

Aboriginal Title as a Constitutionally Protected Property Right

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*Delgamuukw v. British Columbia*¹ is undoubtedly one of the most important decisions the Supreme Court of Canada has ever handed down. It will have a continuing, long-term impact on the Aboriginal peoples' relationships with the federal and provincial governments, as well as on the constitutional division of powers in this country.² While there are many aspects of the decision that require analysis and discussion, this paper's focus is on the definition of Aboriginal title provided by the Court. In particular, I am going to discuss the status of Aboriginal title, not only as a *property right*, but also as a *constitutionally protected property right*. This will involve looking at the central position of property, especially *real* property, in the common law.³ It will also involve examining the effect of constitutionalizing Aboriginal title, along with other Aboriginal rights, in 1982. Related to this is the question of how Aboriginal title can be infringed. Finally, I will return to property rights generally, and briefly consider the implications of *Delgamuukw* for the protection accorded to those rights by Anglo-Canadian law.

Notes will be found on pages 67–75.

1. The Central Position of Real Property in the Common Law

Land was by far the most important form of wealth in England prior to the Industrial Revolution. Due to the feudal system, it also played a central role in the political, military and social structure of the country. So as the common law took form in the period following the Norman Conquest, disputes over land naturally predominated in the king's courts. Judicial decisions involving land accordingly played a major role in the development, not only of property law, but of other branches of English law as well.⁴

Because land was so important, protecting real property from arbitrary seizure by the king was at least as important as guarding it against other persons. The nobles who forced King John to sign *Magna Carta* in 1215 thought this protection to be of sufficient importance to warrant a key clause to curtail this abuse of royal power. Chapter 29 accordingly provided that “[n]o Freeman shall ... be disseised [i.e., dispossessed of his land] ... but by the lawful Judgment of his Peers, or by the law of the Land.”⁵ This restraint on the authority of the executive branch of government is still in force in Britain,⁶ and would have been received in Canada as part of our constitutional law.⁷ It is a basic aspect of the rule of law,⁸ protecting real property against government taking except in accordance with law.⁹

However, the constitutional protection accorded to property rights by Anglo-Canadian law is only effective against the *executive*. Due to the doctrine of parliamentary sovereignty (or supremacy),¹⁰ the *legislative* branch of government has no binding constitutional obligation to respect private property. But this does not mean that property is not a fundamental right in our legal system. On the contrary, it has been long regarded as enjoying special status in English law, along with other fundamental rights and freedoms. William Blackstone, for example, the great compiler and categorizer of English law, said this in reference to the rights and liberties of British subjects:

these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and *the right of private property*; because, as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.¹¹

Modern enumeration of fundamental rights and freedoms also include the right of private property. Halsbury's *Laws of England*,¹² for example,

lists the right to property under the constitutional law heading, “Duties and Rights of the Subject,” along with liberty, the right to life, freedom of expression, freedom of conscience, and the right of association.

While lack of protection against legislative taking means that property rights do not enjoy the kind of constitutional status they have been accorded in the United States,¹³ presumptions of statutory interpretation do provide limited protection against legislative infringement in Anglo-Canadian law.¹⁴ There are two relevant presumptions. First, it is always presumed that the legislature does not intend to interfere with vested rights, particularly rights of property.¹⁵ So if the legislature intends to take private property, it must express that intention clearly, as the courts will, if possible, construe the legislation as not interfering with property rights.¹⁶ Secondly, the courts will presume that the legislature intends that compensation be paid for any private property that is taken, unless compensation is unequivocally denied.¹⁷ Through this indirect means of interpretation of statutes, the courts have succeeded in providing property rights with limited protection against legislative taking.¹⁸

When Canada’s Constitution was patriated in 1982, a conscious decision was made not to include property rights in the fundamental rights and freedoms guaranteed by the Charter.¹⁹ However, Aboriginal rights were accorded constitutional protection outside the *Charter* by section 35 of the *Constitution Act, 1982*.²⁰ As Aboriginal title is an Aboriginal right, it is constitutionally protected.²¹ Moreover, the *Delgamuukw* decision confirmed suggestions in earlier Supreme Court decisions that Aboriginal title is a form of property right.²² We therefore need to examine the *Delgamuukw* decision in more detail to understand the proprietary nature of Aboriginal title.

2. Aboriginal Title as a Property Right

In *Delgamuukw*, Chief Justice Antonio Lamer²³ rejected the argument made by the Gitksan and Wet’suwet’en that Aboriginal title is tantamount to an inalienable fee simple estate.²⁴ But he also rejected the position of the Canadian and British Columbian governments that Aboriginal title has no independent content, being no more than a bundle of rights to engage in activities that are themselves Aboriginal rights, or, alternatively, that “aboriginal title, at most, encompasses the right to exclusive use and occupation of land in order to engage in those activities which are aboriginal rights themselves.”²⁵ Instead, Lamer found that Aboriginal title lies in between these opposing positions. He described its content in this way:

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety

of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit, to be explained more fully below, flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.²⁶

The Chief Justice went on to elaborate on this description of Aboriginal title. Commenting on *St. Catherine's Milling and Lumber Co. v. The Queen*,²⁷ he said subsequent cases have demonstrated that the Privy Council's description of it as "a personal and usufructuary right" "is not particularly helpful to explain the various dimensions of aboriginal title."²⁸ He continued:

What the Privy Council sought to capture is that aboriginal title is a *sui generis* interest in land. Aboriginal title has been described as *sui generis* in order to distinguish it from "normal" proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.²⁹

So Aboriginal title, while unlike other common law real property interests, is nonetheless "an interest in land."³⁰ Moreover, it is "a *right to the land itself*,"³¹ which "encompasses the *right to exclusive use and occupation of land* held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures."³² These descriptions of Aboriginal title clearly indicate that it is a real property right, though *sui generis* in nature.³³ This is confirmed by an observation the Chief Justice made respecting the general inalienability of Aboriginal title, other than by surrender to the Crown:

This Court has taken pains to clarify that aboriginal title is only "personal" in this sense [i.e., in the sense of being inalienable], and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the

land and cannot compete on an equal footing with other proprietary interests: see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at p. 677.³⁴

Nor do the other *sui generis* aspects of Aboriginal title referred to by the Chief Justice diminish its status as a proprietary interest. The first of these is its *source* in occupation of land “before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward.”³⁵ There is a similarity here with the land titles of the French settlers who came to Canada during the French régime—their property interests, which continued after France ceded New France to Britain in 1763,³⁶ are not “normal estates, like fee simple,” because their source is not English law, but the French law that was in force prior to Britain’s acquisition of sovereignty. However, in contrast with the situation of the French settlers, the relevance of Aboriginal law to Aboriginal title appears to be its value, along with proof of physical presence and use, in establishing occupation of land at the time of assertion of Crown sovereignty.³⁷ Once that occupation has been shown, apparently Aboriginal title then exists as a generic right that does not vary from one Aboriginal nation to another in accordance with their diverse systems of law.³⁸ However, Aboriginal law would probably be applicable *within* each Aboriginal nation to govern the land rights of the members *inter se*.³⁹

Another *sui generis* aspect of Aboriginal title that distinguishes it from common law real property interests is that it is *communal*. Chief Justice Lamer put it this way in *Delgamuukw*:

Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community.⁴⁰

This is an extremely important passage in his judgment, as it provides a foundation for a right of self-government.⁴¹ For the purposes of this paper, however, it also reveals how the law of Aboriginal title appears to diverge from the usual common law position on legal personality. As a general rule, in Anglo-Canadian law title to property must be vested in an individual person or persons, who can be either natural persons (human beings) or artificial persons (corporations). If a group of people owns property, title must be vested in all the members of the group *as individuals*. The group cannot, as an entity in its own right, hold title because it lacks legal personality. It is for this reason that the common law does not permit unincorporated associations as such to hold title to property.⁴² By holding that Aboriginal title is “a collective right

to land held by all members of an aboriginal nation,” Chief Justice Lamer cannot have meant that the members hold as individuals, as there would then be no significant distinction between this aspect of Aboriginal title and landholding by members of unincorporated associations, and so Aboriginal title would not be *sui generis* in this respect. Instead, he must have intended to accord a form of legal personality to Aboriginal nations.⁴³ If so, they have unique status in Anglo-Canadian law which probably enhances their claim to a right of self-government,⁴⁴ but does not affect the proprietary nature of their Aboriginal title.

A final *sui generis* aspect of Aboriginal title is the “inherent limit” mentioned in one of the passages already quoted from *Delgamuukw*, where Lamer said that Aboriginal lands cannot be used in ways that are “irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s aboriginal title.”⁴⁵ He referred to this as a “limit on the content of aboriginal title,” and said that it is “a manifestation of the principle that underlies the various dimensions of that special interest in land—it is a *sui generis* interest that is distinct from ‘normal’ proprietary interests, most notably fee simple.”⁴⁶ He then linked this inherent limit to the need to maintain the continuity of an Aboriginal nation’s special relationship with their land: “That relationship should not be prevented from continuing into the future. As a result, uses of the land that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.”⁴⁷

This inherent limit raises important issues that cannot be dealt with here, such as the potential impact of the pre-sovereignty practices, customs and traditions of particular Aboriginal nations on the uses they can make of their lands, and the implications of the limit for self-government.⁴⁸ But for the purposes of this paper, what needs to be understood is that the inherent limit does not diminish the proprietary nature of Aboriginal title. By way of analogy, consider zoning laws in Canadian cities. Those laws often place quite severe restrictions on the uses that fee simple owners can make of their lands, without affecting the proprietary nature of their title. Similarly, the inherent limit does not affect the characterization of Aboriginal title as proprietary. While the limit may restrict the uses which Aboriginal nations can make of their lands, their right of use and occupation is nonetheless exclusive,⁴⁹ and it is this right to exclude others, rather than a right to put the land to any use, that makes Aboriginal title proprietary.⁵⁰ But one effect of the limit is probably that there are uses to which some Aboriginal lands cannot be put by anyone as long as they are subject to Aboriginal title,⁵¹ in the same way as there are uses to which zoned lands cannot be put as long as the zoning restrictions remain in force.

It is therefore clear from the *Delgamuukw* decision that Aboriginal title is a proprietary interest in land, though differing from what the Chief Justice called “normal” common law property interests, like the fee simple. Moreover, it includes a right to exclusive use and occupation. The proprietary nature and exclusivity of Aboriginal title are not affected by its *sui generis* aspects, which include its source in occupation of land prior to Crown sovereignty, its inalienability other than by surrender to the Crown, its communal nature, and restrictions on use arising from its inherent limit. But as mentioned earlier, Aboriginal title is not just a property right. Since the entrenchment of Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, it is also a *constitutionally protected* property right. We now need to consider what this means, and the extent to which Aboriginal title can be infringed, notwithstanding its constitutional status.

3. Constitutional Protection and Infringement of Aboriginal Title

Section 35(1) of the *Constitution Act, 1982*,⁵² provides: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” In *Delgamuukw*, Chief Justice Lamer said this about this provision:

s.35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were “existing” in 1982. The provision, at the very least, constitutionalized those rights which aboriginal peoples possessed at common law, since those rights existed at the time s.35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before 1982 (e.g., *Calder [v. Attorney-General of British Columbia]*, [1973] S.C.R. 313), s.35(1) has constitutionalized it in its full form.⁵³

The reason Aboriginal rights were accorded constitutional protection in 1982 was to protect them against interference by the *legislative branch of governments*.⁵⁴ This protection was not required against private persons and the *executive branch* because, to the extent that these rights are recognized as such by the common law, that law protects them, along with other legal rights, against interference by anyone, unless the interference is authorized by legislation.⁵⁵ But as we have seen, constitutional entrenchment was required if these rights were to be protected against *legislative* interference because, due to the doctrine of parliamentary sovereignty, even fundamental rights and freedoms are subject to legislative infringement if the intention to infringe them is unequivocally expressed.⁵⁶

Of course constitutional entrenchment does not provide absolute protection against legislative infringement. Where *Charter* rights are concerned, section 33 (the “notwithstanding” clause) provides for legislative override, and section 1 subjects those rights “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” While pointing out that these provisions do not apply to section 35 because it is outside the *Charter*,⁵⁷ the Supreme Court in *R. v. Sparrow*⁵⁸ created a test for infringement of Aboriginal rights that is similar in some respects to the approach it uses in applying section 1. Briefly stated, the *Sparrow* test requires the Crown to prove that any legislative (or legislatively authorized) infringement of Aboriginal rights is for a valid legislative objective that is compelling and substantial, and that the Crown’s fiduciary obligations towards the Aboriginal peoples have been respected. If the Crown fails to do this, the infringement will be constitutionally invalid.⁵⁹

In *Delgamuukw*, Chief Justice Lamer made it clear that the *Sparrow* justification test applies to infringements of Aboriginal title.⁶⁰ On why the constitutional rights of the Aboriginal peoples can be infringed at all, he said it was “important to repeat” what he had said in *R. v. Gladstone*:

Because ... distinctive aboriginal societies exist within, and are part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are part of that community), some limitation of those rights will be justifiable. *Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.*⁶¹

Elaborating on the kinds of objectives that might justify infringement of Aboriginal title, the Chief Justice said this:

In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular

measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.⁶²

As most of these objectives—agriculture, forestry, and mining, for example—relate to *provincial* areas of jurisdiction, the issue of provincial power to infringe Aboriginal title arises here. But while Lamer specifically said in *Delgamuukw* that Aboriginal title can be infringed by the provinces,⁶³ he also held that Aboriginal title is under *exclusive* federal authority because it is within the core of federal jurisdiction over “Indians, and Lands reserved for the Indians.”⁶⁴ As explained in detail elsewhere, in my opinion these two aspects of Lamer’s judgment are irreconcilable, and so the issue of provincial power to infringe Aboriginal title will have to be re-examined by the Court.⁶⁵

For the purposes of this paper, then, we will focus our attention on *federal* power to infringe Aboriginal title, which apparently arises from Parliament’s authority over “Lands reserved for the Indians.”⁶⁶ The first thing to note is that the power of Parliament to *extinguish* Aboriginal title, which undoubtedly existed prior to 1982,⁶⁷ was taken away by section 35(1) of the *Constitution Act, 1982*. In *R. v. Van der Peet*, Chief Justice Lamer said this in reference to Aboriginal rights generally, of which Aboriginal title is one manifestation:

At common law aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights...; it is this which distinguishes the aboriginal rights recognized and affirmed in s.35(1) from the aboriginal rights protected by the common law. Subsequent to s.35(1) aboriginal rights *cannot be extinguished* and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow, supra* [n.33].⁶⁸

As we have seen, the range of objectives that will meet the first branch of the justificatory test for *infringement* of Aboriginal title was stated by Lamer in *Delgamuukw* to be “fairly broad,” including “the development of agriculture, forestry, mining, and hydroelectric power ... [and] the building of infrastructure and the settlement of foreign populations to support those aims.”⁶⁹ What Lamer had in mind here does not appear to be limited to the taking of Aboriginal lands for *public* purposes, such as the construction of highways or state-owned hydroelectric projects. Instead, he seems to have also envisaged that Parliament could temporarily take Aboriginal lands and make them available to *private* individuals and corporations (his “foreign populations”), who would then

engage in farming, forestry, mining, etc.⁷⁰ And as long as this was “of sufficient importance to the broader community as a whole”⁷¹ (i.e., the Canadian public), the taking would be justifiable under the *Sparrow* test.

This means that the real property rights of the Aboriginal peoples are not just subject to legislative *regulation* in the public interest,⁷² as are all property rights, for purposes such as environmental protection. Aboriginal title is also subject to legislative *taking*,⁷³ not only for direct public purposes such as the construction of highways and other infrastructure, but also for private development that has only a tangential connection with the public interest.⁷⁴ For example, if Aboriginal lands are suitable for agriculture, but are not being used by their Aboriginal titleholders for that purpose, it seems that Parliament can take them and allow farmers to use them if that would be of sufficient importance to Canadians as a whole. As I have stated elsewhere, this sounds very much like a modern-day equivalent of “a familiar justification for dispossessing Aboriginal peoples in the heyday of European colonialism in eastern North America—agriculturalists are superior to hunters and gatherers, and so can take their lands”⁷⁵

What is even more remarkable about this judicial disregard for the sanctity of Aboriginal title⁷⁶ is that, unlike other property rights, it is supposed to be protected against legislative infringement by the Canadian Constitution. Given the kinds of objectives that Lamer considered to be sufficiently compelling and substantial for Aboriginal title to be infringed, one has to seriously question the value of this constitutional entrenchment.

However, the *Sparrow* justification test does include a couple of features that may serve to provide practical protection to Aboriginal title. First, the requirement that the fiduciary obligations of the Crown be respected includes a duty to consult with Aboriginal peoples when infringements of their Aboriginal rights are contemplated. In *Delgamuukw*, Lamer put it this way:

aboriginal title encompasses within it a right to choose to what ends a piece of land can be put ... This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. *There is always a duty of consultation.*⁷⁷

The extent of this duty will depend on the circumstances, including the severity of the infringement. It could range from a minimum standard to discuss the matter where the infringement is relatively minor, up to a requirement of full consent where serious infringement is involved.

Even where the minimum standard applies, however, “this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue.”⁷⁸

Secondly, the duty to respect the Crown’s fiduciary obligations includes a duty to pay compensation for infringements of Aboriginal title. In *Delgamuukw*, Chief Justice Lamer found that this duty arose out of the title’s economic aspect. He elaborated as follows:

Indeed, compensation for breaches of fiduciary duty are [*sic*] a well-established part of the landscape of aboriginal rights: *Guerin*, [*supra* n.22]. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.⁷⁹

Moreover, as this duty to pay compensation is part of the justificatory test for infringements of Aboriginal title, the duty itself appears to be constitutional. This probably means that Parliament cannot avoid it by passing legislation, as it can where other, non-constitutional property rights are concerned.⁸⁰ So as a practical matter, this duty to pay compensation might well cause Parliament to exercise caution before infringing Aboriginal title, especially if the benefit of the infringement would go mostly to a province or a third party.⁸¹

4. Implications of *Delgamuukw* for the Protection of Other Property Rights in Canada

For Canadians who are concerned about the protection of their private property rights from government interference, the *Delgamuukw* decision is anything but reassuring. It is sobering to compare the degree of protection that the Supreme Court accorded to the *constitutional* property rights of the Aboriginal peoples with the protection the courts have traditionally accorded to *common law* property rights. To quote again from Blackstone, “[s]o great moreover is the regard of the law for private property, that it will not authorize the least violation of it; *no, not even for the general good of the whole community.*”⁸² Acknowledging parliamentary sovereignty, however, Blackstone had to concede that, for a new road to be constructed, for example, the legislature could and often did expropriate land for the public good upon payment of full compensation. However, only the legislature can authorize this because the executive has no authority to expropriate property, even for public purposes, without statutory authority.⁸³ Moreover, while in theory there

would be nothing to prevent a legislature from expropriating land for reasons other than public purposes such as roads and other infrastructure, or without paying compensation, in practice this rarely happens, as legislatures are reluctant to infringe a fundamental common law right without good reason.⁸⁴

In Canada various federal and provincial statutes govern the taking of private property for public purposes.⁸⁵ The Canada *Expropriation Act*,⁸⁶ for example, provides in section 4(1) that “[a]ny interest in land ... that, in the opinion of the Minister [of Public Works and Government Services], is required by the Crown for a public work or other public purpose may be expropriated by the Crown in accordance with the provisions of this Part.”⁸⁷ However, as Professor Eric Todd has pointed out, “[t]he exercise of the power of expropriation interferes drastically with private property rights and therefore the courts generally construe expropriation statutes strictly and in favour of the individual whose rights are affected.”⁸⁸ Moreover, any exercise of a power of expropriation has to comply strictly with the procedural requirements in the enabling statute. Failure to respect those requirements will render the expropriation invalid, exposing the expropriating authority to damages and/or an injunction for trespass or nuisance.⁸⁹

We have seen that, despite the constitutional entrenchment of Aboriginal title, the Supreme Court in *Delgamuukw* said that it can be infringed to meet objectives that appear to go far beyond the kind of public purposes envisaged by expropriation statutes.⁹⁰ As long as the infringement is of sufficient importance to the general public, and the Crown’s fiduciary obligations are respected, the constitutional rights of the Aboriginal peoples can be legislatively overridden. Moreover, there is no mention in *Delgamuukw* of any requirement for the kinds of procedural safeguards that are generally contained in expropriation statutes.⁹¹ So in practice, if not in constitutional theory, Aboriginal title might enjoy greater protection against federal infringement under current expropriation legislation than it does under the Canadian Constitution. If this is correct, we should be very skeptical of the value of constitutional entrenchment of *any* property rights.

Acknowledgments

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Notes

- 1 [1997] 3 S.C.R. 1010.
- 2 See Kent McNeil, *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right?* (Toronto: Robarts Centre for Canadian Studies, York University, 1998) (hereinafter McNeil, *Defining Aboriginal Title*); Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 *Sask. L. Rev.* 431 (hereinafter McNeil, "Aboriginal Title and the Division of Powers"); Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 *Dalhousie L.J.* 185.
- 3 One could also look at the central place that land generally holds in Aboriginal cultures and legal systems: e.g., see Fred Plain, "A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America," in Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), 31, esp. 34; Leroy Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm'," in J. Rick Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986), 243; John J. Borrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary* (Toronto: Butterworths, 1998), 1-4.
- 4 See generally S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London: Butterworths, 1981); A.W.B. Simpson, *A History of the Land Law*, 2nd ed. (Oxford: Clarendon Press, 1986).
- 5 *Magna Carta*, 17 John (1215).
- 6 *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1973-86), vol. 8, para. 908 n.2. See also *Attorney-General v. De Keyser's Royal Hotel*, [1920] A.C. 508 (H.L.), at 569, where Lord Parmoor stated: "Since Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown."
- 7 *Magna Carta* would have been received as part of the applicable statute law in all the common law provinces. As a fundamental part of the British constitution, no doubt it applies in Quebec as well, despite the reintroduction of French civil law by the *Quebec Act*, 14 Geo. III (1774), c.83 (U.K.) (the Preamble to the *Constitution Act, 1867*, 30 & 31 Vict., c.3 (U.K.), provides that Canada shall have "a Constitution similar in Principle to that of the United Kingdom").
- 8 See *Entick v. Carrington* (1765), 19 How. S.T. 1029 (C.P.).
- 9 See James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 2nd ed. (New York: Oxford University Press, 1998), 13-14, 54-55.
- 10 On this doctrine, see R.F.V. Heuston, *Essays in Constitutional Law*, 2nd ed. (London: Stevens and Sons, 1964), 58-81; Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, 6th ed. (London: Penguin Books, 1986), 70-73; E.C.S. Wade and A.W. Bradley, *Constitutional and Administrative Law*, 11th ed. by A.W. Bradley and K.D. Ewing (London: Longmans, 1993), 65-75.

- 11 William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-69), vol. 1, at 129 (emphasis added). See also Herbert Broom, *Constitutional Law Viewed in Relation to Common Law*, 2nd ed. by George L. Denman (London: W. Maxwell and Son, 1885), 225-45.
- 12 *Supra* n.6, vol. 8, para. 833.
- 13 The Fifth Amendment to the American Constitution provides in part that no one shall be “deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” For detailed discussion, see Ely, *supra* n.9.
- 14 See T.R.S. Allan, “Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism” (1985) 44 *Cambridge L.J.* 111, at 117-25.
- 15 In *Attorney-General for Canada v. Hallet and Carey Ltd.*, [1952] A.C. 427 (P.C.), at 450, Lord Radcliffe said that “there is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a ‘strict’ construction.” See also Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), 370-76.
- 16 See *Colet v. R.*, [1981] 1 S.C.R. 2, at 10.
- 17 See *Western Counties Railway Co. v. Windsor and Annapolis Railway Co.* (1882), 7 App. Cas. 178 (P.C.), at 188; *Commissioner of Public Works (Cape Colony) v. Logan*, [1903] A.C. 355 (P.C.), at 363-64; *Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd.*, [1919] A.C. 744 (H.L.), per Lord Atkinson at 752; *Manitoba Fisheries Ltd. v. R.*, [1979] 1 S.C.R. 101.
- 18 See also *Attorney-General v. Horner* (1884), 14 Q.B.D. 245 (C.A.), esp. per Brett M.R. at 256-7; *London and North Western Railway Co. v. Evans*, [1893] 1 Ch. 16 (C.A.), per Bowen L.J. at 28; *The Commonwealth v. Hazeldell Ltd.* (1918), 25 C.L.R. 552 (H.C. Aust.), per Griffith C.J. and Rich J. at 563; *Attorney-General v. De Keyser’s Royal Hotel*, *supra* n.6, per Lord Atkinson at 542, Lord Parmoor at 576, 579; *Colonial Sugar Refining Co. v. Melbourne Harbour Trust Commissioners* (1927), 38 C.L.R. 547 (P.C.), at 559.
- 19 See J. McBean, “The Implications of Entrenching Property Rights in Section 7 of the Charter” (1988) 26 *Alta. L. Rev.* 548. *The Canadian Charter of Rights and Freedoms* consists of the first 34 sections of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, c.11 (U.K.).
- 20 *Supra* n.19. Section 35(1) is quoted in text accompanying n.52, *infra*.
- 21 *Delgamuukw*, *supra* n.1, per Lamer C.J.C. at 1091-95 (para. 133-39).
- 22 See *Guerin v. The Queen*, [1984] 2 S.C.R. 335, per Wilson J. at 349, Dickson J. at 376-82; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at 677-78; *Roberts v. Canada*, [1989] 1 S.C.R. 322, at 340.
- 23 Lamer C.J.C. delivered the principal judgment, for himself, Cory and Major J.J. La Forest J. delivered a separate judgment for himself and L’Heureux-Dubé J., concurring in result but differing to some extent in his reasons. McLachlin J. simply said: “I concur with the Chief Justice. I add that I am also in substantial agreement with the comments of Justice La Forest.” *Delgamuukw*, *supra* n.1, at 1135 (para. 209).
- 24 A fee simple is the greatest private interest in land available at common law. For all practical purposes, it is equivalent to ownership.

- 25 *Delgamuukw*, *supra* n.1, at 1080 (para. 110).
- 26 *Ibid.*, at 1080-81 (para. 111).
- 27 (1888), 14 App. Cas. 46, at 54.
- 28 *Delgamuukw*, *supra* n.1, at 1081 (para. 112).
- 29 *Ibid.* See also *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at 666-67 (para. 14). On the *sui generis* nature of Aboriginal rights generally, see John Borrows and Leonard I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 *Alta. L. Rev.* 9.
- 30 This was apparent from the *St. Catherine's* decision itself, in which Lord Watson decided that Aboriginal title to land "is an interest other than that of the Province in the same" within the meaning of section 109 of the *Constitution Act, 1867*, 30 & 31 Vict., c.3 (U.K.), and that the beneficial interest in Aboriginal title lands would only become available to the provinces "as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title": *supra* n.27, at 58-59. For discussion, see Hamar Foster, "Aboriginal Title and the Provincial Obligation to Respect It: *Is Delgamuukw v. British Columbia 'Invented Law'?*" (1998) 56 *The Advocate* 221.
- 31 *Delgamuukw*, *supra* n.1, at 1096 (para. 140) (emphasis in original). See also 1095 (para. 138).
- 32 *Ibid.*, at 1083 (para. 117) (emphasis added).
- 33 Note that, when considering Aboriginal and treaty rights apart from title, such as an Aboriginal right to fish or a treaty right to hunt, the Supreme Court has been careful to avoid applying what Dickson C.J. and La Forest J. referred to in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1112, as "traditional common law concepts of property": see *R. v. Sundown*, [1999] 1 S.C.R. 393, at 411-12 (at para. 34-36). But those kinds of rights, which are communal rights to participate in "activities," are different from Aboriginal title because it is "the right to the land itself": *Delgamuukw*, *supra* n.1, at 1093-95 (para. 137-39).
- 34 *Delgamuukw*, *supra* n.1., at 1081-82 (para. 113). To this it might be added that alienability is not an essential attribute of real property, even at common law. Apart from statute, a fee tail estate was not alienable as such, though it could be converted into an alienable fee simple by barring the entail: see Simpson, *supra* n.4, at 90-91. Also, at common law the Crown could create inalienable fee simple estates: see Joseph Chitty, *A Treatise of the Law on the Prerogatives of the Crown* (London: Joseph Butterworth and Son, 1820), 386 n.(h). In *Pierce Bell Ltd. v. Frazer* (1972-73), 130 C.L.R. 575 (H.C. Aust.), at 584, Barwick C.J. said that a statutory restraint on alienation of land granted by the Crown would not reduce, or make conditional, the fee simple estate obtained by the grantee. Moreover, the Crown's underlying title to all land in its common law dominions is an inalienable real property interest: see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), 80-93, esp. 92 n.58. See also A.W.B. Simpson, "Real Property," in H.W.R. Wade, *Annual Survey of Commonwealth Law 1972* (London: Butterworths, 1973), 320, at 324, where the author, a foremost authority on English real property law, criticized the decision in *Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.R. 141 (F.C. Aust.) (since overruled by *Mabo v. Queensland (No. 2)* (1992), 175 C.L.R. 1 (H.C. Aust.)) because, *inter alia*, it

contains a discussion of the concept of ownership which perpetuates what seems to be an error—the idea that alienability is an essential feature of this concept. Ownership is a notion based upon the central idea of there being a special relationship between a person or group and a thing, and this relationship is thought of as having such importance as to justify conferring upon the owner a right of excluding others from whatever use the thing is capable of and seems to be appropriate. In extremely intense cases of ownership the exclusion is automatic. For example only Odysseus could bend his bow, and only King Arthur could draw the sword from the stone.... Hence it is a weak form of ownership which permits alienation; in more intense forms it is personal, and thus it is that some forms of property are buried with the dead from whom they cannot be separated. [emphasis added]

- 35 *Delgamuukw*, *supra* n.1, at 1082 (para. 114) (emphasis in original).
- 36 See *Drulard v. Welsh* (1906), 11 O.L.R. 647 (Ont. Div. Ct.).
- 37 *Delgamuukw*, *supra* n.1, per Lamer C.J.C. at 1099-1100 (para. 146-48).
- 38 See Brian Slattery, "Varieties of Aboriginal Rights" (1998) 6:4-6 *Canada Watch* 71.
- 39 See Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 *Can. Bar Rev.* 727, at 745-46; Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 *Tulsa J. Comp. & Int'l L.* 253, at 285-91.
- 40 *Delgamuukw*, *supra* n.1, at 1082-83 (para. 115).
- 41 While the Court declined to deal with the issue of self-government directly (see *ibid.*, per Lamer C.J.C. at 114-15 (para. 170-71), La Forest J. at 1134 (para. 205)), it has been pointed out that Lamer's comments on the communal nature of aboriginal title and the decision-making authority of Aboriginal communities have important implications for self-government, as "[m]aking decisions about the care and use of land is a fundamental activity of government": Peter H. Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61 *Sask. L. Rev.* 247, at 272. For more detailed discussion, see McNeil, *supra* n.39, at 278-91.
- 42 See generally Dennis Lloyd, *The Law Relating to Unincorporated Associations* (London: Sweet and Maxwell Ltd., 1938); Harold A.J. Ford, *Unincorporated Non-Profit Associations: Their Property and Their Liability* (Oxford: Clarendon Press, 1959); S.J. Stoljar, *Groups and Entities: An Enquiry into Corporate Theory* (Canberra: Australian National University Press, 1973).
- 43 Note that there is a considerable body of case law on the legal capacity of Indian bands and band councils: e.g., see *Johnson v. British Columbia Hydro and Power Authority*, [1981] 3 C.N.L.R. 63 (B.C.S.C.); *Beauvais v. The Queen*, [1982] 4 C.N.L.R. 43 (F.C.T.D.); *Joe v. Findlay*, [1987] 2 C.N.L.R. 75 (B.C.S.C.); *Bannon v. Pervais*, [1990] 2 C.N.L.R. 17 (Ont. Dist. Ct.); *Ochapowace First Nation v. Araya*, [1995] 1 C.N.L.R. 75 (Sask. C.A.); *Chadee v. Norway House First Nation*, [1997] 2 C.N.L.R. 48 (Man. C.A.). However, the legal capacity of bands and band councils appears to be dependent on the fact that they have been created and granted statutory powers by the In-

- dian Act, R.S.C. 1985, c.I-5: see *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan*, [1982] 3 C.N.L.R. 181 (Sask. C.A.); *Paul Band v. R.*, [1984] 1 C.N.L.R. 87 (Alta. C.A.); *Heron Seismic Services Ltd. v. Muscowpetung Indian Band*, [1991] 2 C.N.L.R. 52 (Sask. Q.B.); *Telecom Leasing Canada v. Enoch Indian Band of Stony Plain Indian Reserve No. 135*, [1994] 1 C.N.L.R. 206 (Alta. Q.B.); compare *Tawich Development Corporation v. Deputy Minister of Revenue of Quebec*, [1997] 2 C.N.L.R. 187 (C.Q.). For an argument that band councils do not owe their existence and powers solely to the *Indian Act*, see Kent McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*" (1996) 34 *Osgoode Hall L.J.* 61, at 79-88. See also Geoffrey S. Lester, "Do Treaty Indians Have a Corporate Personality? A Note on the Pawis, Blackfoot and Bear Island Cases," [1990] 1 C.N.L.R. 1.
- 44 In practice, governments own land in their own right, though in Anglo-Canadian law the requirement of legal personality is satisfied by the theory that the indivisible Crown has title as a corporation sole. The difficulty posed by federalism is avoided in this regard by dividing the Crown into the Crown in right of Canada and the Crown in right of each province, making it possible for the Crown in right of Canada to sue the Crown in right of a province over title to land, and vice versa. But the collective nature of the Crown's title should be apparent because Crown land is not held for the benefit of the Crown itself, but for the benefit of the Crown's subjects: see *The Queen v. Symonds* (1847), [1840-1932] N.Z.P.C.C. 387 (N.Z.S.C.), per Martin C.J. at 395; *Williams v. Attorney-General for New South Wales* (1913), 16 C.L.R. 404 (H.C. Aust.). Similarly, an Aboriginal nation can be regarded as a *political* entity that holds title to the nation's lands on behalf of all the members of the nation.
- 45 *Delgamuukw*, *supra* n.1, at 1080 (para. 111), quoted at greater length in text accompanying n.26, *supra*.
- 46 *Ibid.*, at 1088 (para. 125).
- 47 *Ibid.*, at 1089 (para. 127).
- 48 On the latter issue, see McNeil, *Defining Aboriginal Title*, *supra* n.2, at 11-14.
- 49 See *supra* n.32 and accompanying text.
- 50 See quotation from Simpson, *supra* n.34.
- 51 See *Delgamuukw*, *supra* n.1, per Lamer C.J.C. at 1091 (para. 131): "If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so." Obviously any such use of the lands by persons other than the Aboriginal titleholders would also violate their Aboriginal title, though if authorized by a non-Aboriginal government this would raise the issue of whether the violation was a justifiable infringement, a matter to be discussed in Part 3 below.
- 52 *Supra* n.19.
- 53 *Delgamuukw*, *supra* n.1, at 1091-92 (para. 133).
- 54 This protection is accorded by s.52(1) of the *Constitution Act*, 1982, which provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

- 55 Constitutional entrenchment apart, in our parliamentary system of government legislatures can authorize the executive to infringe common law rights, including fundamental rights and freedoms: e.g., see *Attorney-General for Canada v. Hallet and Carey Ltd.*, *supra* n.15; *R. v. Halliday*, [1917] A.C. 260 (H.L.). Where, however, the executive lacks clear and plain statutory authority, it is prevented from interfering with legal rights by the rule of law: see *Entick v. Carrington*, *supra* n.8; *Roncarelli v. Duplessis*, [1959] S.C.R. 121. This vital protection against government interference is also manifested in the rule that the Crown and its officials cannot infringe the rights of British subjects by acts of state: see *Walker v. Baird*, [1892] A.C. 491 (P.C.); *Johnstone v. Pedlar*, [1921] 2 A.C. 262 (H.L.); *Eshugbayi Eleko v. Government of Nigeria*, [1931] A.C. 662 (P.C.), at 671; *Attorney-General v. Nissan*, [1970] A.C. 179 (H.L.); *Buttes Gas v. Hammer*, [1975] Q.B. 557 (C.A.), at 573.
- 56 *Supra* nn. 10-18 and accompanying text.
- 57 See *supra* nn. 19-20 and accompanying text.
- 58 *Supra* n.33, at 1102, 1108-19.
- 59 See also *R. v. Gladstone*, [1996] 2 S.C.R. 723, per Lamer C.J.C. at 762-80 (para. 54-84); *R. v. Adams*, [1996] 3 S.C.R. 101, per Lamer C.J.C. at 133-35 (para. 56-59); *R. v. Côté*, [1996] 3 S.C.R. 139, per Lamer C.J.C. at 189-90 (para. 81-83).
- 60 *Delgamuukw*, *supra* n.1, at 1107-14 (para. 160-69).
- 61 *R. v. Gladstone*, *supra* n.59, at 774-75 (para. 73), quoted in *Delgamuukw*, *supra* n.1, at 1107-08 (para. 161) (emphasis added by Lamer in *Delgamuukw*; “equally” emphasized in original). For critical commentary on this aspect of the *Gladstone* decision, see Kent McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?” (1997) 8:2 *Constitutional Forum* 33.
- 62 *Delgamuukw*, *supra* n.1, at 1111 (para. 165). See also per La Forest J. at 1132-33 (para. 202).
- 63 *Ibid.*, at 1107 (para. 160).
- 64 *Constitution Act, 1867*, 30 & 31 Vict., c.3 (U.K.), s.91(24). Because Aboriginal title is under exclusive federal jurisdiction, Lamer concluded that since Confederation the provinces have had no constitutional authority to extinguish it: *Delgamuukw*, *supra* n.1, at 1115-23 (para. 172-83).
- 65 See McNeil, “Aboriginal Title and the Division of Powers,” *supra* n.2.
- 66 See *Delgamuukw*, *supra* n.1, per Lamer C.J.C. at 1116-18 (para. 174-76).
- 67 *Ibid.*, at 1118 (para. 175).
- 68 [1996] 2 S.C.R. 507, at 538 (para. 28) (emphasis added).
- 69 *Supra* n.62 and accompanying text.
- 70 The taking of the lands would have to be temporary because if permanent it would *extinguish* the Aboriginal title, and as we have seen Parliament lost the power to extinguish Aboriginal title in 1982: see *supra* n.68 and accompanying text.
- 71 *Supra* n.61 and accompanying text.
- 72 Note that in *Sparrow*, *supra* n.33, at 1113, Dickson C.J.C. and La Forest J., for a unanimous Court, specifically rejected the public interest justification for infringements of Aboriginal rights: “We find the ‘public interest’ justi-

- fication to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.” However, in *Gladstone* and *Delgamuukw*, Lamer C.J.C. seems to have embraced the public interest justification. See McNeil, *Defining Aboriginal Title*, *supra* n.2, at 17-21.
- 73 Harvesting timber and extracting minerals from land clearly involves taking, as those resources are included in Aboriginal title (*Delgamuukw*, *supra* n.1, at 1083-88 (para. 116-24)), and are part of the land until severed from it. Moreover, the value of real property is generally diminished by their removal. Even preventing the owner of minerals from accessing them is a form of government taking: see *British Columbia v. Tener*, [1985] 1 S.C.R. 533. Arguably, taking of natural resources, especially non-renewable resources like minerals, would involve extinguishment of the Aboriginal title to those resources, and therefore be prohibited by section 35(1): see *supra* n.68 and accompanying text.
- 74 Lamer seemed to think that economic development could be of sufficient importance for the general public to justify infringement of Aboriginal rights. In *Delgamuukw*, *supra* n.1, at 1108 (para. 161), he said:
- But legitimate government objectives also include “the pursuit of economic and regional fairness” and “the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups” [*Gladstone*, *supra* n.59] (para. 75). By contrast, measures enacted for relatively unimportant reasons, such as sports fishing without a significant economic component (*Adams*, *supra* [n.59]) would fail this aspect of the test of justification. [emphasis added]
- Where the economic development is being carried out by a large corporation (as it usually is in the context of forestry and mining, for example), this sounds remarkably like a Canadian echo of the old refrain of American free-enterprise that what is good for General Motors is good for America.
- 75 McNeil, *Defining Aboriginal Title*, *supra* n.2, at 20.
- 76 I use the word “sanctity” in this context, not so much because property rights are at issue (though some writers, like Blackstone, *supra* n.11, vol. 2, at 1-15, esp. 2-3, have grounded property rights in natural law), but because Aboriginal title does have spiritual value for most, if not all, Aboriginal peoples: e.g., see authorities cited in n.3, *supra*.
- 77 *Delgamuukw*, *supra* n.1, at 1113 (para. 168) (emphasis added).
- 78 *Ibid.* See also *Cheslatta Carrier Nation v. British Columbia (Environmental Assessment Act, Project Assessment Director)*, [1998] 3 C.N.L.R. 1 (B.C.S.C.); *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, [1998] 4 C.N.L.R. 68 (F.C.T.D.); *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.). For discussion, see Sonia Lawrence and Patrick Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000) 79 *Can. Bar Rev.* 252.
- 79 *Delgamuukw*, *supra* n.1 at 1113-14 (para. 169).
- 80 Of course the denial of compensation, where non-constitutional rights are concerned, would have to be unequivocal: see cases cited in nn. 17-18, *supra*.

- 81 As discussed above (see *supra* nn. 69-74 and accompanying text), if Aboriginal title can be infringed for the purpose of resource development undertaken by corporations, much of the benefit may in fact go to those corporations.
- 82 Blackstone, *supra* n.11, vol. 1, at 139 (emphasis added).
- 83 See Broom, *supra* n.11, at 231: “no man’s property can legally be taken from him or invaded by the direct act or command of the sovereign, without the consent of the subject, given expressly or impliedly through parliament.” See also Keith Davies, *Law of Compulsory Purchase and Compensation*, 3rd ed. (London: Butterworths, 1978), at 9-10; Graham L. Fricke, ed., *Compulsory Acquisition of Land in Australia*, 2nd ed. (Sydney: The Law Book Company Limited, 1982), 5-6, esp. 5 n.3; *Rugby Water Board v. Shaw Fox*, [1973] A.C. 202 (H.L.), per Lord Pearson at 214 (“compulsory acquisition and compensation for it are entirely creations of statute”). Note, however, that there is an exception to this where the Crown seizes or destroys property in time of war, in which case it must pay compensation, except where the destruction occurred as a direct result of battle: see *Attorney-General v. De Keyser’s Royal Hotel*, *supra* n.18; *Commercial and Estates Co. of Egypt v. The Board of Trade*, [1925] 1 K.B. 271 (C.A.), esp. per Atkin L.J. at 294-7; *Burmah Oil Co. v. Lord Advocate*, [1965] A.C. 75 (H.L.); *Halsbury’s Laws of England*, *supra* n.6, vol. 8, para. 920. See also Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Toronto: Carswell, 1992), at 20.
- 84 For an instance of this, see the controversy arising out of the British Parliament’s response to *Burmah Oil Co.* case, *supra* n.83, discussed in A.L. Goodhart, “The *Burmah Oil Case* and the War Damage Act 1965” (1966) 82 L.Q.R. 97.
- 85 See Todd, *supra* n.83, at 7-16, 26-27; *Canadian Encyclopedic Digest*, Ontario 3rd ed. (Toronto: Carswell), Title 61 - Expropriation (March 1998), §25-50.
- 86 R.S.C. 1985, c. E-21.
- 87 Note that subsections (2) to (7) of section 4 include special provisions regarding expropriation of Cree-Naskapi lands, Sechelt lands, Yukon First Nations settlement land, and Tetlit Gwich’in Yukon land. Analysis of these provisions would involve constitutional questions and an examination of the specific land claims agreements to which the provisions relate, matters that are outside the scope of this paper. Also, there is probably a constitutional limitation on federal expropriation, as the taking would have to be related to a federal head of power: see Todd, *supra* n.83, at 32, and generally Andrée Lajoie, *Expropriation et fédéralisme au Canada* (Montréal: Les Presses de l’Université de Montréal, 1972).
- 88 Todd, *supra* n.83, at 26. E.g., see *Blue Haven Motel Ltd. v. Burnaby (District)* (1965), 52 D.L.R. (2d) 464 (B.C.C.A.); *Saratoga Holdings Ltd. v. Surrey (District)* (1971), 18 D.L.R. 371 (B.C.C.A.); *Park Projects Ltd. v. Halifax (City)* (1981), 22 L.C.R. 244, at 252 (N.S.E.C.B.), affirmed (1982), 25 L.C.R. 193 (N.S.C.A.). Moreover, the courts will not imply a power of expropriation that is not clearly expressed: see *Simpson v. South Staffordshire Water Works Co.* (1865), 34 L.J. Ch. 380, esp. per Lord Westbury L.C. at 387; *Winnipeg (City) v. Cauchon* (1881), Man. R. (Armour) temp. Wood 350 (Man. Q.B.); *Thomson v. Halifax Power Co.* (1914), 16 D.L.R. 424 (N.S.S.C); compare *Har-*

- ding v. Cardiff (Township)* (1881), 29 Gr. 308 (Ont. H.C.), affirmed (1882), 2 O.R. 329 (Ont. Div. Ct.). For discussion and further references, see Todd, at 26-29. In this respect, the approach of the courts is in keeping with general principles of statutory interpretation: see *supra* nn. 14-18 and accompanying text. See also *Canadian Encyclopedic Digest*, *supra* n.85, §59-74.
- 89 See *Dominion Iron and Steel Co. v. Burt*, [1917] A.C. 179 (P.C.), esp. at 185; *R. v. Lee* (1917), 16 Ex. C.R. 424, esp. at 428, affirmed (1919), 59 S.C.R. 652; *Re Magnone* (1957), 23 W.W.R. 415 (B.C.S.C.), esp. at 417. For discussion and further references, see Todd, *supra* n.83, at 29-31; *Canadian Encyclopedic Digest*, *supra* n.85, §18-24.
- 90 On what constitutes a public work or purpose, see *R. v. O'Halloran*, [1934] Ex. C.R. 67; *Vaughan Construction Co. v. Nova Scotia (Attorney-General)* (1967), 60 D.L.R. (2d) 692 (N.S.S.C.); *Thompson v. R.*, [1978] 5 W.W.R. 635 (Man. Q.B.); *Pineridge Property Ltd. v. British Columbia District No. 57 Board of Education* (1982), 40 B.C.L.R. 221 (Co. Ct.); *Grauer Estate v. R.* (1986), 1 F.T.R. 51. Compare *Piccirillo v. British Columbia (Minister of Forests and Lands)* (1988), 47 D.L.R. (4th) 513 (B.C.S.C.). See also *Semiahmoo Indian Band v. Canada*, [1998] 1 C.N.L.R. 250 (Fed. C.A.), involving a surrender of reserve land, in lieu of expropriation, for expansion of a Canada Customs facility. As the Crown simply retained the land without using it "for customs facilities or any other public purpose" (p.253, emphasis added), Isaac C.J. for a unanimous Court held that the Crown had breached its fiduciary duty to the Band in obtaining the land. At pp. 264-65, he said: "While the Crown must be given some latitude in its land-use planning when it actively seeks the surrender of Indian land for a public purpose, the Crown must ensure that it impairs the rights of the affected Indian Band as little as possible, which includes ensuring that the surrender is for a timely public purpose."
- 91 See Todd, *supra* n.83, 39-81; *Canadian Encyclopedic Digest*, *supra* n.85, §125-373.