Co-Existence of Indigenous Rights and Other Interests in Land in Australia and Canada

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CO-EXISTENCE OF INDIGENOUS RIGHTS AND OTHER INTERESTS IN LAND IN AUSTRALIA AND CANADA

Kent McNeil*

In *Wik Peoples v. Queensland*, the High Court of Australia decided by a majority of four to three that the grant of pastoral leases by the Crown did not necessarily extinguish any Native title the Wik and Thayorre Peoples might have to the leased land. Given that approximately 42 percent of Australia is subject to pastoral leases, this decision is obviously of great importance. The issues raised in the case are also complex, involving the common law doctrines of tenures and estates, and the nature of Native title and of the interests created by pastoral leases. No attempt will be made in this short article to analyze or even explain all of these complexities. My modest goal is simply to summarize the positions taken in the four majority judgments on the issue of co-existence of Native title and pastoral leases, and to compare those positions with Canadian case law on the co-existence of Aboriginal and non-Aboriginal interests in land.

Legal counsel for the appellants in the *Wik* case accepted the authority of the Crown prior to the enactment of the *Racial Discrimination Act* 1975 (Cth) to grant pastoral leases over Native title lands. They also admitted that, in the event of conflict between rights granted by a pastoral lease and rights held under Native title, the pastoral rights would prevail. These admissions were dictated by the pronouncements of the High Court in *Mabo v. Queensland [No. 2]* and *Western Australia v. The Commonwealth* that Native title could be extinguished prior to the coming into force of the *Racial Discrimination Act* by Crown

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3 *Ibid.,* per Toohey J. at 166; see also *per* Kirby J. at 256–7.
5 (1995), 183 C.L.R. 373 (also called the *Native Title Act Case*).
grant of an interest that was inconsistent with the Native title. I have nonetheless argued elsewhere that extinguishment of Native title by Crown grant violates fundamental common law principles, in particular the aspect of the rule of law that the executive branch of government cannot infringe legal rights without specific prerogative power or clear legislative authority. Moreover, as the discussion of Canadian case law later in this article will reveal, Canadian courts have not accepted the High Court’s pronouncements on extinguishment by grant.

Turning to the issue of co-existence of Native title and other interests in land, I am going to briefly discuss the four majority judgments in the Wik case. In accordance with the appellants’ admissions, Toohey J. held that pastoral leases granted by the Crown prevail over Native title to the extent that the two are inconsistent. Inconsistency occurs if the rights conferred by a lease and the rights held by virtue of Native title cannot co-exist. After examining the terms of the pastoral leases in question and the provisions of the statutes under which they were granted, Toohey J. concluded that the leases did not confer rights of exclusive possession on the grantees, and so were not necessarily inconsistent with any Native title that the Wik and Thayorre Peoples may have to the same lands. However, the issue of

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6 See Kent McNeil, “Racial Discrimination and Unilateral Extinguishment of Native Title” (1996) 1 A.I.L.R. 181. Note, however, that pastoral leases can only be created pursuant to statute. The majority judgments in Wik therefore open the door to an argument that grants made under prerogative power rather than statutory authority could not extinguish Native title. Moreover, the requisite statutory authority would have to reveal a clear and plain intention that the Native title be extinguished by issuance of inconsistent grants: see Richard Bartlett, “Wik: Equality and the Fallacy of ‘Extinguishment’” (1997) 4:1 I.L.B. 11 (this “clear and plain” requirement will be discussed in more detail infra). Brennan C.J., in his dissenting opinion in Wik (1996), 141 A.L.R. 129, at 151, nonetheless maintained the position he took in Mabo [No. 2] on extinguishment by Crown grant: “The strength of native title is that it is enforceable by the ordinary courts. Its weakness is that it is not an estate held from the Crown nor is it protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant.” Now whether or not Native title is an estate held from the Crown, in the absence of clear and plain legislative intention to the contrary it should be protected against impairment by Crown grant in the same way as all legal rights are protected by the common law against unauthorized executive interference. Common law estates are protected against Crown grant, not because they are Crown tenures, but because they are legal interests. To draw an analogy outside of tenural relations, it is just as much a violation of legal rights and just as contrary to the rule of law for the Crown to infringe Native title by executive action as it is for the Crown to seize a person’s chattels: see the leading case of Entick v. Carrington (1765), 19 How. ST 1029.

7 Wik Peoples v. Queensland, at 185, 190.

8 Ibid., at 185.

9 Ibid., at 181–2, 188–9, 190.
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inconsistency could not be determined without knowing whether Native title could be established with respect to those lands, and if it could, the extent of the rights entailed by it. As those matters had not yet been dealt with at trial, Toohey J. did not decide whether there actually was inconsistency in this particular case. Moreover, given his conclusion that there might not be any inconsistency, he also left open the question of whether there could be a suspension of Native title during the term of a lease which did in fact confer inconsistent rights on the grantee.

Gaudron, Gummow and Kirby JJ. concurred with Toohey J.’s general conclusions that pastoral leases are not necessarily inconsistent with Native title, and so the rights under each can exist concurrently.

In assessing the nature of the rights granted by pastoral leases to determine whether there was inconsistency, Gaudron J. emphasized that pastoral leases owe their existence to statute rather than to the common law. The issue of whether these grants conferred rights of exclusive possession therefore depends on statutory interpretation, rather than on the common law meaning of terms such as “demise” and “lease” and the distinction between leases and licences. After examining the relevant statutes, Gaudron J. decided that the pastoral leases granted under them did not confer a right of exclusive possession, partly because the grant of such a right would have extinguished Native title, and statutes are not to be construed as extinguishing or diminishing Native title in the absence of clear and unambiguous words to that effect. She therefore concluded that the pastoral leases did not extinguish Native title, and did not give the grantees “a right to exclude native title holders from their traditional lands.”

10 On the possible extent of Native title, Toohey J. said that it could range from rights that may “approach the rights flowing from full ownership at common law” to an entitlement “to come on to land for ceremonial purposes, all other rights in the land belonging to another group”: ibid., at 185, quoting from Mabo v. Queensland [No. 2] (1992), 175 C.L.R. 1, at 89, 190, [1992] 5 C.N.L.R. 1 at 72, 152–3. For commentary on this aspect of the decision, see Kent McNeil, “Aboriginal Title and Aboriginal Rights: What’s the Connection?”, (1997) 36:1 Alberta Law Review (forthcoming).

11 Wik Peoples v. Queensland, at 188–90.

12 Ibid., at 188, 190.

13 Ibid., at 189–90.

14 Ibid., at 204.

15 Ibid., at 205–9.

16 Ibid., at 208–9, 218.

17 Ibid., at 209, 218.
On the issue of inconsistency, the appellants had “argued that, if pastoral leases did confer rights of exclusive possession, native title rights were not extinguished because those rights were not exercised” under the leases in question. In response to this, Gaudron J. said the grant of a right of exclusive possession, in and of itself, would be inconsistent with Native title, whether or not the grantees actually exercised the right. However, after concluding that pastoral leases did not confer a right of exclusive possession, she said that the satisfaction of certain conditions in one of the leases requiring construction of buildings and improvements might, “as a matter of fact, but not as a matter of legal necessity, impair or prevent the exercise of native title rights and, to that extent, result in their extinguishment.” That, she said, was a question of fact “to be determined in the light of the evidence led on the further hearing of this matter in the Federal Court.” So according to Gaudron J., it seems that a right of exclusive possession will extinguish Native title regardless of whether it has been exercised, but conditions that would involve factual inconsistency with Native title if met will only extinguish that title if and when they are met.

In a judgment similar in many respects to Gaudron J.’s, Gummow J. held that the leases in question had been granted pursuant to statutory authority rather than prerogative power. As the interests created by these grants were statutory in nature, one has to look to the statute, rather than to common law classifications of estates and interests, to determine their nature. For Gummow J., the main issue was whether the sui generis statutory interests created by these grants were necessarily inconsistent with incidents of Native title that might have existed with respect to these lands at the time the grants were made. Like Gaudron J., he said that inconsistency in this context means inconsistency between the rights of the grantees and the Native title holders, not inconsistency between their actual activities on the land. After assessing the nature of

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18 Ibid., at 193. With respect to the Mitchellton leases, the grantees never actually took possession: ibid., per Brennan C.J. (dissenting) at 138, Gummow J. at 221, Kirby J. at 269, 278.
19 Ibid., at 193.
20 Ibid., at 218.
21 Ibid.
22 Ibid., at 224, 236.
23 Ibid., at 241–3.
24 Ibid., at 233.
the interests created by the grants, Gummow J. concluded that they were not necessarily inconsistent with whatever Native title the Wik and Thayorre Peoples might have, and so “none of these grants necessarily extinguished all incidents of native title which then were subsisting.” However, like Gaudron J. he was of the view that the performance of conditions in the leases requiring improvements on the land could result in physical inconsistency which would extinguish Native title where those improvements had been made.

Kirby J. wrote the final majority judgment. For him as well, extinguishment of any Native title the Wik and Thayorre Peoples might have depended on whether there was inconsistency between the rights held by virtue of that title and the rights conferred by the pastoral leases. He clearly set out the distinction between what he called the “inconsistency of incidence test” and the “factual conflict test”. The question in the former “was not whether the estate or interest [granted by the Crown] had been exercised, in fact, in a way that was incompatible with the exercise of native title rights, but whether it was legally capable of being so exercised.” In the latter, the issue was

... one of actual or practical inconsistency between the estate or interest conferred in the land (in this case the pastoral lease executed pursuant to statute) and the actual exercise of surviving native title rights. If, in actuality, the two may be reconciled, the native title rights are not extinguished.

Kirby J. rejected the factual conflict test because he said “it is supported neither by legal authority applicable to this country nor by legal principle or policy.” Instead, he applied the inconsistency of incidence test and decided that Native title is not necessarily extinguished by pastoral leases in Queensland, as those leases are sui generis statutory interests which do not confer a right of exclusive possession. His decision on extinguishment is summed up in the following passage:

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25 Ibid., at 248. As a consequence of this conclusion, like Toohey J. he found it unnecessary to deal with the issue of suspension of Native title during the terms of the pastoral leases: see text accompanying n. 12, supra.

26 Ibid., at 247.

27 Ibid., at 262.

28 Ibid.

29 Ibid.

30 Ibid., at 274. See, however, the Canadian case law discussed infra, beginning at n. 37.

31 Ibid., at 279–80.
Only if there is inconsistency between the legal interests of the lessee (as defined by the instrument of lease and the legislation under which it was granted) and the native title (as established by evidence), will such native title, to the extent of the inconsistency, be extinguished.\footnote{Ibid., at 279.}

Overall, the majority judgments in the \textit{Wik} case therefore held that Native title might be extinguished by a Crown grant to the extent that the rights conferred by the grant were inconsistent with the Native titleholders’ rights. Actual exercise of the grantee’s rights would not be necessary to extinguish the Native titleholders’ rights, as long as the two were legally inconsistent. So a grant of a fee simple estate would necessarily extinguish Native title, whereas a grant of a lesser interest such as a pastoral lease might only extinguish those incidents of Native title which were inconsistent with the rights granted. I say “might” rather than “would” extinguish because the majority left open the issue of whether the Native titleholders’ rights, instead of being extinguished, would merely be suspended for the duration of the inconsistent rights. If merely suspended, they should survive the grant of a leasehold conferring exclusive possession or a life estate (and possibly even a fee simple), to be revived when those interests come to an end.\footnote{See text accompanying nn. 54-6, 74-5, 79-80, infra.}

As the \textit{Wik} case involved private rights under pastoral leaseholds, the Court did not deal with the issue of inconsistency between Native title rights and Crown appropriations of land for public purposes. However, Brennan J. (as he then was) did address this issue in obiter in \textit{Mabo [No. 2]}:\footnote{(1992), 175 C.L.R. 1, at 69-70, [1992] 5 C.N.L.R. 1, at 57. For a critique of this extinguishment by Crown appropriation approach, see McNeil, \textit{supra} n. 6.}

Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency.... Native title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (e.g., land set aside as a national park).\footnote{Ibid., at 279.}

However, Brennan J. qualified this by saying that for Native title to be extinguished in this way the Crown actually has to put the land to an inconsistent use:

A reservation of land for future use as a school, a courthouse or a public office will not by itself extinguish native title: construction of the building,
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however, would be inconsistent with the continued enjoyment of native title which would thereby be extinguished.\textsuperscript{35}

There thus appears to be a distinction between Crown grants and Crown appropriations where inconsistency is concerned. In the case of grants, legal inconsistency between the rights granted and Native titleholders’ rights is what matters,\textsuperscript{36} whereas in the case of appropriations it is inconsistent use by the Crown that extinguishes Native title. The explanation for treating Crown appropriations differently may be that the Crown, according to \textit{Mabo [No. 2]}, already has an underlying title and the power to extinguish Native title by appropriation, but until that is actually accomplished by putting the lands to inconsistent use there is no conflict between the Crown’s title and the Native title.

Canadian courts have taken a different approach to the issue of co-existence of private interests in land and Aboriginal rights (including both Aboriginal title to land and more specific Aboriginal rights, such as hunting and fishing rights). In Canada, this issue has come up more often in the context of specific rights than in the context of Aboriginal title to land, and has often involved treaties entered into between the Aboriginal peoples and the Crown. Due to space limitations, I am going to confine my discussion to three cases: \textit{R. v. Sioui},\textsuperscript{37} \textit{R. v. Badger},\textsuperscript{38} and \textit{Delgamuukw v. British Columbia}.\textsuperscript{39}

In \textit{Sioui}, the Hurons of Lorette in Quebec claimed that they had treaty rights to practice their rites and customs on lands within a provincial park, exempting them from provincial legislation regulating public use of the park. They did not claim any right to the land itself within the park. The Supreme Court of Canada upheld the claimed treaty rights, according them protection from the legislation.\textsuperscript{40} On the issue of the territorial scope of the rights, Lamer J. (as he then was), delivering the Court’s unanimous judgment, said that “the rights guaranteed by the

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\textsuperscript{36} But according to Gaudron and Gummow JJ. in \textit{Wik}, there is an exception where the grant imposed conditions which, if met, would result in inconsistency with Native titleholders’ rights. In that situation, it is the factual fulfillment rather than the imposition of the conditions that extinguishes Native title: see text accompanying nn. 20–1, 26, \textit{supra}.
\textsuperscript{37} [1990] 3 C.N.L.R. 127 (S.C.C.).
\textsuperscript{39} [1993] 5 C.N.L.R. 1 (B.C.C.A.).
\textsuperscript{40} The Court relied on s.88 of the \textit{Indian Act}, R.S.C. 1985, c.I-5, which shields treaty rights from provincial laws of general application.
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treaty could be exercised over the entire territory frequented by the Hurons at the time [1760, when the treaty was signed], so long as the carrying on of the customs and rites is not incompatible with the particular use made by the Crown of this territory.  

He arrived at this conclusion by interpreting the treaty in its historical context, taking into account the parties’ probable intentions and the necessity of reconciling their competing interests. So the right of the Crown to use these public lands would prevail over the Hurons’ right to practice their rites and customs because Lamer J. concluded that this was what had been agreed to in 1760, not because the Crown’s rights were superior or paramount. Moreover, the Crown’s rights would prevail only in the event of actual inconsistency between its use of the land and the Hurons’ exercise of their rites and customs. On the facts, Lamer J. did not find any such inconsistency.

Although Sioui did not involve private rights to land, Lamer J. opined that, in the event the Crown granted lands within the territory covered by the treaty, the right of the Hurons to practice their rites and customs on those lands would be lost. He wrote that the proposition that the Hurons could exercise their rights over the entire territory frequented by them in 1760 might

... lead one to suppose, a priori, that the Hurons could cut down trees and make fires on private property that had been part of the territory frequented by them at the time. With respect, I feel that adopting such a position would go beyond what General Murray [who signed the treaty on behalf of the Crown] intended.... The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons’ interests and those of the conqueror.

So once again, Lamer J.’s conclusion on this issue was based on what had been agreed to in 1760, not on any inherent superiority of the rights of grantees of the Crown over the rights of the Hurons.

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42 Ibid., at 157–8.
43 Ibid., at 156. See also at 157: “I readily accept that the Hurons were probably not aware of the legal consequences, and in particular the right to occupy to the exclusion of others, which the main European legal systems attached to the concept of private ownership. Nonetheless, I cannot believe that the Hurons ever believed that the treaty gave them the right to cut down trees in the garden of a house as part of their right to carry on their customs.”
44 See also Claxton v. Saanichton Marina Ltd., [1989] 3 C.N.L.R. 46 (B.C.C.A.), where it was held that a treaty right to fish in a specific location prevailed over and invalidated a Crown grant to the defendant of a licence to construct a marina in the same location. This decision is consistent with Sioui, as the Court in Claxton concluded that the defendant’s development
The Supreme Court of Canada did address the issue of co-existence of private land rights and treaty rights in *R. v. Badger*, in the context of a treaty right to hunt in Alberta. That right had been given constitutional protection in modified form by the *Constitution Act, 1930*[^45], which enacted the Natural Resources Transfer Agreements (NRTAs) in the three prairie provinces. In those agreements, the provinces assured to the “Indians” the right “of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.”[^46]

In *Badger*, the three accused were Indians who had been hunting for food on privately owned lands. One of the issues in the case was therefore whether they had “a right of access” within the meaning of the NRTA for the purpose of hunting on those lands. To decide this issue, Cory J. for the majority referred back to Treaty No. 8 (1899), upon which the accused relied, and found that it guaranteed their right to hunt throughout the territory surrendered by it, except on lands “required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”[^47] From this he concluded that, “if the privately owned land is not ‘required or taken up’ in the manner described in Treaty No. 8, it will be land to which the Indians had a right of access to hunt for food.”[^48] Relying on evidence presented at trial, Cory J. concluded that “in 1899 the Treaty No. 8 Indians would have understood that land had been ‘required or taken up’ when it was being put to a use which was incompatible with the exercise of the right to hunt.”[^49] He found this interpretation to be supported by oral promises made when the treaty was signed and by earlier case law. Moreover, this aspect of the right to hunt had not been modified by the NRTA. Cory J. summed up this point in the following words:

Where lands are privately owned, it must be determined on a case-by-case basis whether they are ‘other lands’ to which Indians had ‘right of access’ under the Treaty. If the lands are occupied, that is, put to visible use which is

[^48]: *Ibid*.
incompatible with hunting, Indians will not have a right of access. Conversely, if privately owned land is unoccupied and not put to visible use, Indians, pursuant to Treaty No. 8, will have a right of access in order to hunt for food.  

Turning to the facts of the case, Cory J. found that two of the accused had been hunting on land that was “visibly being used.” However, the third, Ernest Ominayak, had been … hunting on uncleared muskeg. No fences or signs were present. Nor were there any buildings located near the site of the kill. Although it was privately owned, it is apparent that this land was not being put to any visible use which would be incompatible with the Indian right to hunt for food. Accordingly, the geographical limitations upon the Treaty right to hunt for food did not preclude Mr. Ominayak from hunting upon this parcel of land.

Mr. Ominayak therefore had a right of access to this land for the purpose of hunting for food which brought him within the protection of the NRTA.

The *Badger* decision reveals that the treaty right to hunt continued on lands that were granted to private landowners in fee simple, no doubt after the treaty had been signed. In other words, the grants did not extinguish the treaty right to hunt. The rights of the private landowners and the hunting right of the Indian signatories of the treaty are compatible and concurrent, but the treaty right will become unexercisable if the private landowners put their lands to visible use. So the landowners have the power to trump the right to hunt, but they cannot extinguish it because it will be revived if the lands cease to be put to visible use at a later time. This is apparent from the following passage in Cory J.’s judgment:

The presence of abandoned buildings, then, would not necessarily signify to the Indians that land was taken up in a way which precluded hunting on them. Yet, it is dangerous to pursue this line of thinking too far. The abandonment of land may be temporary. Owners may return to reoccupy the land, to undertake maintenance, to inspect it or simply to enjoy it. How ‘unoccupied’ the land was at the relevant time will have to be explored on a

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53 Note, however, that a new trial was ordered in his case to determine whether or not the provincial legislation infringing his right to hunt could be justified: see *ibid.*, 103–13.
54 Cory J. simply described the lands as “privately owned”, but in the Alberta Court of Appeal, [1993] 3 C.N.L.R. 143, at 145, Kerans J.A. made clear that the interests held were fee simple estates.
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The right to hunt will therefore be suspended but not extinguished on privately owned lands that are put to visible use, and the presence and continuance of such use are questions of fact to be determined in each particular case.

Now it may be thought that the treaty right to hunt was not extinguished by Crown grants in Badger because that right was given constitutional protection in modified form by the NRTA, but that is not the correct explanation for its continuance. If the NRTA was responsible, then the treaty right would only continue on lands granted after the NRTA came into force in 1930. As there is no indication in Cory J.’s judgment of when the lands in question were granted by the Crown, clearly it was irrelevant whether they were granted before or after 1930. If they were granted between 1899 when the treaty was signed and 1930, then the continuance of the treaty right must have been due to the treaty itself and not to the NRTA. This is significant because it means that the application of this aspect of the Badger decision is not limited to the three provinces covered by the NRTAs. Consequently, treaty rights to hunt and pursue other activities in other parts of Canada as well would not necessarily be extinguished by Crown grants of land to private persons.

To sum up the Sioui and Badger decisions on the co-existence of rights, Sioui reveals that treaty rights can be exercised on Crown lands in the treaty area as long as their exercise is not inconsistent with Crown use of the land. Inconsistency is a question of fact rather than law, so the Supreme Court clearly regarded the treaty rights and the Crown’s title as legally compatible. The Sioui decision is therefore consistent with Brennan J.’s dictum in Mabo [No. 2] on the issue of co-existence of Native title and Crown title. Badger extended the concept of co-existence of rights to privately owned lands. Treaty rights can co-exist

55 Ibid., at 96–7.
56 As a comparison of Sioui and Badger reveals, in each situation it will depend on how the particular treaty is interpreted. See also R. v. Bartleman, [1984] 3 C.N.L.R. 114 (B.C.C.A.), at 131, where Lambert J.A. for a unanimous Court held that a treaty right “to hunt over the unoccupied lands” continued on lands that had been granted to private landowners by the Crown, as long as “the particular form of hunting that is being undertaken does not interfere with the actual use and enjoyment of the land by the owner or occupier.” Significantly, the Bartleman case arose in British Columbia where the NRTAs do not apply. Moreover, it was relied on by Cory J. in Badger, [1996] 2 C.N.L.R. 77, at 101.
57 See text accompanying n. 35, supra.
with a private landowner’s rights, and can be exercised as long as the landowner is not putting the lands to visible use. In each case, however, co-existence of the rights depends on interpretation of the treaty, and visible use is a question of fact to be determined on a case-by-case basis. The Badger approach is at variance with the approach taken by the majority in the Wik case, where the test applied where private interests in land were concerned was legal rather than factual inconsistency.  

The relevance of the Sioui and Badger decisions to Australia may be questioned because they both involved treaty rights, and the Crown did not generally sign treaties with the Indigenous peoples of Australia. However, the treaty rights at issue in both those cases would have existed as Aboriginal rights prior to the signing of the treaties. If Aboriginal rights that have been affirmed by a treaty can co-exist with other land rights, Aboriginal rights that have not been so affirmed should be capable of doing so as well. Where Crown lands are concerned, there is no doubt that this is what occurs. Moreover, it appears from Cory J.’s judgment in Badger that Aboriginal rights which have not been affirmed by treaty can also co-exist with rights derived from Crown grants. In his discussion of suspension of the treaty right to hunt while land was being put to visible use, he said this:

> The Indians’ experience with the Hudson’s Bay Company was also relevant. Although that company had title to vast tracts of land, the Indians were not excluded from and in fact continued to hunt on these lands.

As the Hudson’s Bay Company had received title to those vast tracts of land by a Crown grant long before treaties were signed with the Indians who lived there, their Aboriginal rights obviously continued to exist concurrently with the company’s rights. Moreover, the fact that the Crown later signed land surrender treaties with some of the Aboriginal

58 See text accompanying nn. 8, 18–21, 24, and 27–32, supra.
59 For a convincing argument that the Crown did enter into a treaty with the Aborigines in Tasmania, see Henry Reynolds, _Fate of a Free People_ (Ringwood, Vic.: Penguin Books, 1995).
60 See _Simon v. R._, [1986] 1 C.N.L.R. 153 (S.C.C.), at 166–7, where Dickson J. (as he then was) found that a treaty right to hunt had been an Aboriginal right before the treaty was signed.
64 See also _Hamlet of Baker Lake v. Minister of Indian Affairs_, [1979] 3 C.N.L.R. 17 (F.C.T.D.).
The issue of co-existence of Aboriginal rights and private interests in land arose again in Delgamuukw v. British Columbia. That case, which was argued on appeal before the Supreme Court of Canada on June 16 and 17 of this year, when judgment was reserved, involves a claim by the Gitksan and Wet’suwet’en Peoples in British Columbia to land rights and self-government in their traditional territories. As the issues involved in the case are too numerous and complex to receive comprehensive treatment here, I will confine my discussion to the portions of the judgments in the British Columbia Court of Appeal which relate to the issue of co-existence.

Macfarlane J.A., Taggart J.A. concurring, wrote the main majority judgment, in which he dealt with co-existence under the heading “Extinguishment”. In his concurring judgment, Wallace J.A. did not address this matter specifically, but he did say that he agreed generally with Macfarlane J.A. and stated that, on the issue of extinguishment, he was “in complete agreement with the reasons and conclusions expressed by Mr. Justice Macfarlane”.66

Turning then to Macfarlane J.A.’s judgment, in his opinion Aboriginal rights could be extinguished prior to April 17, 1982, without the consent of the Aboriginal peoples, by legislation or pursuant to legislation enacted by a constitutionally competent legislature, as long as the legislative intent to extinguish or authorize extinguishment was clearly and plainly expressed.68 But even if legislation authorized

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65 This is further confirmed by Rupert’s Land and North-Western Territory Order, 23 June 1870, in R.S.C. 1985, App. II, No. 9. The Order imposed an obligation on Canada to settle Aboriginal land claims in the territory granted to the Hudson’s Bay Company in 1670: see Kent McNeil, Native Claims in Rupert’s Land and the North-Western Territory: Canada’s Constitutional Obligations (Saskatoon: University of Saskatchewan Native Law Centre, 1982).

66 [1993] 5 C.N.L.R. 1, at 79, 123.

67 On April 17, 1982, the Constitution Act, 1982, being Schedule B to the Canada Act 1982, (U.K.) 1982, c.11, came into force. As s.35(1) of that Act provided existing Aboriginal and treaty rights with constitutional protection by recognizing and affirming them, they can no longer be extinguished unilaterally by or pursuant to legislation: see Delgamuukw v. British Columbia, [1993] 5 C.N.L.R. 1, per Lambert J.A. (dissenting on other grounds) at 203; R. v. Van der Peet, [1996] 4 C.N.L.R. 177 (S.C.C.), per Lamer C.J. at 193.

68 The clear and plain test for legislative extinguishment was accepted by the Supreme Court of Canada in R. v. Sparrow, [1990] 3 C.N.L.R. 160, at 174–5, and adopted by the High Court of Australia in Mabo (No. 2) [1992], 175 C.L.R. 1, [1992] 5 C.N.L.R. 1, especially per Brennan J. at 64 C.L.R., 53 C.N.L.R.
extinguishment – for example, by enabling the Crown to create interests in land that were inconsistent with Aboriginal rights\(^{69}\) – whether or not extinguishment actually occurred would “of necessity depend upon the nature of the Indian interest affected by the grant, and the nature of the grant itself.”\(^{70}\) He put it this way:

Before concluding that it was intended that an aboriginal right be extinguished one must be satisfied that the intended consequences of the colonial legislation were such that the Indian interest in the land in question, and the interest authorized by the legislation, could not possibly co-exist. Again, if the consequence is only impairment of the exercise of the right it may follow that extinguishment ought not to be implied.\(^{71}\)

In other words, if at all possible a court should find that there is no inconsistency and therefore no extinguishment. Macfarlane J.A. elaborated as follows:

Two or more interests in land less than fee simple can co-exist. A right of way for power lines may be reconciled with an aboriginal right to hunt over the same land, although a wildlife reserve might be incompatible with such a right. Setting aside land as a park may be compatible with the exercise of certain aboriginal customs: \(R. v. Sioui\) [discussed supra].\(^{72}\)

But even in a situation where a fee simple interest was validly created, Macfarlane J.A. did not think that Aboriginal rights would necessarily be extinguished. The reason for this is that, unlike the High Court in \(W i k\), Macfarlane J.A. did not limit co-existence to situations where there was no legal inconsistency between legislatively authorized interests and Aboriginal rights. For him, actual use of the land had to be

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\(^{69}\) Note that Macfarlane J.A. was speaking hypothetically, as he did not refer to any such legislation. In fact, he expressed the opinion that after British Columbia joined Canada in 1871 the province lacked the constitutional authority to extinguish Aboriginal rights by legislation, as those rights came within exclusive federal jurisdiction: \(1993\) \(5\) C.N.L.R. 1, at 64–70; see also \(per\) Lambert J.A. (dissenting on other grounds) at 197–9. Moreover, unless specifically directed at Aboriginal rights (which would make it discriminatory: e.g. see \(M a b o v. Queensland\ [No. 1]\) \((1988)\), 166 C.L.R. 186 (H.C. Aust.)), legislation permitting the extinguishment of Aboriginal rights by the creation of inconsistent interests in land would allow the Crown to extinguish other landholders’ rights in the same way. Such legislation would encounter the strong interpretive presumption against the taking of property, especially without compensation: e.g. see \(The Commonwealth v. Hazeldeell Ltd.\) \((1918)\), 25 C.L.R. 552 (H.C. Aust.), \(per\) Griffith C.J. and Rich J. at 563; \(A t t o r n e y-G e n e r a l v. De Keyser’s Royal Hotel, [1920]\) A.C. 508 (H.L.), \(per\) Lord Atkinson at 542, Lord Parmoor at 576, 579; \(C o l o n i a l S u g a r R e f i n i n g C o. v. M e l b o u r n e H a r b o u r T r u s t C o m m i s s i o n e r s\) \((1927)\), 38 C.L.R. 547 (P.C.), at 559.

\(^{70}\) \(1993\) \(5\) C.N.L.R. 1, at 55.

\(^{71}\) \(I b i d.\)

\(^{72}\) \(I b i d.\), at 63.
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taken into account as well. He wrote:

A fee simple grant of land does not necessarily exclude aboriginal use. Uncultivated, unfenced, vacant land held in fee simple does not necessarily preclude the exercise of hunting rights: *R. v. Baritleman* [see *supra*, n. 56].

On the other hand the building of a school on land usually occupied for aboriginal purposes will impair or suspend a right of occupation. Macfarlane J.A. therefore envisaged the same kind of factual compatibility between Aboriginal and non-Aboriginal uses as Cory J. found to exist in the *Badger* case.

Even in the event of a direct conflict between a private landowner’s use of the land and the exercise of Aboriginal rights, those rights would not necessarily be extinguished. The clear and plain test for extinguishment, as articulated by Macfarlane J.A., means that extinguishment will only occur “if the only possible interpretation of the statute is that aboriginal rights were intended to be extinguished.”

Unless the statute clearly provided that the Aboriginal rights would be extinguished in the event of inconsistent use, there would always be another option, namely suspension of the exercise of the rights for as long as the inconsistency existed. If, for example, a leasehold or a life estate was validly created, and the leaseholder or life tenant used the land in a way that was inconsistent with the exercise of Aboriginal rights, those rights would not necessarily be extinguished but could be suspended while the inconsistency lasted. Even where a fee simple estate was validly created, the exercise of Aboriginal rights might merely be suspended while the lands were being put to an inconsistent use.

To sum up Macfarlane J.A.’s views on co-existence, Aboriginal rights and other interests in land can co-exist where there is no legal inconsistency between them, as might occur where there is an Aboriginal right to hunt and a right of way for power lines over the same land. Where there is legal inconsistency, they can still co-exist until such time as the landowner actually uses the land in a manner inconsistent with the exercise of the Aboriginal rights. To this I would add that Macfarlane J.A.’s analysis, while not directly addressing the issue, lends credence to

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73 *Ibid.*; see also at 66. Note that the issue of compatibility of fee simple estates and Aboriginal rights was not directly before the Court, as the Gitksan and Wet’suwet’en’s claim excluded privately-held fee simple lands which had been granted prior to the commencement of their action; instead, they claimed damages from the provincial Crown for wrongful alienation of those lands: see ibid., at 62.

the argument that was made in *Wik* but left undecided by the High Court that Aboriginal rights could be suspended rather than extinguished for the duration of any inconsistency.75

Mr. Justice Lambert dissented in *Delgamuukw* on issues concerning Aboriginal title and self-government, but on the issue of co-existence of Aboriginal rights and other interests in land he expressed views similar to those of Macfarlane J.A.76 He thought that for Aboriginal rights to be extinguished by or pursuant to legislation the legislative intent to extinguish had to be so clear and plain that no other result was possible.77 On co-existence of Aboriginal rights and other interests in land, he wrote:

The fact that there is an inconsistency between the exercise of powers granted by legislation and the exercise of aboriginal rights does not extinguish the aboriginal rights to the extent of the inconsistency, nor does it necessarily suspend them, unless it is clear and plain from the legislation itself that those consequences had been made the subject of clear, plain and considered legislative intention.78

So according to Lambert J.A., legal inconsistency alone would not cause extinguishment unless the legislature itself clearly and plainly intended that result. Absent that intent, conflict in actual use could only lead to extinguishment if the conflict was permanent and the legislation gave priority to the non-Aboriginal interest. In his words,

… unless the legislation provides that the extinguishment arises on the creation of a tenure which might be inconsistent with an Aboriginal right, there must be an actual use made of the land by the holder of the tenure, which is permanently inconsistent with the continued existence of the aboriginal title or right, and does not merely bring about a temporary suspension.

…

I do not think there is any basis in principle for saying that inconsistency between the grant [by the Crown of an interest in land] and native title necessarily means that it is the native title that must give way. If the point were addressed in the legislation itself and a clear and plain intention to extinguish, should there be an inconsistency, were shown, then

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75 See especially the quotation accompanying n. 73, *supra*.
76 Note that “co-existence” was not the term Lambert J.A. employed to describe situations where Aboriginal rights and non-Aboriginal interests exist concurrently as a matter of law. Instead, he seems to have regarded that term as more applicable in the context of political compromise: see *ibid.*, at 254.
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existuishment would be the result.\footnote{Ibid., at 190–1; see also 248. In the second part of this quotation, Lambert J.A. was expressly disagreeing with Brennan J.’s opinion in \textit{Mabo [No. 2]} (1992), 175 C.L.R. 1, at 68, [1992] 5 C.N.L.R. 1, at 56, that “[a] Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title.” Lambert J.A. remarked at 192 “that Mr. Justice Brennan’s proposition that the effect of the grant is enough to extinguish aboriginal title and rights even if the intention is not clear and plain, is contrary to the test enunciated in \textit{Sparrow}.” I would add that it also appears to conflict with Brennan J.’s own adoption of the clear and plain test: see \textit{supra}, n. 68.}

Lambert J.A. clearly envisaged that Aboriginal rights could co-exist even with a fee simple interest. He wrote:

> The fact that an Indian people have an aboriginal title to the occupancy, possession, use and enjoyment of a parcel of land is not necessarily inconsistent with the holding of a fee simple title to the same land by someone else, unless either party decides to try to exclude the other.\ldots  [In that situation], if priority were to be given to a fee simple title over an aboriginal title, by the application of an appropriate legal principle about priorities, then the fee simple title may extinguish the aboriginal title of exclusive occupancy in the same land, but may not extinguish the aboriginal rights of hunting or gathering on the land, depending, perhaps, on the use that the holder of the fee simple title is making of the land.\footnote{[1993] 5 C.N.L.R. 1, at 190.}

In sum, Lambert J.A. relied on the clear and plain test to maximize co-existence between Aboriginal rights and other interests in land. Aboriginal rights would only be extinguished by the creation of inconsistent interests if the legislature clearly and plainly intended that result, and then only to the extent of the inconsistency. Otherwise they would co-exist, unless there was a conflict in actual use, in which case the non-Aboriginal interest would only prevail if that was clearly and plainly intended by the legislature. However, where the inconsistency was temporary rather than permanent, instead of being extinguished the Aboriginal rights would merely be suspended.

The fifth \textit{Delgamuukw} judge, Mr. Justice Hutcheon, also dissented in part, but not on the issues of extinguishment and co-existence. He expressed broad agreement with portions of the judgments of Macfarlane and Lambert J.J.A. on those issues, and added:

> Without actual use by settlers, I think the law is that expressed in \textit{Mabo}, \textit{supra}, by Mr. Justice Brennan at p. [68]:

> A reservation of land for future use as a school, a courthouse or a public office will not by itself extinguish native title: construction of the building, however, would be inconsistent with the continued enjoyment of native rights.
title which would thereby be extinguished. But where the Crown has not
granted interests in land or reserved and dedicated land inconsistently with
the right to continued enjoyment of native title by the indigenous
inhabitants, native title survives and is legally enforceable.

Whether the Indian title is extinguished by grant in fee simple is a
question that need not be decided at this state [sic] of the proceeding.
Likewise, the entitlement to compensation need not be decided.81

Like Macfarlane and Lambert JJ.A., Hutcheon J.A. therefore appears to
have been of the opinion that inconsistency involves conflict between the
exercise of Aboriginal rights and actual use of the land by the Crown or
its grantees. Creation of a fee simple estate by grant would not
necessarily extinguish those rights, though Hutcheon J.A. left that issue
open.

In conclusion, comparison of the Wik judgments with Canadian case
law on the issue of co-existence of Indigenous rights and other interests
in land reveals that Canadian courts have gone much further than Wik in
preserving those rights in face of Crown grants. According to Wik,
Native title must give way to Crown grants of private interests.
However, the majority decided that, where interests like pastoral leases
that do not confer a right of exclusive possession were created by grant,
Native title would be preserved, but only to the extent that there was no
legal inconsistency between the grantees’ rights and the Native title.

In Canada, the courts have not decided that private interests created
by grant prevail over Aboriginal rights as a general rule. From Sioui it
appears that those interests can prevail over treaty rights, but in that
particular case it would have been because that was the understanding of
the parties who signed the treaty. Badger reveals that, even where there
was such an understanding, the treaty rights can still co-exist with the
rights of grantees – even if they have fee simple estates – as long as the
grantees do not actually use their lands for purposes that are inconsistent
with the exercise of the treaty rights. So unlike the High Court in Wik,
the Supreme Court of Canada has applied a factual inconsistency rather
than a legal inconsistency test, at least where treaty rights are concerned.
Moreover, where factual inconsistency occurs, the Supreme Court has
indicated that the rights will not be extinguished but merely suspended
for as long as the inconsistent lasts.

In Delgamuukw, the British Columbia Court of Appeal dealt with

81 Ibid., at 261.
the issue of co-existence of Aboriginal rights and the rights of grantees of the Crown. All the judges were of the opinion that the power of the Crown to override Aboriginal rights by grant would depend on a constitutionally competent legislature clearly and plainly conferring authority on the Crown to do that. But even where that authority had been given, issuance of a grant creating rights that were legally inconsistent with Aboriginal rights would not extinguish those rights. Instead, the Aboriginal rights could still be exercised until the grantee actually used the land in a manner that conflicted with the exercise of the Aboriginal rights. In that event, Lambert J.A. was of the view that the Aboriginal rights would be suspended rather than extinguished, and none of his colleagues expressed disagreement with him on that point. Moreover, Lambert J.A.’s view has since received strong support from Badger, where Cory J. said that a treaty right (which in that instance reaffirmed a pre-existing Aboriginal right) would merely be suspended for the duration of inconsistent use of the land by a landowner who had a fee simple estate derived from a Crown grant.

It remains to be seen whether the Supreme Court of Canada will address the related issues of the efficacy of Crown grants of lands subject to Aboriginal rights, and the possible co-existence of private interests and Aboriginal rights, in the Delgamuukw appeal. As no specific grants were being questioned in that case, and no actual situations of potential co-existence were presented, the Supreme Court may well avoid these issues entirely. However, the Court has already given a clear indication in Badger that even valid grants to private landowners will only suspend the rights of Aboriginal peoples in the event of actual inconsistent use. In light of that authority in particular, the High Court’s decision in Wik still lags behind Canadian jurisprudence on Indigenous rights.