

2015

## The Constitutional Dimensions of Aboriginal Title

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### Citation Information

Slattery, Brian. "The Constitutional Dimensions of Aboriginal Title." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71. (2015).

DOI: <https://doi.org/10.60082/2563-8505.1305>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/3>

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# The Constitutional Dimensions of Aboriginal Title

Brian Slattery\*

## I. INTRODUCTION

In attempting to explain the nature of Aboriginal title, commentators have often resorted to analogies with traditional property rights. The Privy Council originally likened Aboriginal title to a “usufruct”, a form of property right found in Roman and civil law.<sup>1</sup> And more recently, others have compared Aboriginal title to a “fee simple” — the highest form of land title known to the common law.<sup>2</sup>

In *Tsilhqot'in Nation v. British Columbia*,<sup>3</sup> the Supreme Court of Canada rightly pours cold water on such efforts. It insists on the distinctive nature of Aboriginal title as a *sui generis* right and resists any attempt to fit it into standard property categories. As Chief Justice McLachlin explains for a unanimous Court:

Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title “is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts”.<sup>4</sup>

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<sup>1</sup> In *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, at 54 [hereinafter “*St. Catherine's*”], the Privy Council described Aboriginal title as a “personal and usufructuary right”. For critical discussion, see William B. Henderson, “Canada's Indian Reserves: The Usufruct in Our Constitution” (1980) 12 Ottawa L. Rev. 167.

<sup>2</sup> In *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 110 (S.C.C.) [hereinafter “*Delgamuukw*”], the appellants argued that Aboriginal title was tantamount to an “inalienable fee simple”.

<sup>3</sup> [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257 (S.C.C.) [hereinafter “*Tsilhqot'in Nation*”].

<sup>4</sup> *Id.*, at para. 72.

Nevertheless, nature abhors a vacuum. When we have nothing with which to compare Aboriginal title, traditional property concepts tend to slip back into the discussion. Indeed, McLachlin C.J.C. immediately goes on to say:

Aboriginal title confers ownership rights *similar* to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.<sup>5</sup>

These are significant similarities. Yet, as *Tsilhqot'in Nation* makes clear, in many other ways Aboriginal title is strikingly different from fee simple — so different that one wonders if it can be the same *sort* of right at all. Consider these points of distinction. First, Aboriginal title is a *collective right* — vested in an Aboriginal People rather than an individual.<sup>6</sup> Moreover, it is inherently collective — it cannot be held by an individual, but only by a group. By contrast, fee simple is typically vested in a single individual.

Second, Aboriginal title is internally *pluralistic*. Although it presents a uniform face to the outside world, it is governed internally by the laws of the particular Aboriginal Nation — laws that differ from one Nation to the next.<sup>7</sup> In sum, Aboriginal title has a complex internal structure. It is like a clockwork egg, its smooth surface concealing an intricate world within — a world as diverse as its Aboriginal title-holders. By contrast, fee simple typically lacks such an internal structure, let alone one so diverse.

Third, Aboriginal title has a *jurisdictional dimension*. The fact that it is vested in a community means that there must be some body or bodies endowed with the authority to determine which individuals have the right to use the land and to regulate the ways the land may be used.<sup>8</sup> By contrast, the fact that fee simple is generally held by an individual ordinarily obviates the need for such a power.

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<sup>5</sup> *Id.*, at para. 73 (emphasis added).

<sup>6</sup> *Id.*, at para. 74. I use the terms “Aboriginal Nation” and “Aboriginal People” in a broad, interchangeable sense, so as to comprise all the Aboriginal Peoples covered by s. 35, *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, where they are described as including “the Indian, Inuit and Métis peoples of Canada”.

<sup>7</sup> *Id.*, at para. 75.

<sup>8</sup> *Id.*, at paras. 18, 73, 94.

Fourth, Aboriginal title is *inalienable* — it cannot be sold or transferred outside the group, but may only be surrendered to the Crown.<sup>9</sup> Fee simple, on the other hand, is inherently alienable; it may be sold, leased and bequeathed with very few restrictions.<sup>10</sup>

Fifth, according to the Supreme Court, Aboriginal title is subject to an *inherent limit* which prevents the land from being despoiled or encumbered in ways that preclude future generations from using and enjoying the land.<sup>11</sup> By contrast, at common law, lands held under fee simple may be exploited in any manner the owner sees fit — even laid to waste or rendered unfit for normal purposes.<sup>12</sup>

Finally, Aboriginal title flows from a *special historical relationship* between the Crown and Aboriginal peoples. Chief Justice McLachlin comments:

It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question.<sup>13</sup>

This final characteristic provides the key to the nature of Aboriginal title. The historical relationship between the Crown and Aboriginal peoples evolved organically from a complex series of treaties, alliances and associations from the 1600s onward, many of which continue to the present day. Over time this relationship took on a *constitutional character*, as Aboriginal peoples became partners in the emerging federation of Canada.<sup>14</sup> Aboriginal title, as the “unique product” of this relationship, shares in its constitutional character.

In effect, the reason why Aboriginal title cannot be described in traditional property terms is that it is not a concept of *private law* at all. It is a concept of *public law*. It does not deal with the rights of private entities but with the rights and powers of constitutional entities that form part of the Canadian federation. If we cast about for analogies to Aboriginal title, we discover a close parallel in Provincial title — the rights held by the Provinces to lands within their boundaries. Indeed a

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<sup>9</sup> *Id.*, at para. 74.

<sup>10</sup> This is the position at common law. Of course, restrictions may be imposed by legislation.

<sup>11</sup> *Tsilhqot'in Nation*, *supra*, note 3, at para. 74.

<sup>12</sup> Once again, these remarks deal with the position at common law. Legislation normally poses significant limits to the owner's rights.

<sup>13</sup> *Tsilhqot'in Nation*, *supra*, note 3, at para. 72.

<sup>14</sup> For detailed discussion, see B. Slattery, “The Aboriginal Constitution” in J. Cameron, B.L. Berger & S. Lawrence, eds., *Constitutional Cases 2013* (2014) 67 S.C.L.R. (2d) 319.

comparison between Aboriginal title and Provincial title has the capacity to shed light on some puzzling aspects of the subject.

This observation may at first seem surprising — it is certainly not how Aboriginal title has often been viewed. So in the next section we will sketch in broad strokes the main similarities between the two forms of title. Nevertheless, Aboriginal title and Provincial title are hardly identical, and in the third section we will explore some complications and differences. One such is the “inherent limit” on Aboriginal title, which has no apparent parallel on the Provincial side. Another arises from the fact that many Aboriginal title lands are located within Provincial boundaries, leading to questions about the relative rights of Aboriginal Nation and Province. A final complication arises from the joint application of Aboriginal, Provincial and Federal laws to Aboriginal lands.<sup>15</sup>

## II. THE KINSHIP OF ABORIGINAL TITLE AND PROVINCIAL TITLE

### 1. Collective

Both Aboriginal title and Provincial title are inherently collective in character — that is, both are vested in constitutional entities that represent communities of people. In the first case, the title is lodged in the Aboriginal Nation under the common law doctrine of Aboriginal title, as recognized and affirmed in section 35, *Constitution Act, 1982*.<sup>16</sup> In the other case, the title is held by the Province under sections 109 and 117, *Constitution Act, 1867*,<sup>17</sup> and related clauses. As we will see later, in both instances the title is a species of beneficial interest; neither the Aboriginal Nation nor the Province holds the ultimate title to the land, which is vested in the unitary Crown.<sup>18</sup>

The collective character of Aboriginal title has been established in a long series of cases. Thus in *Delgamuukw*,<sup>19</sup> Lamer C.J.C. holds that Aboriginal title cannot be held by individual Aboriginal persons; it is a collective right vested in all members of an Aboriginal Nation.<sup>20</sup>

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<sup>15</sup> For the sake of brevity, Aboriginal title lands are henceforth described simply as “Aboriginal lands”.

<sup>16</sup> Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

<sup>17</sup> (U.K.), 30 & 31 Vict., c. 3 [reprinted in R.S.C. 1985, App. II, No. 5].

<sup>18</sup> See discussion below in s. II.3.

<sup>19</sup> *Delgamuukw*, *supra*, note 2.

<sup>20</sup> *Id.*, at para. 115.

*Tsilhqot'in Nation* reiterates this view, but with a slightly different emphasis:

Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations.<sup>21</sup>

As for the Provinces, their collective title to the public lands within their borders is recognized in section 109, *Constitution Act, 1867*, which provides:

All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union ... shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.<sup>22</sup>

With both Provinces and Aboriginal Nations, the collective nature of their title is a function of their public character as constitutional entities representing communities of people. However, as we will see later, this collective character does not preclude a Province or Aboriginal Nation from allocating or recognizing individual rights to the lands in question — in each case to the extent permitted by the laws of the Province or Nation and subject to overall constitutional limits.

One difference may be noted here: while Provincial title traces its origins to the Crown, Aboriginal title is a form of allodial title — one that does not originate in the Crown but rests on the common law doctrine of Aboriginal title, which is a form of inter-societal law linking Aboriginal Peoples with the Crown.<sup>23</sup>

<sup>21</sup> *Tsilhqot'in Nation*, *supra*, note 3, at para. 74; see also para. 86.

<sup>22</sup> See also s. 117, *Constitution Act, 1867*, which provides: “The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act ...”. Section 109 refers only to the original Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, however the Provinces that subsequently joined Confederation were eventually placed in a similar position. For detailed discussion, see: Gerard La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969), at 1-47 [hereinafter “La Forest, *Natural Resources*”]; and Peter Hogg, *Constitutional Law of Canada*, loose-leaf ed. (Toronto, ON: Thomson Carswell, 2007, updated), ch. 29 [hereinafter “Hogg, *Constitutional Law of Canada*”].

<sup>23</sup> For discussion and references, see Brian Slattery, “The Metamorphosis of Aboriginal Title” (2006) 85 Can. Bar Rev. 255, at 257-59, 269-71 [hereinafter “Slattery, ‘Metamorphosis of Aboriginal Title’”].

## 2. Pluralist

Both Provincial title and Aboriginal title shelter under their auspices a diverse array of land regimes. In each case the title is basically uniform in external structure but diverse in internal make-up — like a chemical compound that assumes a myriad of crystalline forms. Thus, although Quebec holds a title that in its exterior dimensions is virtually identical to that of Ontario, its internal land regime is quite distinctive, governed by civil law rather than common law. By the same token, while the Aboriginal title of the Mi'kmaq is basically the same in external make-up as the title of the Tsilhqot'in, in each case it assumes a different inner form, as determined by the laws of the Nation.<sup>24</sup>

The diversity of Provincial land regimes flows from section 129 of the *Constitution Act, 1867*, which continues in force the laws that applied in the various Provinces before they joined Confederation.<sup>25</sup> In the case of Quebec, this law was the Civil Code of Lower Canada of 1866, which codified the melange of old French law and legislation that hitherto governed property and civil rights in the Province. In the rest of Canada, the land regime was based on English common law, with an overlay of statutes.<sup>26</sup>

On the Aboriginal side, the multiplicity of land regimes stems from the common law principle of continuity, whereby the laws and customs of Aboriginal Nations presumptively continued in force after the advent of the Crown.<sup>27</sup> As McLachlin C.J.C. states in the *Tsilhqot'in Nation* case:

Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of

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<sup>24</sup> For discussion, see Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727, at 744-48 [hereinafter "Slattery, 'Understanding Aboriginal Rights'"]; Slattery, "Metamorphosis of Aboriginal Title", *supra*, note 23, at 269-71, 279; Kent McNeil, "Aboriginal Title in Canada: Site-Specific or Territorial?" (2014) 91 Can. Bar Rev. 745 [hereinafter "McNeil, 'Aboriginal Title in Canada'"].

<sup>25</sup> Section 129 states: "Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union ... shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; ...".

<sup>26</sup> See the historical review in Bruce Ziff, *Principles of Property Law*, 6th ed. (Toronto: Thomson Reuters, 2014), at 61-75.

<sup>27</sup> For discussion, see: Slattery, "Understanding Aboriginal Rights", *supra*, note 24, at 738-39; Peter Hutchins, Carol Hilling & David Schulze, "The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine" (1995) 29 U.B.C. Law Rev. 251, especially at 262-64 [hereinafter, "Hutchins, Hilling & Schulze, 'Aboriginal Right to Self-Government'"]; Mark D. Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill L.J. 711; McNeil, "Aboriginal Title in Canada", *supra*, note 24.

use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other land-owners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.<sup>28</sup>

In other words, an Aboriginal Nation inherits the body of traditional laws and customs governing the use of its lands, subject always to the Nation's right to adapt and supplement these laws so as to meet contemporary needs and conditions.<sup>29</sup>

### 3. Beneficial

Both Provincial title and Aboriginal title are forms of beneficial title, which import the right to use and control the land and to enjoy its benefits. The ultimate title to both Provincial lands and Aboriginal lands is vested in the unitary Crown — not the Crown in right of the Province or the Crown in right of the Dominion, but the Crown considered as an indivisible entity. In neither case does the Crown's ultimate title carry any beneficial rights to the land.

As regards the Province, this general schema was first elaborated nearly a century and a half ago in *St. Catherine's Milling and Lumber Company v. The Queen*.<sup>30</sup> The Privy Council held that, wherever public land is described in constitutional instruments as “the property of” or as “belonging to” a Province, these expressions simply mean that the right to its beneficial use or proceeds has been appropriated to the Province and is subject to the control of its legislature, the land itself being vested in the Crown.<sup>31</sup> In other words, all beneficial interest in public lands within provincial boundaries lies with the Province, while the title remains in the Crown.<sup>32</sup>

<sup>28</sup> *Tsilhqot'in Nation*, *supra*, note 3, at para. 75. See also *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507 (S.C.C.), *per* McLachlin J., at para. 263: “The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread — the recognition by the common law of the ancestral laws and customs of the aboriginal peoples who occupied the land prior to European settlement.”

<sup>29</sup> See generally John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

<sup>30</sup> (1888), 14 A.C. 46 [hereinafter “*St. Catherine's*”]. For discussion and further references, see La Forest, *Natural Resources*, *supra*, note 22, at 15-26.

<sup>31</sup> *St. Catherine's*, *supra*, note 30, at 56 (para. 8).

<sup>32</sup> *Id.*, at 55 (para. 7).



The Supreme Court confirms this holding in the recent case of *Grassy Narrows First Nation v. Ontario (Natural Resources)*,<sup>33</sup> which concerns a transfer of territories from the Dominion of Canada to the Province of Ontario effected in the *Ontario Boundaries Extension Act*.<sup>34</sup> Chief Justice McLachlin holds for the Court that the legislation did not constitute a transfer of Crown rights in the lands to Ontario, but rather a transfer of the beneficial interest. In effect, it changed the beneficial owner of the lands and the emanation of the Crown responsible for dealing with them, but it did not alter the position of the unitary Crown as holder of the ultimate title.<sup>35</sup>

The *Tsilhqot'in Nation* case adopts a similar approach to Aboriginal lands.<sup>36</sup> Chief Justice McLachlin holds that Aboriginal title is a beneficial interest in the land, the ultimate title to which is vested in the Crown. This means that the Aboriginal title-holders have the right to the benefits associated with the land — the right to use it, enjoy it and profit from its economic development. For its part, the Crown does not hold any beneficial interest in the land. It does not have the right to use and enjoy the land or benefit from any profits flowing from its use. It holds only the radical or underlying title, which has two related components, namely a fiduciary duty owed to Aboriginal people when dealing with their land, and the right to encroach on Aboriginal title if this can be justified under section 35 of the *Constitution Act, 1982*.<sup>37</sup> These components apply at both Provincial and Federal levels, depending on which emanation of the Crown has the constitutional authority to deal with the Aboriginal lands in question.

#### 4. Jurisdictional

Provinces and Aboriginal Nations alike have the power to manage their lands and to pass laws governing their management.<sup>38</sup> This power

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<sup>33</sup> [2014] S.C.J. No. 48, [2014] 2 S.C.R. 447 (S.C.C.) [hereinafter "*Grassy Narrows*"].

<sup>34</sup> S.C. 1912, c. 40.

<sup>35</sup> *Grassy Narrows*, *supra*, note 33, at paras. 46, 48.

<sup>36</sup> *Tsilhqot'in Nation*, *supra*, note 3, at paras. 18, 69-71.

<sup>37</sup> *Id.*, at para. 71.

<sup>38</sup> For parallel approaches that stress the jurisdictional dimensions of Aboriginal title, see Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 *Tulsa J. of Comp. and Int'l L.* 253, reprinted in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001), 58 at 95-101; Kent McNeil, "Indigenous Land Rights and Self-Government: Inseparable Entitlements" in Lisa Ford and Tim Rowse, eds., *Between Indigenous and Settler*

has both executive and legislative aspects. It includes the power to grant land rights to private individuals and groups by way of sale, lease and licence, to the extent permitted by the laws of the particular Province or Aboriginal Nation. It also comprises the power to pass laws and regulations controlling how the lands are allocated and used, so as to ensure that the public interest is served — including the power to expropriate private property and other interests in land. The Supreme Court has further suggested that Aboriginal Nations are subject to an “inherent limit” in the form of a constitutional duty to safeguard the rights of future generations — to be discussed later.<sup>39</sup>

In the case of the Provinces, this power is established by section 92(5) of the *Constitution Act, 1867*, which provides that the Provincial legislature has the exclusive power to make laws regarding the “Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.” This provision is complemented by section 92(13), which confers the power to legislate for “Property and Civil Rights in the Province”.<sup>40</sup>

Aboriginal Peoples stand in broadly the same position with respect to Aboriginal title lands, under section 35, *Constitution Act, 1982*. In the *Tsilhqot’in Nation* case, the Supreme Court affirms that an Aboriginal Nation has the right “to use and control the land and enjoy its benefits”.<sup>41</sup> As noted earlier, this includes “the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land”.<sup>42</sup> In sum, Aboriginal title confers:

... the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of

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*Governance* (Routledge, 2013), 135-47; Dwight Newman, “Aboriginal ‘Rights’ as Powers: Section 35 and Federalism Theory” in Graeme Mitchell *et al.*, eds., *A Living Tree: The Legacy of 1982 in Canada’s Political Evolution* (Toronto: LexisNexis Canada, 2007), 527-40. For general discussions of Aboriginal governmental powers, see: Hutchins, Hilling & Schulze, “Aboriginal Right to Self-Government”, *supra*, note 27; Brian Slattery, “First Nations and the Constitution: A Question of Trust” (1992) 71 Can. Bar Rev. 261, at 278-87.

<sup>39</sup> See s. III.1, below.

<sup>40</sup> For detailed discussion, see La Forest, *Natural Resources*, *supra*, note 22, at 164-76; Hogg, *Constitutional Law of Canada*, *supra*, note 22, ch. 29.

<sup>41</sup> *Tsilhqot’in Nation*, *supra*, note 3, at para. 18.

<sup>42</sup> *Id.*, at para. 73.

first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.<sup>43</sup>

This means that some authoritative body or bodies within the Nation must be vested with the power to ascertain and allocate rights to the land and to control its use and preservation, including the power to expropriate individual interests. While the existence and scope of this jurisdiction are determined globally by the common law of Aboriginal rights, the legal machinery and modalities through which it is exercised are governed by the particular constitution and laws of the Nation in question.<sup>44</sup>

Nevertheless, it could be argued that the power of an Aboriginal Nation to grant land rights to private individuals and entities is restricted by two elements: (1) the rule against alienation; and (2) the “inherent limit”. We will consider the first topic in the next section, and take up the question of the “inherent limit” later.<sup>45</sup>

## 5. Inalienable

In the case of both Provinces and Aboriginal Nations, there are strict restrictions on the power to alienate their lands in such a way as to amputate the lands from the communal territory — in effect, altering the territorial boundaries of the Province or the Nation.

Thus the Province of Ontario cannot by simple agreement transfer its lands to another Province (much less to a private entity) in such a way as to sever those lands from the territory of Ontario. To do this requires a constitutional amendment under Part V of the *Constitution Act, 1982*. Section 43 provides that any alteration to boundaries between Provinces may only be made when authorized by resolutions of the Senate and House of Commons of Canada and of the legislative assembly of each Province to which the amendment applies. More generally, under sections 38(1) and 38(2) a constitutional amendment that derogates from the proprietary rights of a Province requires resolutions supported by a majority of the members of the Senate, the House of Commons and the legislative assemblies of at least two-thirds

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<sup>43</sup> *Id.*, at para. 94. See also *Delgamuukw*, *supra*, note 2, at para. 115 (emphasis added), where Lamer C.J.C. observes: “Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. *Decisions with respect to that land are also made by that community.*”

<sup>44</sup> *Tsilhqot’in Nation*, *supra*, note 3, at para. 75.

<sup>45</sup> See s. III.1, below.

of the Provinces that have at least 50 per cent of the population of all the Provinces.<sup>46</sup>

These requirements do not, of course, affect the Province's capacity to grant or sell lands to private parties, so long as the lands continue to be part of the Province and remain subject to its laws and jurisdiction. What the Province cannot do (not at least without a constitutional amendment) is to transfer its lands in a manner that purports to free them from that jurisdiction.

Similarly an Aboriginal Nation cannot alienate its lands to another entity (whether Aboriginal or non-Aboriginal) in such a way as to permanently sever the lands from the Nation's territory — not at least without following special constitutional procedures involving a surrender to the Crown.<sup>47</sup> This rule traces its origins to laws passed in British American colonies during the 17th and 18th centuries,<sup>48</sup> and it was subsequently given general application in the *Royal Proclamation, 1763*.<sup>49</sup> In the latter document, the King refers to the great frauds and abuses committed in purchasing Indian lands and goes on to forbid private persons from making such purchases:

... 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 ...

This rule aimed to quash the practice whereby settlers and speculators purchased lands from Aboriginal Nations and then claimed title to those lands under the legal systems applying within the settler communities. In effect, this practise purported to convert titles held under Aboriginal law and custom to ones held under English law. Not only were such purchases often tainted with fraud, they also ran afoul of the common law rule that generally speaking all titles to land should originate in the Crown. As Lamer C.J.C. observes in the *Delgamuukw* case:

... the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title

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<sup>46</sup> See also s. 38(3) which permits a Province to block the application of such an amendment to the Province by passing a dissenting resolution in its legislative assembly.

<sup>47</sup> For discussion, see Slattery, "Understanding Aboriginal Rights", *supra*, note 24, at 742-43.

<sup>48</sup> See Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (Doctoral Dissertation, Oxford University, 1979), at 112-17, online: <[http://works.bepress.com/brian\\_slattery/24](http://works.bepress.com/brian_slattery/24)>.

<sup>49</sup> Reprinted in R.S.C. 1985, App. II, No. 1 [hereinafter "*Royal Proclamation*"]. A more accurate text of the Proclamation is found in Clarence S. Brigham, ed., *British Royal Proclamations Relating to America* (Worcester, MA: American Antiquarian Society, 1911), at 212.

from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants. It is also, again only in part, a function of a general policy ‘to ensure that Indians are not dispossessed of their entitlements’: see *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 133.<sup>50</sup>

However, the rule against alienation does not affect the Aboriginal Nation’s capacity to grant or lease lands under its own laws, so long as the lands remain part of the communal territory and subject to the Nation’s jurisdiction. This point was recognized almost two centuries ago by the United States Supreme Court in the classic case of *Johnson & Graham’s Lessee v. McIntosh*.<sup>51</sup> The plaintiffs laid claim to certain lands in the state of Illinois, relying on conveyances made to private individuals in the 1770s by the chiefs of the Illinois and Piankeshaw Nations. The same Nations subsequently ceded the lands in question under public treaty to the government of the United States, which in turn granted them to the defendant. The issue was whether the plaintiffs’ title, ostensibly acquired directly from the Aboriginal Nations, prevailed over the defendant’s title, which stemmed from the American government.

Chief Justice Marshall, speaking for a unanimous Court, rejects the plaintiffs’ claim to hold title under the Indian purchases. He cites several grounds.<sup>52</sup> The first and most familiar maintains that, under the law and practice of Great Britain and the United States, the state possesses the exclusive power to dispose of lands in the American colonies and to extinguish Indian title by purchase or conquest. The Court cites the so-called “principle of discovery” as well as the prohibition of private purchases in the *Royal Proclamation, 1763*.

However, Marshall C.J.C. also advances a distinct line of reasoning, which is highly relevant here. He points out that the title of the Crown can be acquired only by a conveyance from the Crown. If a private individual purchases Indian title for his own benefit, he can acquire only that title. Assuming that the Indians have the power under their laws or customs to allow an individual to hold a portion of their lands in severalty, still the land remains part of the Indians’ territory and continues to be held under them, by a title dependent on their laws. The grant derives its efficacy from their will, and if they choose to retake the

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<sup>50</sup> *Delgamuukw*, *supra*, note 2, at para. 129.

<sup>51</sup> (1823), 8 Wheaton 543, 21 U.S. 543, 5 L. Ed. 681 [hereinafter “*Johnson v. McIntosh*”].

<sup>52</sup> For a fuller analysis of the decision, see Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983), at 17-38.

land and make a different disposition of it (as by surrendering the land to the Crown), the courts of the United States cannot intervene to protect 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.<sup>53</sup>

In effect, the Court draws a distinction between internal land grants, which remain subject to the laws and jurisdiction of the Aboriginal Nation, and external transfers, which purport to remove the land from the Aboriginal territory. The rule against the alienation of Aboriginal lands forbids the second sort of disposition, not the first.

Nevertheless, some cases appear to state the rule against alienation more broadly. For example, in *Delgamuukw*, Lamer C.J.C. says:

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.<sup>54</sup>

Taken in its broadest sense, such language might rule out *any* transfers or sales of Aboriginal lands, even ones that do not affect the lands' status as part of the Aboriginal territory. However, the better view is that it refers only to external transactions, not internal ones. The key question is whether the Aboriginal Nation retains jurisdiction over the lands and hence the power to control their use and to retake them when necessary. If so, the transaction does not violate the rule against alienation.

Nevertheless, it could be argued that, at the least, the rule forbids dispositions of Aboriginal land to persons who are not members of the Aboriginal Nation. Such transactions, it is said, run afoul of the objective of protecting Aboriginal lands from exploitation by outsiders. However, the argument does not seem convincing. Of course, the internal laws and customs of an Aboriginal Nation may restrict or forbid grants of land rights to outsiders, so long as basic constitutional norms are observed. But there does not seem to be anything in the rule against alienation proper that

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<sup>53</sup> *Johnson v. M'Intosh*, *supra*, note 51, at 593.

<sup>54</sup> *Delgamuukw*, *supra*, note 2, at para. 113.

prevents such transactions so long as the Aboriginal Nation retains control of the lands and the power to take them back if and when needed.

### III. COMPLICATIONS

#### 1. The Inherent Limit

According to the Supreme Court, an Aboriginal Nation's ability to use and manage its lands is restricted by an "inherent limit" — for which no parallel exists on the Provincial side. The concept first surfaces in the *Delgamuukw* case, where Lamer C.J.C. states that lands held pursuant to Aboriginal title cannot be used in a manner that is irreconcilable with the nature of the attachment to the land that forms the basis of the Aboriginal group's claim to title.<sup>55</sup> The Chief Justice makes it clear that this limitation does not confine an Aboriginal group to traditional or customary uses of their lands.<sup>56</sup> That, he says, would be to impose a "legal straightjacket".<sup>57</sup> To the contrary, Aboriginal lands may be used for a broad variety of contemporary purposes, regardless whether or not those uses are grounded in the original practices, customs and traditions of the group. Such uses, for example, may extend to the exploitation of any minerals on the lands, including oil and gas reserves.<sup>58</sup>

What then does the inherent limit rule out? In effect, says the Chief Justice, it prevents an Aboriginal group from using its lands in such a way as to rupture the bond with the land that forms the historical basis of the group's title. For example, if the group's occupancy has been established by the use of the land as a hunting ground, then the group may not use it in a way that destroys its value for such a purpose, as 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 devote the land to uses which destroy that relationship, as by turning it into a parking lot.<sup>59</sup> Chief Justice Lamer draws an analogy with the doctrine of equitable waste at common law, which states that persons holding a life estate in real property cannot commit "wanton or extravagant acts of

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<sup>55</sup> *Delgamuukw*, *supra*, note 2, at paras. 111, 125.

<sup>56</sup> *Id.*, at paras. 119-124.

<sup>57</sup> *Id.*, at para. 132.

<sup>58</sup> *Id.*, at paras. 120-122.

<sup>59</sup> *Id.*, at para. 128.

destruction” or “ruin the property”.<sup>60</sup> Those descriptions, he says, capture the kind of limit he has in mind.

It may be seen that two different versions of the inherent limit run through this account. The first is an *historical approach* which seeks to safeguard the original relationship that an Aboriginal group held with its ancestral lands. The second is a *stewardship approach* which bars activities that effectively destroy the land or render it unfit for future use. The two approaches are not wholly consistent and may yield differing results. For example, where an Aboriginal Nation historically used a tract of land for hunting and gathering, converting the entire tract to mixed farming and ranching would arguably rupture the group’s historical relationship with the land because it rules out a hunting and gathering lifestyle. By contrast, on the stewardship approach, the activities of farming and ranching would not ordinarily be considered “wanton or extravagant acts of destruction” that “ruin the property”. Indeed, it can be argued that the historical approach risks imposing just the kind of legal straight-jacket that the Chief Justice hopes to avoid, whereas the stewardship approach is more flexible and forward-looking.

Chief Justice Lamer does not cite any precedents supporting either version of the inherent limit — not surprisingly, because none seem to exist. No trace of the concept can be found in prior leading cases on Aboriginal rights, nor does it feature in such major historical documents as the *Royal Proclamation, 1763* or the Treaties with Aboriginal peoples. Indeed, the contrary view is expressed in a famous passage from *Johnson v. M’Intosh*, where Marshall C.J.C. states that Aboriginal Peoples “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 ...”.<sup>61</sup> This passage has been quoted in innumerable Canadian cases,<sup>62</sup> and it supports the conclusion that Aboriginal people have the right to use their lands as they see fit, subject only to the rule against external alienation.

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<sup>60</sup> *Id.*, at para. 130. Chief Justice Lamer derives these phrases from E.H. Burn, *Cheshire and Burn’s Modern Law of Real Property*, 14th ed. (London: Butterworths, 1988), at 264, and Robert E. Megarry and H.W.R. Wade, *The Law of Real Property*, 4th ed. (London: Sweet and Maxwell, 1975), at 105.

<sup>61</sup> *Johnson v. M’Intosh*, *supra*, note 51, at 574 (emphasis added).

<sup>62</sup> See, e.g., *Calder v. British Columbia (Attorney-General)*, [1973] S.C.J. No. 56, [1973] S.C.R. 313, at 382 (S.C.C.), *per* Hall J.; *Guerin v. Canada*, [1984] S.C.J. No. 45, [1984] 2 S.C.R. 335, at para. 88 (S.C.C.), *per* Dickson J.



So Lamer C.J.C. appears to have created the inherent limit out of whole cloth. Of course the common law is no stranger to judicial innovation, and there is little reason to think the law of Aboriginal title is immune to evolution and change.<sup>63</sup> Nevertheless, the novelty of the concept turns the spotlight on the reasons advanced to support it. How adequate are they?

The Chief Justice's principal argument is that, since the purpose of Aboriginal title is to protect historical Aboriginal occupancy, that purpose should continue into the future and rule out activities that jeopardize the ability of future generations to use and enjoy the lands. "Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time."<sup>64</sup> In effect, this protection applies not only to the past but also to the future. As a result, concludes the Chief Justice, "uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title."<sup>65</sup>

However the conclusion does not appear to follow from the premises. No doubt the doctrine of Aboriginal title is intended to protect ancestral lands from the threat of depredation. However, as the provisions of the *Royal Proclamation, 1763* make crystal clear, such threats have stemmed from *external sources*, in the form of invasive governmental land grants, illicit settlement and fraudulent purchases. The doctrine of Aboriginal title has traditionally sought to place a protective hedge around ancestral lands, not to restrict what kind of Aboriginal activities go on within that hedge. In arguing (correctly) that this protection continues into the future, the Chief Justice makes an unwarranted leap from external protection to internal limitation. To put the matter another way, the mere fact that a doctrine is intended to protect historical occupation does not warrant the conclusion that it carries an inherent limit. Were that the case, a similar limit would govern all land-holdings in Quebec that were protected and continued upon the advent of the British Crown in 1763.

Chief Justice Lamer also argues that the inherent limit has an affinity with the rule forbidding alienation of Aboriginal lands, since alienation would bring to an end the Aboriginal group's entitlement and terminate

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<sup>63</sup> The point is explored in Slattery, "Metamorphosis of Aboriginal Title", *supra*, note 23.

<sup>64</sup> *Delgamuukw*, *supra*, note 2, at para. 126.

<sup>65</sup> *Id.*, at para. 127.

its relationship with the land. In effect, he says, Aboriginal land is more than just a fungible commodity. It has an “inherent and unique value” to its title-holders, which is not exhausted by its economic value. Hence the Aboriginal Nation cannot put the land to uses which would destroy that value.<sup>66</sup> Nevertheless, says the Chief Justice, the unique value of Aboriginal lands does not detract from the ability of an Aboriginal People to surrender its lands to the Crown in exchange for valuable consideration. To the contrary, he says, the idea of surrender reinforces the conclusion that Aboriginal title is subject to an inherent limit: “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.”<sup>67</sup>

The logic of this argument is somewhat puzzling. The objective of preserving Aboriginal lands for future generations seems more likely to be *subverted* by the possibility of surrender to the Crown, than the contrary. To repeat, the main dangers to Aboriginal lands have historically stemmed from external sources. The underlying rationale of the rule against alienation would more plausibly support tighter restrictions on surrenders to the Crown than limitations on internal activities.

Overall, then, the arguments in favour of the inherent limit seem far from convincing. Nevertheless, the concept makes a return appearance in the *Tsilhqot'in Nation* case, albeit in a modified form. Chief Justice McLachlin quotes *Delgamuukw* to the effect that an Aboriginal group's uses of its land must not be irreconcilable with the nature of the group's attachment to that land, explaining that “it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land”.<sup>68</sup> She elaborates on these points in a passage that merits full quotation:

Aboriginal title ... comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes — to

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<sup>66</sup> *Id.*, at para. 129.

<sup>67</sup> *Id.*, at para. 131.

<sup>68</sup> *Tsilhqot'in Nation*, *supra*, note 3, at para. 15.

the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.<sup>69</sup>

This passage represents a shift away from the *historical approach*, which links the inherent limit to the particular relationship an Aboriginal group originally held with its lands, to the *stewardship approach*, which highlights the need to preserve the overall value of the land, preventing activities that “destroy the ability of the land to sustain future generations of Aboriginal peoples”.<sup>70</sup>

What are the merits of this revised version of the inherent limit? On the one hand, it has the unexceptionable goal of seeking to ensure that the ancestral territory of an Aboriginal Nation retains its worth for the indefinite future — making it more difficult for any single generation to favour its own short-term interests over those of future generations. The concept also has a certain resonance with the philosophical beliefs of many Aboriginal Peoples — that they are mere “stewards” of the land, which they hold in trust for generations to come. To this extent, the concept stands in contrast to the individualistic philosophy that animates some aspects of the common law, which allows land-owners to effectively destroy their lands with impunity.

On the other hand, however, one would have thought that these matters should be left in the hands of Aboriginal Peoples themselves, who are best able to judge how to manage their lands in accordance with their own laws and traditions. Once again a comparison with Provincial title proves helpful. As seen earlier, both the Province and the Aboriginal Nation hold collective titles to their lands, and both are subject to constitutional restraints on external alienation. The fact that Provincial title is inherently collective and held for the benefit of present and future generations has never been thought to import an inherent limit that restricts the Province’s ability to make decisions about managing its lands or that subjects those decisions to judicial scrutiny.

In the end, however, the greatest problem with the inherent limit is the uncertainty that it breeds, inevitably fostering conflict and litigation and discouraging beneficial development. As the Supreme Court acknowledges, there is considerable doubt as to what sorts of activities

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<sup>69</sup> *Id.*, at para. 74.

<sup>70</sup> *Id.*, at para. 121. See also para. 88: “the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations”.

the inherent limit actually rules out.<sup>71</sup> The unfortunate result is that Aboriginal Nations may be prompted to surrender their lands to the Crown in order to convert their rights into European-style titles, thus avoiding the ambiguities of the inherent limit and the costs and delays associated with litigation. This is surely not the result the Supreme Court intended.

## 2. The Interaction of Provincial and Aboriginal Titles

When Aboriginal lands are located within the boundaries of a Province, what legal interest does the Province have in such lands? The basic framework for an answer is provided by section 109 of the *Constitution Act, 1867*, which states that all lands belonging to the Provinces at the time of Confederation shall continue to belong to them “subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same”.<sup>72</sup> In the *St. Catherine’s* case, the Privy Council holds that Indian title is an “Interest other than that of the Province” which constitutes a burden on the underlying title of the Crown. When Indian title is surrendered to the Crown, the beneficial interest in the lands passes to the Province, with the ultimate title remaining in the Crown.<sup>73</sup>

However, absent such a surrender, what sort of interest does the Province possess in Aboriginal lands? It is not a form of *beneficial interest* because the full beneficial title is vested in the Aboriginal Nation. Neither does it constitute the *underlying title*, because that title is held by the Crown — an entity distinct from both the Province and the Dominion. Thus the Province holds at best some form of conditional future interest in Aboriginal lands — a *sui generis* interest that does not import any current rights of possession or enjoyment, and which may never come to fruition. This interpretation appears to accord with the account offered in *Tsilhqot’in Nation*:

Aboriginal title confers a right to the land itself and the Crown is obligated to justify any incursions on title. As explained above, the content of the Crown’s underlying title is limited to the fiduciary duty

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<sup>71</sup> *Id.*, at para. 74: “Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.”

<sup>72</sup> See discussion above in s. II.1.

<sup>73</sup> *St. Catherine’s*, *supra*, note 30, especially at para. 12. This holding is reaffirmed by the Supreme Court in *Grassy Narrows*, *supra*, note 33, at para. 33.

owed and the right to encroach subject to justification. It would be hard to say that the Crown is presently entitled to enjoyment of the lands in the way property that is vested in possession would be. *Similarly, although Aboriginal title can be alienated to the Crown, this does not confer a fixed right to future enjoyment in the way property that is vested in interest would. Rather, it would seem that Aboriginal title vests the lands in question in the Aboriginal group.*<sup>74</sup>

This does not mean that the Province lacks the power to pass laws of general application extending to Aboriginal lands. As the Privy Council holds in the *Fisheries Case*,<sup>75</sup> proprietary rights and legislative jurisdiction are distinct matters. Thus, for example, the fact that the federal Parliament has jurisdiction over a certain subject-matter such as “Fisheries” does not mean that it possesses any proprietary rights with respect to it. Conversely, as we will now see, the fact the Province does not have a present proprietary interest in Aboriginal lands does not mean that it altogether lacks legislative jurisdiction.

### 3. The Division of Powers

How then does the existence of Aboriginal title affect the powers of Parliament and the Provincial legislatures to pass laws applying to the lands in question? This question merits a paper in its own right. Our remarks here are limited to three general propositions.

*First*, just as a Provincial legislature has primary jurisdiction to manage its lands under sections 92(5) and 92(13) of the *Constitution Act, 1867*, so also an Aboriginal Nation has primary powers of management over its lands under the doctrine of Aboriginal title and section 35 of the *Constitution Act, 1982*.

*Second*, just as Provincial lands may be affected in certain respects by legislation passed by the Federal Parliament, so also Aboriginal lands may be affected in certain respects by statutes passed at both Provincial and Federal levels.

*Third*, just as there are significant limits on Federal powers to affect Provincial lands and powers of management (embodied in sections 91-92A and 109 of the *Constitution Act, 1867*), so also there are strict constitutional restraints on both Provincial and Federal powers to affect

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<sup>74</sup> *Tsilhqot'in Nation*, *supra*, note 3, at para. 112 (emphasis added).

<sup>75</sup> *Re British North America Act, 1867*, s. 108 (Can.), [1898] A.C. 700 [the “*Fisheries Case*”], at para. 4. For discussion, see Hogg, *Constitutional Law of Canada*, *supra*, note 22, ch. 29.4.

Aboriginal lands and management powers (flowing from section 35 of the *Constitution Act, 1982*, as well as sections 91(24) and 109 of the *Constitution Act, 1867*).

We have already considered the Aboriginal power to manage its lands under the doctrine of Aboriginal title.<sup>76</sup> We turn to the second and third propositions, upon which *Tsilhqot'in Nation* throws a partial light, relating mainly to the Provinces.<sup>77</sup> Chief Justice McLachlin holds that, broadly speaking, Provincial laws of general application apply to lands held under Aboriginal title. The reason is that, in general, Provincial governments have the power to regulate land use within the Province, regardless whether the lands are held by the Crown, by private owners, or by the holders of Aboriginal title. This power is grounded in section 92(13) of the *Constitution Act, 1867*, which gives the Provinces the power to legislate with respect to property and civil rights in the Province.

Nevertheless, observes the Chief Justice, Provincial power to regulate land held under Aboriginal title is constitutionally curbed in two distinct ways. First, it is limited by section 35 of the *Constitution Act, 1982* which requires any abridgment of the rights flowing from Aboriginal title to have a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with the Aboriginal title holders. Second, in some instances a Province's power may also be limited by the Federal power over "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*.

The point to be drawn from this brief discussion is that the constitutional restrictions on Federal and Provincial powers regarding Aboriginal lands are more akin to the limits enshrined in the division of powers between the Federal government and the Provinces, than they are to the protections afforded to individual rights in the *Canadian Charter of Rights and Freedoms*.<sup>78</sup> The fact that Aboriginal title has important constitutional and jurisdictional dimensions introduces a number of factors that are largely absent in the Charter context. The complexity of the case law governing the division of powers between Federal and Provincial authorities indicates how much work remains to be done in determining the relative scope of Aboriginal, Federal and Provincial powers — and stands as a warning against easy generalizations.

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<sup>76</sup> See discussion above in s. II.4.

<sup>77</sup> *Tsilhqot'in Nation*, *supra*, note 3, at paras. 101-103, 139.

<sup>78</sup> Part I of the *Constitution Act, 1982*, *supra*, note 16 [hereinafter "Charter"].

#### IV. CONCLUSION

Aboriginal title is a close cousin of Provincial title. It has a similar underlying structure and rationale, designed to preserve for the group the power to manage and benefit from its lands, without undue interference from other levels of authority. Aboriginal title finds its initial constitutional expression in the *Royal Proclamation, 1763*, just as Provincial title is recognized in the *Constitution Act, 1867*. Like Provincial title, Aboriginal title is a collective right that carries with it extensive jurisdictional powers and is protected by constitutional rules against external alienation. In the case of both Aboriginal Nations and the Provinces, the beneficial title to their lands is vested in the community, while the underlying title is held by the Crown. Just as one may speak of the Crown in right of the Province, perhaps one may also speak of the Crown in the right of the Aboriginal Nation.