Osgoode Hall Law Journal

Volume 18, Number 4 (December 1980)

Article 7

Baker Lake and the Concept of Aboriginal Title

David W. Elliott

BAKER LAKE AND THE CONCEPT OF ABORIGINAL TITLE

By DAVID W. ELLIOTT*

As a result of *Hamlet of Baker Lake* v. *Minister of Indian Affairs*,[1] aboriginal title[2] has come closer to gaining recognition in Canada as a common law right existing independently of the Royal Proclamation of 1763.[3] As several aspects of this decision of the Trial Division of the Federal Court show, the judicial development of aboriginal title has not been easy and the concept will face more growing pains in the years to come. Nevertheless, throughout the decision Mahoney J. makes a serious effort to deal with several of the unanswered or partly answered questions surrounding aboriginal title. In doing so he has removed some of the uncertainty clouding this elusive concept.

The *Baker Lake* case arose as the result of concerns by the Inuit of the Baker Lake area[4] of the Northwest Territories that government-licensed exploration companies were interfering with their aboriginal rights, particularly their right to hunt caribou.[5] They sought relief that included a declaration

---

* Associate Professor, Department of Law, Carleton University.

1 [1980] 1 F.C. 518, [1979] 3 C.N.L.R. 17 (F.C.T.D.). Reasons for judgment delivered on November 15, 1979. (Leave to appeal the decision to the Federal Court of Appeal was not sought.) As well as the Hamlet of Baker Lake, the plaintiffs comprised the Baker Lake Hunters and Trappers Association; the Inuit Tapirisat of Canada; and 112 individual Inuit who lived, hunted and fished in the Baker Lake area at the time of the case. The defendants comprised the Minister of Indian Affairs and Northern Development; certain officers of the Government of Canada responsible under the Minister for the administration of mining laws in the Northwest Territories; the Attorney General for Canada; and six mining and mining exploration companies.

2 "The native interest is variously described as 'Indian title,' 'aboriginal title,' 'original title,' 'native title,' 'right of occupancy,' 'right of possession,' and so on. These terms have been used more or less interchangeably." See Lysyk, *The Indian Title Question in Canada: An Appraisal in the Light of Calder* (1973), 51 Can. Bar Rev. 450 at 450. Where the term "aboriginal rights" is differentiated from "aboriginal title," aboriginal rights are regarded as the rights enjoyed pursuant to aboriginal title. Cumming and Mickenberg, eds., *Native Rights in Canada* (2d ed. Toronto: General Publ., 1972) at 3n. 3 offered the following definition: "Aboriginal rights [are] those property rights which inure to native peoples, by virtue of their occupation upon certain lands from time immemorial." Cumming, in *Native Rights and Law in an Age of Protest* (1973), 11 Alta. L. Rev. 238 at 239, states that: "Aboriginal rights are those property rights which native peoples retain as a result of their original use and occupancy of lands." The two definitions above might be combined to provide the following, slightly more descriptive definition: "Aboriginal rights are those property rights that inure to aboriginal peoples by virtue of their occupation and use of certain lands from time immemorial."

3 Royal Proclamation, 1763 (issued by George III). Reprinted in R.S.C. 1970, Appendix II at 123.

4 An area of approximately 78,000 square kilometers around the community of Baker Lake, west of Chesterfield Inlet on the northwest shore of Hudson Bay, in the District of Keewatin.

5 In *The Hamlet of Baker Lake* v. *The Min. of Ind. Aff. and North. Dev.*, [1979] 1 F.C. 487, 87 D.L.R. (3d) 342, 7 C.N.L.R. 75 (F.C.T.D.), the forerunner of the 1979

that the Baker Lake area was subject to an Inuit aboriginal title to hunt and fish; a declaration that the mining regulations licensing the companies did not apply to the Baker Lake area; and orders halting the mining activities in the area.[6]

Mahoney J. held that the Inuit did have an aboriginal title to most of the Baker Lake area, but that the rights pursuant to this title could be validly abridged by legislation.

Finding that Indian aboriginal title law applies *prima facie* to Inuit,[7] Mahoney J. felt compelled by the *Sigeareak E1-53* decision[8] to determine if there was a common law basis for the concept of aboriginal title that was independent of the Royal Proclamation of 1763. He held that there was, basing the finding on his view that in *Calder*[9] "the six members of the Supreme Court who found it necessary to consider the substantive issues, which dealt with the territory outside the geographic limits of the Proclamation, all held that an aboriginal title recognized at common law had existed."[10]

---

decision, Mahoney J. delivered on April 27, 1978 the reasons for issuing on April 24, 1978 an interim injunction prohibiting the issue of prospecting permits, the grant of mining leases and the recording of claims under the *Canada Mining Regulations*, S.O.R./77-900 and the issue of permits under the *Territorial Land Use Regulations*, S.O.R./77-210, in respect of mining exploration and related activities within the Baker Lake area. The Inuit claimed (in their action for an interim injunction and in the present litigation) that the activities associated with mineral exploration were interfering with their ability to hunt the caribou of the area, both on individual occasions and generally, by driving the caribou away from the area.

[6] *Supra* note 1, at 524-25 (F.C.), 20 (C.N.L.R.).

[7] *Id.* at 555 (F.C.), 43 (C.N.L.R.). Mahoney J. gave as his reference for this conclusion *Re Eskimos*, [1939] S.C.R. 104, [1939] 2 D.L.R. 417. Although *Re Eskimos* was a constitutional reference, the Court used broad language there in determining that Indians includes Eskimos (Inuit), so that Mahoney J.'s qualified inference seems reasonable. In *Sigeareak E1-53* v. *The Queen*, [1966] S.C.R. 645 at 650, 57 D.L.R. (2d) 536 at 540, [1966] 4 C.C.C. 393 at 397, the Supreme Court had applied the *Re Eskimos* interpretation of Indians to a situation involving alleged Inuit rights.

[8] *Id.* In *Sigeareak*, which involved a charge of abandoning game fit for human consumption in an area of the Northwest Territories not far from the Baker Lake area, the Supreme Court of Canada stated that:

> The Proclamation specifically excludes territory granted to the Hudson's Bay Company and there can be no question that the region in question was within the area granted to Hudson's Bay Company. Accordingly the Proclamation does not and never did apply in the region in question and the judgments to the contrary are not good law.

Op. cit, at 650 (S.C.R.), 540 (D.L.R.), 397 (C.C.C.).

[9] *Calder* v. *A.G.B.C.*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1.

[10] *Supra* note 1, at 556 (F.C.), 43-44 (C.N.L.R.). The six members to whom Mahoney J. refers here were Judson J. (with whom Martland and Ritchie JJ. agreed) and Hall J. (with whom Spence and Laskin JJ. agreed). It may be noted that in the view of Hall J. in *Calder*, the territory of the Nishgas was *not* "outside the geographic limits of the Proclamation." In Hall J.'s view, "[t]he wording of the Proclamation itself seems quite clear that it was intended to include the lands west of the Rocky Mountains": *id.* at 398 (S.C.R.), 206 (D.L.R.), 68 (W.W.R.). Hall J. also regarded the Proclamation as "a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories": *op. cit.*, at 395 (S.C.R.), 203 (D.L.R.), 65 (W.W.R.). Hall J. felt that aboriginal title existed independently of the Proclamation (or any other

This finding seems to attribute to the Supreme Court in *Calder* a stronger collective position on the notion of an independent aboriginal title than was in fact taken. Mahoney J. quoted[11] the passage in which Judson J. said that "the fact is that when the settlers came, the Indians were there. . . ."[12] In this passage, Judson J. was asserting that the Nishga people were claming in *Calder* an aboriginal title independent of the Proclamation.[13] Judson J. was of the view that the case law did not necessarily preclude the existence of such a title,[14] but he did not go so far as to recognize it himself.[15] His position was simply that any aboriginal title which might have existed had since been extinguished.[16] If it cannot be said that Judson J. went so far as to recognize the existence at common law of an independent aboriginal title, then the *Calder* decision as a whole is not very strong authority for this proposition.[17]

---

treaty, executive order or legislative enactment (*op. cit.*, at 390 (S.C.R.), 200 (D.L.R.), 61 (W.W.R.)) but that the Proclamation could be regarded as "[p]arelleling and supporting" the claim which could be made independently of it: *op. cit.* at 394 (S.C.R.), 203 D.L.R.), 65 (W.W.R.).

[11] *Supra* note 1, at 556 (F.C.), 44 (C.N.L.R.).

[12] *Supra* note 9, at 320 (S.C.R.), 156 (D.L.R.), 11 (W.W.R.):

> Although I think that it is clear that Indian title in British Columbia cannot give its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructory right". *What they are asserting in this action* is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign." [Emphasis added.]

[13] See the phrase emphasized in note 12, *id.*

[14] "I do not take these reasons [the reasons of Lord Watson in the *St. Catherine's Milling* case: (1888), 14 App. Cas. 46 at 54-55, 4 Cart. B.N.A. 107 at 117-19 (P.C.)] to mean that the Proclamation was the exclusive source of Indian title": *id.* at 322 (S.C.R.), 152 (D.L.R.), 7 (W.W.R.).

[15] Mahoney J. mentions that Judson and Hall JJ. referred to *Worcester* v. *State of Georgia*, 6 Pet. 515, 31 U.S. 350 (1832), and speculates that their acceptance of an aboriginal title arising independently at common law "may well be based upon an acceptance of the reasoning of Chief Justice Marshall" in that decision: *supra* note 1, at 557 (F.C.), 44 (C.N.L.R.). While there is little doubt that in *Worcester* (and in *Johnson* v. *M'Intosh* 8 Wheat. 543, 21 U.S. 240 (1832)) Chief Justice Marshall saw aboriginal title as a right recognized at common law independently of the Proclamation, and while there is little doubt that Hall J. in *Calder* accepted this reasoning (*supra* note 9, at 380-86 (S.C.R.), 193-97 (D.L.R.), 53-58 (W.W.R.)) there is no explicit indication that Judson J. did so. Judson J.'s statement that the Canadian *St. Catherine's* decisions were "strongly influenced" by these decisions of Chief Justice Marshall does not demonstrate this, nor does the passage from *Worcester* quoted by Judson J. at 321 (S.C.R.), 151 (D.L.R.), 5-6 (W.W.R.).

[16] In the concluding part of his judgment, Judson J. stated: "In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to *any right of occupancy which the Nishga Tribe might have had*, when, by legislation, it opened up such lands for Indian occupation." *Supra* note 9, at 344 (S.C.R.), 167 (D.L.R.), 23 (W.W.R.). [Emphasis added.]

[17] Without Judson J. (and Martland and Ritchie JJ.), the proposition would have the support of only Hall J. (and Spence and Laskin JJ.); three of the seven judges in *Calder* (Pigeon J., the seventh judge, based his judgment on a procedural matter unrelated to the question of the legal basis of aboriginal title).

Mahoney J. did note[18] that both Judson and Hall JJ. referred in *Calder* to a decision by Marshall C.J. of the United States Supreme Court in *Worcester* v. *State of Georgia*.[19] *Worcester* and Marshall C.J.'s earlier decision in *Johnson* v. *M'Intosh*[20] may have been worth pursuing further. In each of these decisions there are clear assertions that aboriginal title is a right cognizable at law,[21] and these assertions are made independently of references to the Proclamation.[22]

Had he relied less heavily on *Calder*, Mahoney J. might have felt compelled to examine cases such as these in greater depth, and to attempt an analysis of "first principles" regarding the legal basis of aboriginal title, something long overdue in this area of law. Is aboriginal title capable of independent existence in Canadian common law? If so, what are the legal principles upon which it is based: common law constitutional rules governing the acquisition of territory;[23] prior recognition by the executive or legislative

---

[18] *Supra* note 1, at 556 (F.C.), 44 (C.N.L.R.).

[19] *Supra* note 15.

[20] *Id.*

[21] "[The original inhabitants] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, ...": *Johnson, supra* note 15, at 574 (Wheat.), 253 (U.S.); "[The Indian title of occupancy] is no more incompatible with a seisin in fee, than a lease for years, and might as effectively bar an ejectment.": *op cit.*, at 592 (Wheat.), 261 (U.S.). "The Indian nations had always been considered as ... retaining their original rights, as the undisputed possessors of the soil, from time immemorial, with the single exception [of the restriction on alienation] ....": *Worcester, supra* note 15, at 559 (Pet.), 379 (U.S.).

[22] In *Johnson, id.* at 594 (Wheat.), 262 (U.S.), the Proclamation is referred to as "an additional objection" (*i.e.*, an objection in addition to the objection based on a general description of the nature of aboriginal title, a description that stressed both its legal character and its inability to be alienated except to the government) to the title asserted by the plaintiffs (a title that they claimed to have obtained by virtue of grants directly from the Indians); in *Worcester, id.* at 559 (Pet.), 379 (U.S.) rights which are said to have existed from "time immemorial" cannot also be attributable solely to the Proclamation.

[23] It looked at first as if counsel for the defendants might succeed in drawing Mahoney J. into a discussion of the relationship between the rules for the acquisition of colonies and aboriginal title. The defendants noted that the Baker Lake area had originally been part of Rupert's Land, which had been granted to the Hudson's Bay Company. They argued that since Rupert's Land had been a settled colony, rather than a conquered or ceded colony, there was no presumption (as there would be with a conquered or ceded colony) that the laws and rights of the original inhabitants remained in force after the settlement. Mahoney J. agreed that Rupert's Land had been a settled colony (*supra* note 1, at 532 (F.C.), 25 (C.N.L.R.)), but noted that the distinction between settled and conquered or ceded colonies had not been articulated in a reported case until 1693, and said that in its early development the distinction was not applied to the resolution of disputes involving the indigeneous population (*op cit.*, at 532 (F.C.), 26 (C.N.L.R.)). Rather than pursuing these points, Mahoney J. then indicated (*op cit.*, at 557 (F.C.), 45 (C.N.L.R.)) that the settled colony argument had been rendered untenable by the Supreme Court of Canada's decision in *Calder, supra* note 9. An examination of *Johnson* reveals that Chief Justice Marshall had to do a lot of improvising to apply the settled conquered colonies distinction to the situation of the Thirteen Colonies in North America. As Slattery points out in *The Land Rights of Indigeneous Canadian Peoples as Affected by the Crown's Acquisition of their Territories* (Oxford: unpublished D.Phil. thesis, Oxford Univ., 1979) at 27, the classical distinction (as articulated in *Blankard* v. *Galdy* (1693), 2 Salk. 411, 4 Mod. Rep. 215, 90 E.R. 1089) failed to

branches of government;[24] principles of international law;[25] or analogies to common law concepts, such as prescription,[26] adverse possession,[27] licences,[28] or profits à prendre?[29]

If aboriginal rights are to be cognizable in the courts of law, there must be some means of proving their existence to the courts of law in the first place. Drawing on a variety of earlier decisions,[30] Mahoney J. set down the following requirements for proof of aboriginal title:

1. That they [the plaintiffs, the Inuit] and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.

---

provide for the situation of settlement of already inhabited lands. See the more flexible modern version of the distinction articulated in *Freeman* v. *Fairlie* (1828), 1 Moore Ind. App. 306 at 325; 16 E.R. 117 at 128.

[24] The defendants in *Baker Lake* also argued that there is no aboriginal title unless it has been recognized by statute or prerogative act of the Crown or by treaty having statutory effect, but Mahoney J. said that the *Calder* decision rendered this argument untenable too, (*supra* note 1, at 557 (F.C.), 45 (C.N.L.R.)). See Hall J.'s arguments against this requirement of government recognition in *Calder, supra* note 9, at 390-93, 404-406 (S.C.R.), 200-202, 210-11 (D.L.R.), 61-64, 73-74 (W.W.R.) (in the latter pages Hall J. argued that the Act of State doctrine of international law had no application to the situation in the *Calder* case). On the other hand, if government recognition is not a *sine qua non* of aboriginal title, can it serve as an indication of the existence of aboriginal title? To what extent if at all, *e.g.*, do the following instruments of government constitute recognitions of the existence of aboriginal title: Article 40 of the Articles of Capitulation of Québec in 1760? the Royal Proclamation of 1763? the Canadian Indian land cession treaties? the documents initiating and implementing the transfer of Rupert's Land and the North-western Territory into Canada in 1870? (on the former, see *Baker Lake, supra* note 1, at 565-66 (F.C.), 52 (C.N.L.R.)).

[25] See, *e.g.*, the "discovery" doctrine articulated by Chief Justice Marshall in *Johnson, supra* note 15, at 572-89 (Wheat.), 252-60 (U.S.), a doctrine that restricted the scope of aboriginal title at the same time as it recognized the title.

[26] Although Hall J. declined to classify aboriginal title as a prescriptive right in *Calder, supra* note 9, at 353 (S.C.R.), 174 (D.L.R.), 30 (W.W.R.) (because of the lack of a prior right), it might be argued that a rough analogy can be drawn between aboriginal title and prescription, nevertheless.

[27] If prior use for a sufficiently long time can give rise to a claim that the common law will recognize as prior to that of most or all others, then aboriginal people who can show occupation and use from time immemorial may be in a position to argue for analogous treatment. It should be noted here that analogies to prescription or adverse possession could prove to be double-edged swords: they could work against as well as for aboriginal peoples in cases where others used aboriginal peoples' lands for long periods of time.

[28] Like a licence, the Indian interest described in the *St. Catherine's Milling* case, *supra* note 14, at 54 (App. Cas.), 118 (Cart. B.N.A.) is apparently revocable at will, "dependent upon the good will of the Sovereign." Unlike a bare or simple licence, the interest would appear to be an interest in land: see text accompanying notes 53-56, *infra*.

[29] See, *e.g.*, *R.* v. *Isaac* (1975), 13 N.S.R. (2d) 460 at 469, 9 A.P.R. 460 at 469 (N.S.C.A.).

[30] Including *Calder, supra* note 9; *Kruger* v. *The Queen*, [1978] 1 S.C.R. 104, 75 D.L.R. (3d) 434, 34 C.C.C. (2d) 377; *Johnson, supra* note 15; *Worcester, supra* note 15; *Re Southern Rhodesia*, [1919] A.C. 211 at 233 (P.C.); and *U.S.* v. *Santa Fe R.R.*, 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 60 (1941).

3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England.[31]

Mahoney J. was under no illusions that the requirements would be easy to apply. Documentation of aboriginal title brings the court into a realm where written records are rare, where judges must rely on anthropological, historical and archaeological evidence, and make judgments of a subjective nature. Acknowledging these difficulties in the case at hand,[32] Mahoney J. was nevertheless able to conclude that on the balance of probabilities the Inuit had established an aboriginal title to all the Baker Lake area except a portion of the south-west corner, which he said appeared to have been occupied primarily by Indian people, not Inuit, on the advent of English sovereignty.[33] It is interesting to speculate on what the result would have been had Mahoney J. found that Indians and Inuit had used this corner roughly equally: would the "exclusivity" requirement have negated both titles, or would it have been relaxed to allow recognition of a joint title held by each?

Had the Inuit title been extinguished? Here Mahoney J. was faced with an apparently divided view from the Supreme Court of Canada on the proper test for legislative extinguishment of aboriginal title. The plaintiffs, relying on the judgment of Hall J. in *Calder*, argued that to extinguish aboriginal title legislation must contain express words stating this object.[34] The defendants, relying on the judgment of Judson J. in *Calder*, argued that extinguishment could occur as a necessary result of legislation, even where no such intention was expressed in it.[35]

Mahoney J. disagreed with the contention that Hall J. had gone so far as to say that Parliament must state its intention to extinguish explicitly in the statute itself. He said that this requirement would be contrary to the basic principle that:

> 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.[36]

The true test, concluded Mahoney J., is whether or not the legislator

---

[31] *Supra* note 1, at 557-58 (F.C.), 45 (C.N.L.R.).

[32] *Id.* at 562-63 (F.C.), 49-50 (C.N.L.R.). Note Mahoney J.'s flexible approach to interpreting the first requirement at 558 (F.C.), 46-47 (C.N.L.R.).

[33] *Id.* at 562-63 (F.C.), 49-50 (C.N.L.R.).

[34] *Id.* at 566 (F.C.), 53 (C.N.L.R.).

[35] *Id.* It should be noted that this was Mahoney J.'s understanding of the thrust of the defendants' contention.

[36] *Id.* at 568 (F.C.), 55 (C.N.L.R.). Mahoney J. traced the "clear and plain" intention requirement used by Hall J. in *Calder* to *Santa Fe R.R., supra* note 30, at 353-54 (U.S.), 255 (S. Ct.), 273-74 (L. Ed.), where Douglas J. said that in view of a statutory indication to the contrary, extinguishment could not be "lightly implied" (*i.e.*, it *could* be implied in a sufficiently compelling case). Mahoney J. noted that no Canadian legislation requiring that legislative extinguishment of aboriginal titles had been brought to his attention, and that numerous Canadian authorities (including *Sikyea* v. *The Queen*, [1964] S.C.R. 642, 50 D.L.R. (2d) 80, 49 W.W.R. 306, delivered by Hall J. for the Court) had held that the right to hunt, even when confirmed by treaty, is subject to

has expressed a clear and plain intention to extinguish the aboriginal title.[37] In his view, the legislation by the Parliament of Canada since 1870 had not expressed such an intention in relation to the aboriginal title of the Inuit. Examining the charter granting Rupert's Land (of which the Baker Lake area is now a part) to the Hudson's Bay Company in 1670 and to the order in council admitting Rupert's Land to Canada in 1870, Mahoney J. found that there had been no intention to extinguish the aboriginal title.[38] Since there had been no surrender of the title either, the title continued.

Whether, as Mahoney J. suggested, the "clear and plain intention" test was effectively the test of both Hall and Judson JJ. in *Calder*, or whether it represents a compromise between the tests of these two judges, it is not without merit. If aboriginal title is to be a concept cognizable generally at common law, then it must be subject to the same general limitations as are other common law rights, and one of these limitations is subordination to statute by virtue of the principle of Parliamentary sovereignty. On the other hand, the requirement of a clear and plain intention to extinguish aboriginal title raises a form of presumption against extinguishment that should provide at least some protection against cases of "extinguishment by oversight."

Can the rights enjoyed pursuant to aboriginal title be abridged? This question had already been answered for Mahoney J. by the decisions of the Supreme Court of Canada in *Derriksan* v. *The Queen*[39] and *Kruger* v. *The Queen*.[40] Mahoney J. summarized the answer as follows: "There can, however, be no doubt as to the effect of competent legislation and that, to the extent that it does diminish the rights comprised in an aboriginal title, it prevails."[41]

In the view of Mahoney J., extinguishment can be effected only by the Parliament of Canada,[42] whereas abridgment may be possible by other legis-

---

regulation by competent legislation. Mahoney J. noted that s. 1(a) of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, did not make the aboriginal title in issue in *Baker Lake* an exception to the general rule that courts must give effect to legislation even when its necessary effect is to abridge or entirely abrogate common law rights.

[37] *Supra* note 1, at 569 (F.C.), 56 (C.N.L.R.).

[38] Mahoney J. examined the provisions of the Charter and of the Order in Council before adopting the "clear and plain intention" test. In Mahoney J.'s examination of these provisions, the implication seems to be that there is no need at this point to consider whether something like the "clear and plain intention" test of extinguishment is necessary, because a simple interpretation of the Charter and Order in Council makes it clear (in the view of Mahoney J.) that extinguishment is not intended. Mahoney J. felt that the Charter did not extinguish the aboriginal rights of the Inuit because the Charter gave the Hudson's Bay Company a notional title to the land that, like that of the Crown itself, could co-exist with the Inuit title, and because the Charter did not purport to interfere or authorize the Company to interfere with the Inuit laws.

[39] (1976), 71 D.L.R. (3d) 150, [1976] 6 W.W.R. 480, 31 C.C.C. (2d) 575 (S.C.C.).

[40] *Supra* note 30.

[41] *Supra* note 1, at 576 (F.C.), 61-62 (C.N.L.R.).

[42] *Id.* at 574 (F.C.), 60 (C.N.L.R.). It is suggested that Mahoney J. is correct on this point: apply the rule in *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] A.C. 566 at 580, 10 W.W.R. 391 at 398 (P.C.) to the exclusive legislative jurisdiction conferred by s. 91(24) of the *British North America Act, 1867*, 30 & 31 Vict., c. 3, and see

latures or through delegated legislation.[43] In the case at hand, Mahoney J. held that to the extent that the aboriginal rights of the Inuit had been abridged by federal mining legislation, this abridgment was not invalid.[44]

As with extinguishment, it is difficult to argue with a legal capacity conferred pursuant to the Parliamentary sovereignty doctrine, assuming the absence of impediments in the written part of our constitution. Nevertheless, it would seem inconsistent if on one hand the law imposed special requirements before permitting extinguishment by Parliament, while on the other hand it permitted all legislatures to override aboriginal rights at will by way of abridgment.

Apart from the fact that an abridged right, unlike an extinguished right, presumably "revives" once the offending legislation is repealed or amended, the present law appears to contain no definite limit to the extent of possible federal abridgement. Provincial abridgement is subject to two additional constraints, although they are indirect in nature. Provincial abridgment is invalid if it constitutes legislation directed at Indians or lands reserved for the Indians,[45] or if it is found to have the effect of paralyzing the status and capacities of Indians.[46]

---

the *St. Catherine's Milling* case, *supra* note 14; and *A.G. Can.* v. *A.G. Ont.* [1910] A.C. 537 at 644, 645-46, 1 Olmstead 567 at 574, 575-76 (P.C.).

[43] *Supra* note 1, at 574 (F.C.), 60 (C.N.L.R.). Mahoney J.'s source for this statement is presumably the decision in *Kruger, supra* note 30, in which the Supreme Court of Canada upheld the British Columbia *Wildlife Act*, R.S.B.C. 1979, c. 433, on the ground that it was a law of general application and was valid either as a provincial law in its own right, or as a provincial law that had been referentially incorporated as federal legislation by virtue of section 88 of the *Indian Act*, R.S.C. 1970, c. I-6, notwithstanding the fact that the British Columbia statute may have restricted aboriginal hunting rights claimed on behalf of Kruger.

[44] *Id.* at 576 (F.C.), 61-62 (C.N.L.R.). Because of the approach he took on this question, Mahoney J. avoided having to reach a definite overall conclusion regarding the degree of abridgment which had in fact taken place. Mahoney J. did say that the intermittent passage of low-flying aircraft constituted a serious harassment of the caribou in individual cases and could frustrate a hunter should it occur in the course of a hunt (*op. cit.*, at 546-47 (F.C.), 35-36 (C.N.L.R.)). On the other hand, he found no evidence that the caribou were severely harassed by round-the-clock diamond drilling, exploration camps, marker ribbons, or high-flying aircraft. The generally inconclusive nature of the evidence and of the findings is reflected in the following passages.
Mahoney J. said:

> While the overall caribou population of the Baker Lake Area appears to have declined and the ability of the Baker Lake hunters to satisfy their needs from that population has undoubtedly been impaired, the balance of probabilities, on the evidence, is that activities associated with mineral exploration are not a significant factor in the population decline. Clearly, there have been a number of instances where low flying aircraft employed in those activities have interfered with particular hunters.

Op. cit. at 548 (F.C.), 36 (C.N.L.R.). Later, Mahoney J. noted that: "Two or three witnessed incidents [of harassment] may well reflect a reality of countless unwitnessed incidents." *Op. cit.* at 555 (F.C.), 43 (C.N.L.R.).

[45] This is a constitutional restriction to which all provincial legislation is subject: see, *e.g., Cardinal* v. *A.G. Alta.*, [1974] S.C.R. 695 at 703, 40 D.L.R. (3d) 553 at 559-60, 13 C.C.C. (2d) 1 at 7.

[46] In *Kruger, supra* note 30, at 110 (S.C.R.), 438 (D.L.R.), 381 (C.C.C.), Dickson J. said that:

It might be asked whether the existing common law constraints on abridgment are adequate. Thought might be given in a subsequent case to articulating a simple presumption against abridgment. Such a presumption would involve no challenge to Parliamentary sovereignty; it would apply to communal rights a well-established common law tradition used to safeguard rights considered important to individuals. It would provide some balance to the presumption already in place in regard to extinguishment.[47]

Because extinguishment had not taken place in the *Baker Lake* case, the question of the extent to which there is a presumption in favour of compensation in cases of extinguishment[48] did not arise. Moreover, because the plaintiffs in *Baker Lake* had not sought compensation, Mahoney J. considered

---

> the fact that a law may have graver consequences to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group. The analogy may be made to a law which in its effect paralyzes the status and capacity of a federal company. . . . such an act is no 'law of general application'. . . .

Similarly, at 112 (S.C.R.), 440 (D.L.R.), 382-83 (C.C.C.), Dickson J. states: "It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians. Were that so, s. 88 would not operate to make the Act applicable to Indians." What Dickson J. has done here, it is suggested, is apply the doctrine of intrajurisdictional immunity (discussed in Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 83-84, 92-95, 355-64, 387n. 27) to s. 91(24) of the *British North America Act*. For a different view of the meaning of the paragraph from which the second passage cited above is taken, see Jordan, *Government, Two-Indians, One* (1978), 16 Osgoode Hall L.J. 709 at 722.

[47] While such a presumption would be unlikely to have much effect in the case of relatively unequivocal statutory prohibitions such as those found in the *Derrikson* and *Kruger* cases, it could have considerable room to operate in determining the scope of activity permissible under legislation granting rights to third parties on land subject to aboriginal title. In a general situation like that in *Baker Lake, e.g.*, the presumption could operate so as to exclude excessive harassment of caribou from the range of activity deemed permissible in the government mining exploration permits. On the facts in *Baker Lake* itself, Mahoney J. appears to have found the evidence of serious harassment to be inconclusive overall but it is possible to conceive of other circumstances in which serious harassment could be clearly shown and documented: see *supra* note 44.

[48] In Canada, although many statutes provide for compensation for expropriation of property, there is no general constitutional right to compensation where property has been taken (contrary to the situation in the United States by virtue of the last part of the Fifth Amendment to the American constitution; although in regard to constitutional compensation for expropriation of Indian title in the United States, see *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 222, 75 S. Ct. 313, 99 L. Ed. 314 (1955)). Nor does the "due process" provision of the *Canadian Bill of Rights* guarantee such compensation: see *Nat'l. Capital Comm'n.* v. *Lapointe*, [1972] F.C. 568 at 571, 29 D.L.R. (3d) 376 at 379 (F.C.T.D.). In *Calder*, Judson J. implies that the *Tee-Hit-Ton* rule should apply in Canada but fails to mention any common law presumption in favour of compensation: *supra* note 9, at 344 (S.C.R.), 167-68 (D.L.R.), 23-26 (W.W.R.). Hall J., on the other hand, states the presumption in language which in some places ("the expropriation of private rights by the government under the prerogative necessitates the payment of compensation. . . ." (*op. cit.*, at 352 (S.C.R.), 173 (D.L.R.), 30 (W.W.R.)) may appear to suggest that it is something more than a mere presumption. Overall, it is suggested that although there is a common law presumption in favour of compensation that likely extends to aboriginal title, its precise application to aboriginal title remains uncertain in the wake of *Calder*.

it unnecessary to determine if any abridgment which may have occurred was compensable.[49] Apart from a suggestion in *Kruger* that many kinds of abridgment of private rights are not compensable,[50] the question of whether there is a presumption in favour of compensation in cases of abridgment of aboriginal title remains unexplored.

In the course of his judgment, Mahoney J. made a number of comments about the content and character of aboriginal title that reflect earlier judicial statements on this topic.[51] He made the common sense observation that the incidents of aboriginal title which will be given effect at common law are those that were traditionally exercised by the aboriginal people.[52]

Toward the end of the judgment, Mahoney J. suggested that the aboriginal title arising from the Royal Proclamation is not a proprietary right,[53] giving as his source the judgment of Lord Watson in the *St. Catherine's Milling* case.[54] If what is understood by "proprietary" interest is an interest in land, then it is difficult to agree that Lord Watson found that this right is not proprietary in nature.[55] Referring in this case to the territory ceded by the Salteaux tribe of Objibbeway Indians, Lord Watson said that: "The ceded territory was at the time of the union, land vested in the Crown, subject to 'an interest other than that of the Province in the same', within the meaning of sec. 109. . . ."[56] The words "the same" here refer to "land," and the interest in the land "other than that of the Province" to which Lord Watson refers is the Indian interest.

Whether aboriginal title is a proprietary interest in the sense of an interest in land could have a bearing on how and whether the courts will decide

---

[49] *Supra* note 1, at 576 (F.C.), 61 (C.N.L.R.).

[50] "Most legislation imposing negative prohibitions affects previously enjoyed rights in ways not deemed compensatory": *Kruger, supra* note 30, 108 (S.C.R.), 437 (D.L.R.), 380 (C.C.C.).

[51] In the opinion of Mahoney J. these rights were communal rights (see *supra* note 1, at 565 (F.C.), 52 (C.N.L.R.). *Cf. Amodu Tijani* v. *Southern Nigeria*, [1921] 2 A.C. 399 at 403-404 (P.C.); *Re Paulette and Register of Titles (No. 2)* (1974), 42 D.L.R. (3d) 8 at 27 (N.W.T.S.C.), *rev'd on other grounds*, 63 D.L.R. (3d) 1 (N.W.T.C.A.), *aff'd on other grounds*, [1977] 2 S.C.R. 628); that they could co-exist with a national title such as that of the Crown (*op. cit.*, at 565 (F.C.), 52 (C.N.L.R.); *cf.* the *St. Catherine's* case, *supra* note 14, at 55 (App. Cas.), 119 (Cart. B.N.A.)), but not with the interest of an ordinary private estate holder (*op. cit.*, at 565 (F.C.), 52 (C.N.L.R.)). In the case of the Baker Lake Inuit they comprised the specific rights of occupancy, hunting and fishing (*op. cit.*, at 563 (F.C.), 50 (C.N.L.R.)).

[52] *Supra* note 1, at 559 (F.C.), 46-47 (C.N.L.R.), basing this on *Amodu Tijani, id.*

[53] *Id.* at 577 (F.C.), 62-63 (C.N.L.R.).

[54] Mahoney J. referred to the *St. Catherine's* decision, *supra* note 14, at 54 ff. (App. Cas.), 118 ff. (Cart. B.N.A.).

[55] Lord Watson did say (*id.* at 54 (F.C.), 118 (Cart. B.N.A.)) that the Indians' tenure was "a personal and usufructuary right," but it has been decided since (in *A.G. Que.* v. *A.G. Can.*, [1921] A.C. 401 at 410-11, 56 D.L.R. 373 at 378-79 (P.C.)) that "personal" in this passage meant that the Indian interest could be alienated only to the Crown.

[56] *Supra* note 14, at 58 (App. Cas.), 121 (Cart. B.N.A.).

that aboriginal rights can be enforced against third parties infringing them without express statutory authority to do so.

This question was also of direct relevance in the *Baker Lake* case itself. Section 8 of the *Territorial Lands Act* provides that: "The Governor in Council may make regulations for the leasing of mining regulations in, under or upon territorial lands and the payment of royalties therefor, but such regulations shall provide for the protection of and compensation to the holders of surface rights."[57] Had it been decided that the Inuit aboriginal title constituted an interest in land, the Inuit would have been "holders of surface rights" within the meaning of the section, and might well have succeeded in their action for a declaration that the mining regulations pursuant to this section of the *Territorial Lands Act* did not apply.

In summary, it may be that the *Baker Lake* decision overemphasizes the recognition given in *Calder* to the concept of an aboriginal title independent of the Royal Proclamation. Had it not done so, the decision might have attempted the "first principles" analysis of the legal basis of aboriginal rights so long overdue in this area of law. Although it may not have made a difference in the fact situation in *Baker Lake*, some form of presumption against abridgment would seem desirable. In regard to the legal character of aboriginal title, it is difficult to agree that Proclamation-based aboriginal title is not proprietary in character.

On the other hand, the *Baker Lake* decision rightly confirms that the Inuit are heirs to the general tradition of Indian aboriginal title. The decision supports the concept of an aboriginal title cognizable generally in law, not dependent on the geographical and semantic uncertainties of the Royal Proclamation. It synthesizes existing judicial requirements for the proof of aboriginal title. It offers a reconciliation of the apparently contradictory positions on extinguishment in *Calder*.

In *Baker Lake*, Mahoney J. has recognized in aboriginal title a full common law right, with the advantages and disadvantages that notion implies. In the process, he has made a significant contribution to clarifying the aboriginal title concept. Much more remains to be done, however, particularly to ensure that the title can provide effective legal safeguards for the people who claim it. The concerns that led to the *Baker Lake* case still exist, and are likely to grow with each passing year.

[57] R.S.C. 1970, c. T-6.