarantee of individual rights based largely upon the 14th Amendment to the United States Constitution and including a right to due process of law and the equal protection of laws.⁷⁹ The framers preferred to place their faith in the democratic process for the protection of individual rights and saw constitutional guarantees as restricting that process. Thus the Constitution contains no general guarantee of the due process of law.

The few provisions contained in the Constitution which afford protection against governmental action in disregard of individual rights do not amount to such a general guarantee.⁸⁰ It follows that, in so far as the plaintiffs' claim is reliant upon a constitutional right to the due process of law, it must fail.

The plaintiffs contend that the actions of which they complain amounted to the exercise of judicial power otherwise than by courts constituted in accordance with Ch III of the Constitution and hence could not be validly authorised by the 1918 Ordinance. That contention is dependent upon acceptance of the view that the removal and detention of Aboriginal children pursuant to the powers conferred by the 1918 Ordinance were of a penal character and hence constituted judicial rather than executive functions. It is by no means apparent that this view can be sustained. However much one may with hindsight debate the appropriateness of the actions authorised by the 1918 Ordinance, those actions may legitimately be seen as non-punitive. The Chief Protector (and then the Director) was the legal guardian of Aboriginals and that position, although its precise scope was uncertain, clearly imposed an obligation to act in the interests of the Aboriginal community but did not involve the performance of judicial functions. No relevant decision could legitimately be taken under the 1918 Ordinance without regard to the interests of Aboriginals involved and those of the wider Aboriginal population. No doubt it may be said with justification that the events in question did not promote the welfare of Aboriginals, but that does not mean that the decisions made and the actions taken were of a judicial rather than an executive character.

[In any event, Dawson J agreed with Brennan CJ that Ch III does not apply to the exercise of judicial power within the Territories.]

⁷⁹ See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 43 108 ALR 681 per Brennan J; Official Record of the Debates of the Australasian Federal Convention (Melbourne), 8 February 1898, vol IV at 664-91; Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed, 1910, pp 614-15; La Nauze, *The Making of the Australian Constitution*, 1972, p 227

⁸⁰ [Ed. Note: Here, Dawson J cites ss 41 (right to vote in federal elections), 51(xxiiiA) (freedom from civil conscription for doctors and dentists), 51(xxxi) (right to compensation on just terms for property acquired by federal government); 80 (right to trial by jury for federal offences); 116 (freedom of religion); and 117 (non-discrimination on basis of state of residence).

Legal equality

[Dawson reaffirmed his support for the majority view in *Leeth v Commonwealth* rejected an implied equality right in the Constitution.]

Freedom of movement and association

In attacking the validity of the 1918 Ordinance, the plaintiffs rely upon an implied constitutional right to, or guarantee of, freedom of movement and association for political, cultural and familial purposes and say that, in authorising the removal and detention of Aboriginals, the 1918 Ordinance denied that right or offended against that guarantee.

To the extent that the right or guarantee which is asserted is founded upon an implied right to freedom of communication for political purposes, it is now establishedⁿ¹⁰³ that such protection as the Constitution affords to freedom of communication is relevantly derived from the requirement that members of the Commonwealth Parliament be directly chosen by the people at periodic elections.

No system of government, elected or otherwise, is prescribed for the territories. Sovereign legislative power is conferred by s 122 upon the Commonwealth Parliament to make laws for the government of the territories but there need be no representation of a territory in either House of the Parliament, nor is there any requirement that institutions of representative government exist within the territories. There is nothing to be found in the Constitution which would support an implied constitutional right to, or guarantee of, freedom of movement and association for political or other purposes that might limit the powers conferred by s 122. This aspect of the plaintiffs' claim must fail.

Fundamental rights and genocide

[Here, Dawson rejected the claim that the challenged laws were designed to destroy any Aboriginal group, held that the 1918 statute, when enacted, did not violate any international law to which Australia was a party, and found that any act that was designed for the best interests of a people could not be genocide.]

The plaintiffs' submission amounts to an argument that there are some rights at common law which are so fundamental that it is beyond the sovereign power of parliament to destroy them. It is an argument which would seek to avail itself of the reservation expressed by this court in *Union Steamship Co of Australia Pty Ltd v King* [(1988) 166 CLR 1 at 10] when, having recognised that the words "for the peace, order and good government" contained in a grant of legislative power are not words of limitation, the court said:

They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. ***

That question was, however, raised in *Kable v Director of Public Prosecutions (NSW)*, [(1996) 138 ALR 577] and there I expressed the view that the doctrine of parliamentary supremacy is a doctrine as deeply rooted as any in the common law and that it is of its essence that a court, once it has ascertained the true

scope and effect of valid legislation, should give unquestioned effect to it accordingly. I need not here repeat the reasoning or refer to the authorities which support that view.

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TOOHEY J [only areas of difference with Brennan CJ and Dawson J are noted below]:

[Although Chapter III does apply to the Territories, the removal of aboriginal children was not a judicial function but an executive one when the detention is for the welfare of the child rather than as punishment.]

[As to freedom of religion, Toohey J found s 116 only implicated by a statute enacted with a purpose to prohibit free religious exercise.] It may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory, though this is something that could only be demonstrated by evidence. But I am unable to discern in the language of the Ordinance such a purpose.

[Toohey J found that the plaintiffs had an implied right of freedom of association for political purposes, even though they lacked the right to vote. For this reason, he found that “the relevant provisions of the Ordinance must not be disproportionate to what was reasonably necessary for the protection and preservation of the Aboriginal people of the Northern Territory.” In this regard], it is relevant to consider the standards and perceptions prevailing at the time of the Ordinance. That is not to say that those standards and perceptions necessarily conclude the matter; the infringement of a relevant freedom may be so fundamental that justification cannot be found in the views of the time. But the Ordinance does have a welfare character and questions of proportionality and adaptedness cannot exclude the prevailing perceptions. ***

Legal Equality

[Although recognizing an implied equality right, Toohey J found] the Ordinance reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment of persons answering the description of "Aboriginal or half-caste"? No such basis would survive analysis today. But, for the reasons advanced earlier in this judgment, the Ordinance must be assessed by reference to what was reasonably capable of being seen by the legislature at the time as a rational and relevant means of protecting Aboriginal people against the inroads of European settlement.

** **

GAUDRON J [Again, only analyses not similar to prior opinions noted]:

[Although Gaudron J analyzed the possibility that s 122 was limited so as not to “extend to laws authorising gross violations of human rights and dignity contrary to established principles of the common law,” this did not occur here where the legislation was designed with a benign purpose.]

[Gaudron found the Chapter III did extend to the territories, but that a law authorizing detention is not an unconstitutional delegation of judicial power.]

In *Leeth*, I expressed the view, to which I still adhere, that Ch III operates to preclude the conferral on courts of discretionary powers which are conditioned in such a way that they must be exercised in a discriminatory manner. [at 502-3] If that view is correct, there is a limited constitutional guarantee of equality before the courts, not an immunity from discriminatory laws which, in essence, is what is involved in the argument that there is an implied constitutional guarantee of equality.

[With regard to the implied freedom of association], although it is for the parliament to make proper provision for the government of the territories of the Commonwealth, responsibility for their government and, thus, for the welfare of those who reside in them ultimately rests with the people to whom the Constitution entrusts the responsibility of choosing the members of parliament. Clearly, the proper discharge of that responsibility depends upon the free flow of information with respect to all matters bearing upon territory government and, also, those matters which bear upon the actual government of the Territories. [Thus, she concluded that the court on remand needed to consider whether the Ordinance impermissibly restricted those freedoms.]

An action for damages for infringement of Constitutional rights

The plaintiffs contend that there is or, perhaps, that there should now be recognised a cause of action sounding in damages for breach of constitutional guarantees and freedoms. They argue that: the integrity of constitutional entitlements, whether articulated as restrictions on legislative or executive power, privileges or immunities or positive rights, and whether express or implied, can only be preserved if appropriate and effective remedies are available for their breach.

And they contend, by reference to decisions in other jurisdictions, notably the decision of the United States Supreme Court in *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*,³²² that, in all such cases, damages are the only appropriate remedy.

There are two matters which should be noted with respect to the plaintiffs' argument. First, it is only necessary to consider the argument as it relates to s 116 and to the implied constitutional freedoms of movement and association, they being, in my view, the only relevant limitations on the legislative power conferred by s 122 and, thus, the only freedoms which could conceivably have been infringed by the actions of which the plaintiffs complain. The second matter to be noted is that, as a matter of logic, the plaintiffs' argument can only succeed if and to the extent that the Constitutional prohibition in question can only be vindicated by an award of damages and, then, only by an award made in an action for breach of that constitutional prohibition rather than in an action for infringement of common law rights.

It is convenient to turn first to s 116. By its terms, s 116 does no more than effect a restriction or limitation on the legislative power of the Commonwealth. It is not, "in form, a constitutional guarantee of the rights of individuals". It does not bind the States: they are completely free to enact laws imposing religious observances, prohibiting the free exercise of religion or otherwise intruding into the area which s 116 denies to the Commonwealth. It makes no sense to speak of a constitutional right to religious freedom in a context in which the Constitution clearly postulates that the States may enact laws in derogation of that right. It follows, in my view, that s 116 must be construed as no more than a limitation on Commonwealth legislative power. More precisely, it cannot be construed as impliedly conferring an independent or free-standing right which, if breached, sounds in damages at the suit of the individual whose interests are thereby affected.

Freedom of movement and of political communication stand in a somewhat different position from the

³²² 403 US 388 (1971). Note that a *Bivens* action cannot be brought against a federal agency, only individual agents: *Federal Deposit Insurance Corp v Meyer* (1994) 127 L Ed 2d 308 at 322-3. As to the position in Ireland and New Zealand, where neither the Irish Constitution nor the New Zealand Bill of Rights expressly provides for remedies, see, respectively, ; *The State (Quinn) v Ryan* [1965] IR 70, and ; *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667.

limited guarantee of religious freedom effected by s 116 of the Constitution. They are freedoms which, of their nature are universal, in the sense that they necessarily operate without restriction as to time or place. That being so, they necessarily restrict State legislative power and thus, may be described as giving rise to general, although as earlier indicated, not absolute freedoms. Even so, it does not follow that the Constitution gives an independent or free standing right to move in society and to associate with one's fellow citizens which, if breached, sounds in damages.

The right to move in society and to associate with one's fellow citizens is an aspect of personal liberty which is jealously guarded by the common law and which is abridged only to the extent that it is inconsistent with positive rights, including property rights, or to the extent that statute law validly provides to the contrary. Personal liberty is protected by the Constitution to the extent that freedom of movement and association are impliedly mandated by it. However, there is no basis, in my view, for construing the Constitution as conferring an additional right over and above those provided by the common law. Moreover, the relevant rights provided by the common law are properly vindicated by actions for trespass to the person and for false imprisonment, actions which sound in damages, including, in appropriate cases, exemplary damages. There is, thus, no necessity to invent a new cause of action.

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If it could be said that the Ordinance was necessary for the preservation or protection of Aboriginal people, it would follow that it was valid in its entirety. However, the Commonwealth asserts no such necessity. Moreover, there is no basis on which it could be said that those provisions of the Ordinance which authorised action impairing the rights of Aboriginal people to move in society and to associate with their fellow citizens, including their fellow Aboriginal Australians, were in any way necessary for the protection or preservation of Aboriginal people or, indeed, those Aboriginal people whose rights in that regard were, in fact, curtailed. Certainly, the powers conferred on the Chief Protector and, later, the Director by ss 6 and 16 were not conditioned on any necessity to take Aboriginal people into custody or to keep and detain them in reserves and institutions for their protection or preservation.

** **

It follows in my view that s 6, so far as it conferred authority to take people into custody, and ss 16 and 67(1)(c) were at all times invalid. As the plaintiffs complain only of their forced removal and detention in Aboriginal reserves and institutions, it is unnecessary to consider whether other provisions of the Ordinance which did not impinge on their freedom of movement and association were also invalid. So far as concerns the Administration Act, its general provisions can and should be read as conferring power subject to the Constitution. So read, no question arises as to its validity.

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[Gaudron J concluded that s 116 "was intended to extend to laws which operate to prevent the free exercise of religion, not merely those which, in terms, ban it."] Again, the question whether the Ordinance authorised acts which prevented the free exercise of religion involves factual issues which cannot presently be determined. However, if Aboriginal people had practices and beliefs which are properly characterised as a religion for the purposes of s 116, and if, as would seem likely, those practices were carried out in association with other members of the Aboriginal community to which they belonged or at sacred sites or other places on their traditional lands, removal from their communities and their traditional lands would, necessarily, have prevented the free exercise of their religion. Whether or not that was the case remains to be decided. But on the assumption that it was, the question arises whether the Ordinance was a law "for prohibiting the free exercise of any religion".

It is convenient now to turn to the Commonwealth's plea that the purpose of the Ordinance was "the protection and preservation of persons of the Aboriginal race" and the issues raised by question 3. Clearly, a law may have more than one purpose. Similarly, a particular purpose may be subsumed in a

larger or more general purpose. That latter proposition is well illustrated by the present case. It is clear from the terms of the Ordinance that one of its purposes, evident from the terms of s 16, was to remove Aboriginal and half-caste people to and keep them in Aboriginal reserves and institutions. That purpose is not necessarily inconsistent with the more general purpose which the Commonwealth asserts. And neither purpose is necessarily inconsistent with the purpose of removing Aboriginal children from their families and communities, thereby preventing them from participating in community practices. Indeed, in the absence of some overriding social or humanitarian need -- and none is asserted -- it might well be concluded that one purpose of the power conferred by s 16 of the Ordinance was to remove Aboriginal and half-caste children from their communities and, thus, prevent their participation in community practices. And if those practices included religious practices, that purpose necessarily extended to prohibiting the free exercise of religion.

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McHUGH J [substantially agrees with Dawson J]

GUMMOW J

[On the question of damages for violation of constitutional rights, plaintiffs urge] the existence in Australia of what in the United States is an action for damages arising from violation of constitutional rights by employees of the federal government. The United States doctrine has been developed since 1971 and derives from *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* [403 US 388 (1971)]. *Bivens* has received some favourable attention in New Zealand.³⁹⁶ However, current authority in this court suggests there is no such doctrine in Australia in respect of executive action in excess of constitutional authority or in contravention of a constitutional prohibition beyond liability under the common law for tortious or other wrongful acts.³⁹⁷ On the other hand, s 84 of the Constitution directly creates an obligation in the Commonwealth enforceable in this court to pay certain pensions and retiring allowances to certain State public servants transferred to and retained by the Commonwealth.

The reasoning in the Australian authorities has not proceeded on the footing that, because a constitutional guarantee operates to impose a restraint upon legislative power (as does s 51(xxxi)) or to confer an immunity upon the individual in respect of certain activity (as does s 117), it follows that the guarantee confers a "right" which must have a remedy in the form of substantive relief upon a personal cause of action. Such a conclusion does not necessarily follow from the premise.

Moreover, *Bivens* has attracted much unfavourable comment in the United States, including the statement that the *Bivens* doctrine is "so devoid of constitutional legitimacy . . . and so harmful in its consequences" that the Supreme Court itself should consider overruling *Bivens*.⁴⁰² The decision is only to be understood against the limited waiver of the tort immunity of the United States by the Federal Torts Claims Act of

³⁹⁶ *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 at 702; cf at 705

³⁹⁷ *James v Commonwealth* (1939) 62 CLR 339 at 369-70 ; *McClintock v Commonwealth* (1947) 75 CLR 1 at 19 ; *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545 at 567-8 ; *Northern Territory v Mengel* (1995) 185 CLR 307 at 350-3, 372-3 129 ALR 1. In certain circumstances member states may be liable to provide reparation for damage sustained by individuals by reason of breach by member states of European Union law: see ; *Three Rivers District Council v Bank of England (No 3)* [1996] 3 All ER 558 at 622-5

⁴⁰² *Davis and Pierce, Administrative Law Treatise*, 3rd ed, (1994), vol 3, §19.5. Previous criticisms by Professor Davis appear throughout his work, *Constitutional Torts*, (1984), esp at 181-210

1946, and by the limitation of the Civil Rights Act of 1871 to deprivation of federal rights by State or local officials acting under colour of State law. The Supreme Court recently declared that:⁴⁰⁵

[W]e implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available (emphasis in original).

The treatment by the Judiciary Act of the tort liability of the Commonwealth has been quite different to that of the United States. So also is the relationship between the common law and the federal Constitution.⁴⁰⁶ Moreover, the plaintiffs' claim that their *Bivens* actions against the Commonwealth would escape any time limitation period would not hold in the United States. It has been held that *Bivens* creates no such class of perpetual federal liabilities.⁴⁰⁷ ***

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Other implications

The plaintiffs also assert that the legislative power from which was derived the authority to make the impugned provisions of the Ordinance was restricted by other constitutional implications. These were identified as a "constitutional right to, and immunity from legislative and executive restrictions on, freedom of movement and association for political, cultural and familial purposes".

The problem is in knowing what "rights" are to be identified as constitutionally based and protected, albeit they are not stated in the text, and what methods are to be employed in discovering such "rights". Recognition is required of the limits imposed by the constitutional text, the importance of the democratic process and the wisdom of judicial restraint.

In *Pioneer Express Pty Ltd v Hotchkiss*, [(1958) 101 CLR 536 at 550] Dixon CJ identified as resting upon a solid foundation the claim to a constitutional implication protecting the citizens of Australia: from attempts on the part of State legislatures to prevent or control access to the Capital Territory and communications and intercourse with it on the part of persons within the States, and to hamper or restrain the full use of the federal capital for the purposes for which it was called into existence.

His Honour referred to considerations which "necessarily imply the most complete immunity from State interference with all that is involved in [the Territory's] existence as the centre of national government", and continued that that implication certainly meant "an absence of State legislative power to forbid, restrain or impede access to it". More recent decisions have emphasised the central importance to the efficacious working of the system of responsible and representative government established by the Constitution for the Commonwealth of communication of information respecting, and discussion of, matters of political interest.

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[With regard to interference with religious freedom, Gummow J opined that the] withdrawal of infants, in

⁴⁰⁵ *Federal Deposit Insurance Corp v Meyer* 127 L Ed 2d 308 at 323 (1994). This case holds that *Bivens* actions run against individuals not federal agencies. In the present actions the plaintiffs sue the Commonwealth itself, not any officers of the Commonwealth

⁴⁰⁶ *Lange v Australian Broadcasting Corp* (1997) 145 ALR 96 at 108-9

⁴⁰⁷ *Leonhard v United States* 633 F 2d 599 at 612-13 (1980) ; *McSurely v Hutchison* 823 F 2d 1002 (1987) ; *Seber v Unger* 881 F Supp 323 at 327 (1995)

exercise of powers conferred by the 1918 Ordinance, from the communities in which they would otherwise have been reared, no doubt may have had the effect, as a practical matter, of denying their instruction in the religious beliefs of their community. Nevertheless, there is nothing apparent in the 1918 Ordinance which suggests that it aptly is to be characterised as a law made in order to prohibit the free exercise of any such religion, as the objective to be achieved by the implementation of the law.