

The Status and Rights of Indigenous Peoples in Canada

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A. Introduction

Of the over thirty million inhabitants of Canada, about three percent are descendants of the first inhabitants of North America.¹ The largest group by far are the over six hundred thousand Indians registered under Canada's Indian Act who mostly belong to one of the 608 Indian bands. More than half of them live on one of the country's 2.370 Indian reserves. Additionally there are some three hundred thousand non-registered Indians and people of mixed blood (called Métis). Another significant aboriginal group are the forty thousand Inuit who live in the Arctic and sub-Arctic regions. Canada's constitution consequently recognizes "Indian, Inuit and Métis peoples" as aboriginal groups.² It should, however, be kept in mind that Canada's indigenous peoples, belonging to eleven major language families which subdivide into 53 different languages, display a much greater cultural and anthropological diversity than can be expressed by this rough characterization.

In any text on the legal status of these indigenous peoples in today's Canada, this one being no exception, the words *sui generis* will almost certainly be detected. These words, like the English "unique", are a token of the legal system's willingness to accept the difference and diversity of aboriginal custom, rights and institutions. They also signal a will to develop legal concepts, derived from habitual concepts or newly created, which act as an interface to reconcile the interests of aboriginal peoples with those of the Canadian society at large. It is these concepts that the present article sets out to explore.

Several aboriginal nations in Canada have occasionally described their situation by referring to themselves and their members as "Citizens Plus".³ This formulation reflects the fact that although most of the about one million aboriginals in Canada do nowadays enjoy the same citizenship and civil rights as any Canadian,⁴ they are also recognized to be holders of certain special (unique, *sui generis*) rights by virtue of their membership in an aboriginal community which has continuously exercised these rights since before European settlement. These "aboriginal

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¹ The data in this paragraph is taken from D.W. Elliott, *Law and Aboriginal Peoples in Canada*, North York, 3rd ed., 1997, part 2, at 10.

² Section 35 (2) of the Constitution Act, 1982: "In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada". Compare the text of the Constitution Act in Annex, VIII., in this issue.

³ Indian Association of Alberta, *Citizens Plus*, Edmonton, 1970.

⁴ J. Woodward, *Native Law*, Toronto et al., 1989 et seq., at 145 sub 6.1 (b).

rights” are recognized under common law; they have been afforded special constitutional protection and are enforced by the courts, above all a vigilant Supreme Court.

Besides customary aboriginal rights, Canada respects a multitude of specific rights enshrined in a host of treaties, “surrenders” and “land claims agreements” that have been negotiated and concluded throughout the last three centuries between the government and certain groups of aboriginal peoples.⁵ These “treaty rights” also enjoy special constitutional protection.

Since each aboriginal group has its own history of negotiating treaties with the settlers’ government and its own culture-bound traditions of exercising specific aboriginal rights, there are at least as many special legal regimes for aborigines as there are groups of indigenous peoples.⁶ Moreover, many of these Indian bands as well as some Inuit and Métis groups also enjoy a considerable degree of autonomy by self-government which has been granted to them either by federal statute or by way of agreement. Under these regimes of self-government they constantly create and transform by-laws, decrees and other legal instruments that have a bearing only on the respective group, thus adding further to the heterogeneity of legal rules.

Not surprisingly, the Canadian government has created a special Ministry, the Ministry of Indian Affairs and Northern Development, to deal with the manifold legal and administrative questions relating to indigenous peoples. This, to an increasing extent, also involves litigation. Cases on questions of aboriginal law have multiplied since representatives of aboriginal nations in the sixties began to take to

⁵ *Ibid.*, at 413 and 414, sub 21.6 (b): “There are hundreds of treaties and treaty-like instruments which may have a bearing on the present rights of Indian people. One of the fundamental jobs of any lawyer working in this field is to determine if any treaty affects the particular land or band involved. Only a handful of the treaties are the subject of litigation. In addition to the regular sources there are hundreds of ‘surrenders’ which affect the various reserve lands in Canada. Surrenders may include treaty-like provisions which create lasting rights and obligations. These are usually kept on file at the regional offices of the Department of Indian Affairs and Northern Development, filed by band name.”

⁶ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 69: “Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right”, confirming what Dickson J. for the Supreme Court of Canada had said in *Kruger v. R.* (1978), 75 D.L.R. (3d) (S.C.C.) [B.C.] 434 at 437: “Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis”. Similarly, the Ontario Court of Appeal in *R. v. Taylor*, [1981] 3 C.N.L.R. 114 at 120 (Ont. C.A.) has said: “Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty’s effect”; in *Delgamuukw v. B. C.*, [1993] 5 W.W.R. 97 (B.C. C.A.), Macfarlane J.A. said at para. 65, “Aboriginal rights are fact and site specific”; see also Woodward (note 4), at 68 sub 2.1 (c) (iv): “The recognition of the uniqueness of each aboriginal community in its relationship with the Crown is a development which brings Canadian native law to maturity. Native people are to be recognized by laws reflecting the particular attributes that make them distinct societies within Canada, rather than according to a generalized scheme.”

the courts their claims for self-determination. Consequently, literature on the law of native peoples has been steadily growing,⁷ especially since the Supreme Court recognized the existence of aboriginal rights under common law in its 1973 landmark ruling on the *Calder* case.⁸

In this manifold and still growing body of law, there is, however, a constantly evolving set of general rules which answers to common questions such as: How is the existence of an aboriginal right determined? How must a Treaty be interpreted in order to ascertain the existence and content of a treaty right? To what extent can government interfere with or even extinguish these rights? What role does compensation for restrictions play? Who is to define the content of an aboriginal right? How far can devolution of government powers to an aboriginal group go? How does the legal system at large deal with the existence of special regimes for indigenous peoples?

It is the aim of this article to succinctly portray this set of general rules as it currently stands. Specifics about the rights and status of certain groups are of interest only insofar as they indicate a general trend or when a general rule has been formed, modified, exemplified or concretized in a case relating to these special rights.

Like any legal regime, the Canadian law relating to aboriginals has a history and a current context without which it cannot be properly understood. We shall therefore begin with a brief overview of how the special regimes for indigenous peoples historically came about. This will allow us to correctly assess the normative framework in which a legal discussion about aboriginal rights in today's Canada is placed. We shall then separately address current questions relating to aboriginal status and rights.

I. Historical evolution of Canadian law relating to indigenous peoples

The law regarding indigenous peoples has evolved in three overlapping periods, as distinguished by the legal instruments which were mainly employed. The first period, from 1680 to 1921, could be called the "treaty period", since it is marked by the British government's use of treaties and surrenders as the main instrument to regulate Indian issues arising from the expanding of settlement in its North

⁷ Woodward (note 4); R.H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland*, Saskatoon, 1990; R.A. Milen (ed.), *Aboriginal Peoples and Electoral Reform in Canada*, Toronto et al., 1991; P. Kulchyski (ed.), *Unjust Relations: Aboriginal Rights in Canadian Courts*, Toronto (et al.), 1994; T. Isaac (ed.), *Aboriginal People and Canadian Law*, Brandon, 1996; M. Asch (ed.), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, Vancouver, 1997; Elliott (note 1); from a comparative perspective: A. Fleras/J.L. Elliott, *The "Nations" Within: Aboriginal-State Relations in Canada, the United States and New Zealand*, Toronto, 1992; A. Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand*, Vancouver, 1995; K.M. Hazlehurst (ed.), *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand*, Aldershot et al., 1996.

⁸ *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

American colonies.⁹ The second period, from 1876 to 1985, is marked by the recourse to instruments of administrative law by the emerging Canadian dominion (and later state) in order to regulate the “Indian Affairs” on its territory.¹⁰ It might perhaps be named the “administrative period”, since it mainly worked with federal statutes (especially the Indian Act) and with registration requirements. The third period began in 1973 with the recognition of aboriginal rights by the Supreme Court in the *Calder* case¹¹ and their subsequent entrenchment in the Constitution Act, 1982.¹² This period might be termed the “period of constitutionalization”.

These periods in the development of Canadian aboriginal law to a certain extent mirror the history of the Canadian state itself. Canada acquired statehood relatively late in a non-revolutionary consensual process.¹³ This evolution was so slow that the most precise date given by the Supreme Court for the acquisition of statehood is “in the period between its separate signature of the Treaty of Versailles in 1919 and the Statute of Westminster of 1931”.¹⁴ Canada had acquired dominion status already with Confederation on 1st July 1867, but remained dependent on the British Parliament for an amendment to its constitution until the “patriation” of the Canadian constitution by the Canada Act, 1982. As in other Commonwealth countries, the Queen of England is still Canada’s formal head of state, although all power is *de facto* exercised by Canadian organs.¹⁵ The long colonial period until the gradual transition to statehood largely corresponds to the treaty period. The overlap between the treaty period and the administrative period roughly corresponds to the time span of dominion self-government before acquisition of statehood. Likewise, the beginning of the period of constitutionalization roughly coincides with the debates on the “patriation”¹⁶ of the Canadian Constitution and the creation of the Canadian Charter of Rights and Freedoms.

The passage from one period to the other should be thought of as a shift in emphasis, not a radical new start. The creation of an Administration for Indian Affairs did not generally do away with treaties, which continued and continue to exist. On the contrary, the performance of treaties on the part of the government was enhanced by the new administration. Likewise, the constitutionalization of aboriginal rights did not lead to the abolishment of the Indian Act or the Ministry. The old legal tools continued to be used, but less frequently or for other pur-

⁹ These dates reflect the years in which the first and the last of the treaties listed in R.A. Reiter, *The Law of Canadian Indian Treaties*, second printing, Edmonton, 1996, were concluded.

¹⁰ These dates indicate the enactment of the first version of the Indian Act until its modification by Bill C-31 in 1985 to conform it to the new Constitution.

¹¹ See above at note 8.

¹² B. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982–1984*, Kingston, 1986.

¹³ See P. Hogg, *Constitutional Law of Canada*, 4th ed. (1997), at s.3., at 47 et seq.

¹⁴ *Re Offshore Mineral Rights of B.C.*, [1967] S.C.R. 792, at 816.

¹⁵ Hogg (note 13), at s.9.6 (g) and 10.1, at 264 and 268 resp.

¹⁶ “Patriation”, a unique Canadian coinage, means bringing the Constitution from Great Britain home to Canada, see *ibid.*, at s.3.5, at 55 et seq.

poses, and often they were re-interpreted. The newly independent Canadian state after 1931, while respecting the old treaties, did not conclude new ones. The subsequent constitutionalization of aboriginal rights, in turn led to the re-evaluation and re-interpretation of old treaties and to a general reappraisal of treaties, now termed "land claims agreements", as tools to make aboriginal rights operable. Though not in itself changing the written administrative law, this also led to a substantial weakening of the administration's powers to regulate Indian affairs without the consent of the aboriginal peoples concerned.

The Canadian law concerning indigenous peoples was for the longest time law regulating Indian affairs only. Regulation concerning Inuit and Métis hardly existed before 1970.¹⁷ European settlement until Confederation concentrated in the south and on the coasts. It was therefore quite natural that, during the treaty period, negotiations were taken up only with the indigenous peoples living there, all of which were Indian tribes. The creation of the Indian Act in 1876 further narrowed the perspective, since it only covered Indian indigenous peoples and established a system introducing many administrative sub-divisions among them. The Act grouped them by bands, registered as "status-Indians" in contrast to "non-status Indians", and as "on-reserve" or "off-reserve" Indians.¹⁸ Legal thinking in the administrative period was thus centered on the administration of Indians under the Act and on managing the inherited treaties and reserve systems. The focus on "status Indians" further blurred the vision for the growing number of persons of mixed Indian and European blood, the Métis. It was the legal recognition of customary aboriginal rights and their subsequent constitutionalization that brought a change in attitude. If the existence of aboriginal rights at common law was independent of treaties and founded essentially on continuous exercise since time immemorial, then there was no reason why Inuit and Métis should not also be holders of such rights.

II. Normative framework

The result of the historic evolution outlined above is a legal framework where constitutional guarantees of aboriginal and treaty rights interact with principles of equity and norms of federal and provincial administrative law.

¹⁷ The first law regarding Métis seems to have been the Alberta Métis Betterment Act, R.S.A. 1970, c.233 (revived 1982, c.26, repealed and superseded by the Métis Settlements Act, S.A. 1990, c. M-14.3); the word Inuit is first found in s. 35 of the Constitution Act, 1982; some provincial legislation of 1978, however, used the word "Inuk", see Woodward (note 4), at 59 sub 1.8.

¹⁸ See further below at notes 38 and 69 and accompanying text.

1. *Constitutional guarantees*

a) General constitutional guarantees

(1) *Reception of existing aboriginal rights*

Section 35 (1) of the Constitution Act, 1982, reads: "The existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed." The legal effect of this section is to give constitutional protection from legislative impairment to aboriginal and treaty rights as they existed on April 17, 1982, when the Constitution Act came into force.¹⁹ It does not, however, define or name these rights. In this way, constitutional rank is attributed to norms which lie outside the constitution and whose formation or abolition depends primarily on indigenous custom or contractual consensus. Any practical application of the provision by the courts therefore forces them to inquire into indigenous custom or to interpret a relevant treaty in order to find out whether and, if so, which rights existed in 1982.²⁰

The provision not only gives constitutional rank to aboriginal and treaty rights. By its location in a separate part II of the Constitution Act, 1982, outside the Canadian Charter of Rights and Freedoms embodied in part I, section 35 further establishes a special status for these rights within the framework of the constitution itself. Aboriginal and treaty rights, unlike Charter rights, are not subject to legislative override under section 33, nor are they effective only against governmental action, as stipulated by section 32.²¹ Also, they are not qualified by section 1, which subjects Charter rights to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."²²

(2) *Superiority to Charter rights*

This special status is further enhanced by a special provision within part I, namely section 25, which reads: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada [...]."

This provision does not create new rights,²³ but it shields aboriginal and treaty rights from erosion by the guarantee of rights set out in the Charter.²⁴ A possible

¹⁹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

²⁰ The rules developed by courts in doing so will be examined further below, at note 130 et seq. and accompanying text.

²¹ *Hogg* (note 13), at s.27.8 (b), at 695.

²² As to be seen below, at note 236 et seq. and accompanying text, the Supreme Court has nevertheless subjected them to substantially very similar limitations.

²³ *R. v. Steinbauer*, [1985] 3 C.N.L.R. 187 (Alta. Q.B.).

²⁴ E. Meehan et al., *The 1995 Annotated Canadian Charter of Rights and Freedoms*, Scarborough, 1995, commentary to section 25, at 518.

conflict between a Charter right and aboriginal or treaty rights will have to be resolved in favour of the latter.²⁵ This rule is remarkable, since it effectively²⁶ creates higher-ranking constitutional law which supersedes lower-ranking constitutional (Charter) law.

(3) *Special amendment procedure*

Constitutional conferences were held in 1983 according to section 37 of the Constitution Act, 1982, to identify and define aboriginal rights. On the occasion of these gatherings the existing constitutional guarantees were further entrenched by issuance of an Amendment Proclamation, 1983, which laid down that before any amendment is made to a constitutional provision dealing with aboriginal rights a constitutional conference has to be convened in which representatives of the aboriginal peoples of Canada will participate.²⁷

(4) *Summary*

All in all, the general constitutional guarantees can be described as exceptionally far-reaching. There is a reception of existing aboriginal and treaty rights by the Constitution Act, 1982, which attributes constitutional rank to these rights, shelters them from the restrictions valid for Charter rights and even stipulates their superiority to Charter rights. These guarantees cannot be changed without consultation with representatives of aboriginal nations at a constitutional conference.

²⁵ This interpretation seems to be generally accepted for the relationship between section 25 and the equality guarantee in section 15, see K. McNeil, *The Constitutional Rights of the Aboriginal Peoples of Canada* (1982), 4 *Supreme Court L. Rev.* 255 at 262; Hogg (note 13), at s.27.9, at 701; in detail B.H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms*, Saskatoon, 1988, at 10 et seq.

²⁶ It seems that this effect is not always fully acknowledged in Canadian doctrine when it comes to conflicts other than those between equality and aboriginal rights, see Hogg (note 13), at s.27.9, at 701: "Section 35 probably leaves s. 25 with no work to do." The underlying assumption seems to be that since section 35 already recognizes and affirms aboriginal and treaty rights, section 25 brings nothing new. Rights can, however, be recognized and affirmed but nevertheless totally or partly outweighed in a concrete case by other rights of similar rank. This collision between rights of the same (constitutional) rank seems to be addressed only by section 25, not by section 35. A possible explanation for the silence of Canadian doctrine on this point could lie in a preoccupation with cases centering on the conflict between federal or provincial legislation and aboriginal custom. Cases where the exercise of an aboriginal or treaty right interferes with a Charter right of a non-aboriginal Canadian (other than the right to equality) are rarely, if ever, discussed.

²⁷ In full the provision reads: "The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the 'Constitution Act, 1867', to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item."

b) Special constitutional guarantees

For historic reasons,²⁸ there exist for Alberta, Saskatchewan and Manitoba so-called “Natural Resource Transfer Agreements” between the government of Canada and each of these provinces. These have been given constitutional status by express constitutional amendment in 1930.²⁹

All three Agreements contain an identical clause guaranteeing to the Indians of the province “the right [...] of hunting, trapping and fishing game 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.”³⁰

2. *Federal and provincial administrative law*

a) Empowerment to regulate on the federal level

Section 91 (24) of the Constitution Act, 1867³¹ confers upon the Canadian federal parliament the exclusive power to make laws in relation to “Indians, and lands reserved for the Indians”. It has been pointed out that laying the regulatory power over Indians mainly into the hands of the federal government *per se* protects indigenous groups.³²

The notion of “Indians” in the first branch of section 91 (24) has been held to also cover Inuit³³ and probably covers all aboriginal peoples of Canada,³⁴ including Métis.

The second branch of section 91 (24) covers lands explicitly set aside as reserves, but also the huge area of land recognized by the Royal Proclamation of 1763³⁵ as “reserved” for the Indians, meaning all land within the territory covered by the Proclamation that was in Indian possession and had not been ceded to the

²⁸ When these so-called prairie provinces were formed, substantial parts of their respective territories were carved out of the Northwest territory. For these parts, the (then) Dominion of Canada at the time of the provinces admission to the Canadian Confederation in 1870 and 1905 reserved title to certain lands. This had the effect that the natural resources on these lands were owned by the Dominion, until they were transferred by agreements in 1930; see Hogg (note 13), at s.28.1, at 706.

²⁹ Constitution Act, 1930, R.S.C., 1985, Appendix II, No. 26.

³⁰ Clause 12 of the agreement with Alberta, Clause 12 of the agreement with Saskatchewan, Clause 13 of the agreement with Manitoba.

³¹ The British North America Act which effected Canadian confederation in 1867 was renamed Constitution Act, 1867 by the Canada Act, 1982.

³² See Hogg (note 13), at s.27.1 (a), at 672: “the main reason for S.91 (24) seems to have been a concern for the protection of the Indians against local settlers, whose interests lay in an absence of restrictions on the expansion of European settlement. The idea was that the more distant level of government – the federal government – would be more likely to respect the Indian reserves that existed in 1867, to respect the treaties with the Indians that had been entered into by 1867, and generally to protect the Indians against the interests of local majorities.”

³³ *Re Eskimos* [1939] S.C.R. 104.

³⁴ Hogg (note 13), at s.27.1 (b), at 674, at note 13.

³⁵ R.S.C. 1985 Appendix II, No. 1.

Crown.³⁶ Possibly the notion “Lands reserved for Indians” extends even farther to cover all land subject to unextinguished Indian title.³⁷

Among the most prominent uses the federal government has made of the empowerment is the Indian Act, which, though politically controversial,³⁸ still codifies most of the federal regulation addressed to Indians, often delegating to the administration for detailed regulation³⁹ and traditionally giving a large amount of discretion to the Ministry of Indian Affairs. The Act’s original intention, when it was first enacted in 1876, was to protect the share of Canada’s land base which remained with Indians after European settlement.⁴⁰ It created the concept of “status-Indians” to separate those who were entitled to reside on Indian lands and use their resources from those who were forbidden to do so.⁴¹ It follows that the concept of an “Indian” according to the Act is much more limited than the concept of “Indians” used in section 91 (24). The federal legislature has thus not used up its competences in the field.⁴²

After having been used for questionable experiments in social engineering in the first half of this century,⁴³ the Act has been substantially modified several times, the last substantial overhaul having taken place in 1985.⁴⁴ Lately the empowerment has also been used to enact legislation implementing the results of the new generation of land claims agreements.⁴⁵

³⁶ Hogg (note 13), at s.27.1 (b), at 675.

³⁷ *Ibid.*

³⁸ The Act has often been criticized on all sides. Many, especially non-aboriginal persons, want it abolished because it violates standards of equality; aboriginal groups in turn want to be able to make their own decisions as self-governing polities and see the Act as inhibiting that freedom; see R.H. Bartlett, *The Indian Act of Canada*, Saskatoon, 1980.

³⁹ Indian Health matters for example have been regulated by regulations passed pursuant to section 73 (1) of the Indian Act, *Indian Health Regulations*, C.R.C. 1978, c. 955.

⁴⁰ The exemption of reserve lands from municipal taxation and from seizure under legal process were other measures of the Act intended to secure those lands for Indians.

⁴¹ “Status” soon came to have other implications. Status Indians were denied the right to vote, they did not sit on juries, and they were exempt from conscription in time of war (although the percentage of volunteers was higher among Indians than any other group).

⁴² It probably will not do so either in the near future, since enthusiasm for comprehensive regulation by instruments of administrative law is on the wane following the constitutionalization of aboriginal rights. Consensual regulation by way of land claims agreements is now much more popular.

⁴³ Possession of liquor was punished more severely under the Act than by general laws. Loitering in pool rooms was forbidden. Indian children were removed from their homes under the Minister’s authority to educate them and sent to residential schools. Children who were habitually absent from school were “deemed” to be juvenile delinquents. Indians could become “persons” by voluntarily enfranchising (i.e. renouncing Indian status) and, in many circumstances, were involuntarily enfranchised by the Act.

⁴⁴ The so-called Bill C-31 (R.S.C. 1985, c. 32 [1st Supp.]) was enacted to remove the remaining discriminatory provisions in the Act and to reinstate those who had previously lost Indian status; the so-called “Kamloops” amendments (R.S.C. 1985, c. 17 [4th Supp.]) were intended to create a distinction between reserve lands available for leasing – “designated lands” – and those surrendered absolutely for sale. The import of this distinction was to give Band Councils regulatory and taxing jurisdiction over their leased lands, see *Opetchesah Indian Band v. Canada*, [1997] 2 S.C.R. 119 for a case ruling on this distinction.

⁴⁵ See below at note 200.

b) Empowerment to regulate on the provincial level

The Canadian Constitution lists a series of subject matters for which the provinces have competence to legislate.⁴⁶ When exercising this competence, provinces are in principle free to extend the effects of this legislation to aboriginal peoples.⁴⁷ There are, however, considerable exceptions to this principle, which in sum do not leave much leeway for provincial regulation of indigenous affairs.

Since provincial laws have to respect the higher-ranking federal laws and constitution, no provincial regulation may contravene a federal or constitutional norm (as in the Indian Act or section 35 of the Constitution Act, 1982). Even when there is no federal or constitutional norm regulating the matter, provinces may regulate only if the subject matter of the regulation does not come within Section 91 (24), the federal empowerment being exclusive. Provincial regulation which directly aims at Indians, which “singles them out”, is therefore clearly inadmissible,⁴⁸ as is the regulation which affects “Indianness”. Indianness is a short formula for the problem that regulation, even if not directly aimed at Indians, could still affect “an integral part of primary federal jurisdiction over Indians”.⁴⁹

The requirement that provinces must not regulate Indianness has led the courts to strike down or at least read down provincial statutes in some cases.⁵⁰ It has been pointed out⁵¹ that the precise content of Indianness in a specific context to a certain degree also depends on the relevant aboriginal groups’ customs. A provincial law regulating hunting for example will almost always affect Indianness,⁵² but not if the specific aboriginal group it affects never hunted.

Provincial laws affecting Indianness (which do not single out Indians and do not run counter to federal, constitutional or treaty norms) can nevertheless become applicable to Indians via Article 88 of the Indian Act, which incorporates by reference “provincial laws of general application”.⁵³

c) Conclusion

The primary regulatory competence for aboriginal affairs lies with the federal government and has been primarily exercised through the enactment of the Indian Act. Provinces can not directly regulate aboriginal issues. Provincial laws of gen-

⁴⁶ Sections 92, 93, 94, and 95 of the Constitution Act, 1982.

⁴⁷ Hogg (note 13), at s.27.2 (a), at 678.

⁴⁸ Ibid., at s.27.2 (b), at 680.

⁴⁹ *Four B Manufacturing v. UGW*, [1980] 1 S.C.R. 1031, at 1047.

⁵⁰ See Hogg (note 13), at s.27.2 (b), at 681.

⁵¹ By Woodward (note 4), at 67 sub 2.1 (c) (iii): “The federal parliament’s jurisdiction over ‘Indians’ under s. 91(24) varies according to the ‘Indianness’ of the different Indian, Inuit and Métis peoples of Canada. This question of fact will vary according to the culture of the particular aboriginal people concerned. A law that affects the values of one people may be of little or no cultural significance to another people. This is not surprising. It is a natural consequence of the remarkable cultural diversity of the aboriginal peoples of Canada.”

⁵² Hogg (note 13), at s.27.2 (b), at 681, at note 58.

⁵³ See in detail *ibid.*, at s.27.3 (b), at 683 et seq.

eral application which are not in conflict with higher-ranking provisions may, however, also affect aboriginal peoples. Interestingly, the concept of “Indianness” can make the division of power between federal and provincial legislation depend on the customary content of aboriginal culture.

3. Equity: Fiduciary relationship

Principles of equity and equitable remedies have come to play an important role in Canadian law related to aboriginal peoples, since the Supreme Court in *Guérin v. the Queen* found an “equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians” to exist on behalf of the Canadian government.⁵⁴ This obligation was held to arise from a *sui generis* “fiduciary relationship” between the Crown and Indians, which in turn derived from the Indians’ aboriginal title and from the Crown’s historic responsibility to protect Indian lands in transactions with third parties.⁵⁵

In the *Guérin* case, officials of the Ministry of Indian affairs had arranged the surrender and lease of Musqueam Indian lands to a Vancouver golf club. Without consulting the band council, they negotiated lease terms far less favourable than originally planned and which were far below the market value. The Court held the Crown in breach of its fiduciary duty and ordered ten million Canadian dollars to be paid in equitable compensation.

This idea of a fiduciary relationship as expressed in *Guérin* was not without a precursor. Canadian courts had already before *Guérin* recognized a common law presumption in favour of treaties and statutes relating to aboriginal peoples.⁵⁶ Also, the interpretation of Indian treaties had been held to be an issue involving “the honor of the Crown”.⁵⁷ What was new in *Guérin* was the recognition of a trust-like duty binding the government in a way that makes it enforceable in the courts.

While the fiduciary duty as expressed in *Guérin* was limited in its subject matter to the handling of aboriginal lands by the Crown,⁵⁸ the Court went a step further⁵⁹ in *Sparrow*.⁶⁰ It found the principle that “government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples” to be “a general guiding principle for s.35 (1)”.⁶¹ It spoke generally of the government’s

⁵⁴ *Guérin v. The Queen*, [1984] 2 S.C.R. 335, at 385, 387.

⁵⁵ *Ibid.*, at 383.

⁵⁶ *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 649, 651 (B.C.C.A.).

⁵⁷ *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, 367 (O.C.A.).

⁵⁸ *Guérin v. The Queen*, [1984] 2 S.C.R. 335, at 377.

⁵⁹ The relationship between *Sparrow* and *Guérin* has been the subject of debate. While some see the fiduciary duties in *Sparrow* and *Guérin* as distinctive concepts (Elliott [note 1], at 94, sub 5. (b).), others want to expand the *Guérin* principle into a coherent legal theory for viewing the Crown-Indian relationship (W. McMurtry/A. Pratt, *Indians and the Fiduciary Concept, Self-government and the Constitution: Guérin in Perspective*, [1986] 3 C.N.L.R. 19, at 31).

⁶⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

⁶¹ *Ibid.*

fiduciary responsibility “with respect to aboriginal peoples”⁶² and said that “the relationship between government and the aboriginals is trust-like.”⁶³

In the *Sparrow* case a Musqueam Indian, relying on his aboriginal right to fish, had challenged his conviction for violating the federal Fisheries Act when fishing with a net that exceeded the permitted length. The acceptance of the fiduciary relationship as “a general guiding interpretive principle”⁶⁴, among other factors, led the Court to develop a liberal canon of interpretation for section 35 (1). In this canon, which will be more closely examined below,⁶⁵ legislative restrictions on aboriginal rights can only be justified by meeting strict criteria, lest they be unconstitutional and void.

This approach has been confirmed in *Quebec v. Canada*, where the Court found the fiduciary relationship to be the factor that “indicates that the exercise of sovereign power may be limited or restrained when it amounts to an unjustifiable interference with aboriginal rights”.⁶⁶

B. Status of Indigenous Peoples under Canadian Law

I. Personal status: Who is an indigenous person?

Any legal regime that confers special status upon a certain group of persons has to define by some means which persons belong to the group. A simple, almost classical solution to solving this problem by means of administrative law has been developed by the Indian Act, which asks indigenous persons to be registered in an Indian Register and precisely defines who is eligible to be registered. A person who is registered has Indian status, others do not.

According to the Indian Act, as it stood before 17 April 1985, a person could be registered, if he was a male descendant of a group recognized as Indians in 1874, or if she was the wife of such a descendant. Indian women marrying non-Indian men lost Indian status; non-Indian women who married Indian men gained such status. Indian status gave rights to health and educational benefits and to tax immunity for on-reserve property. Status-Indians were as a rule attributed to one of the Indian bands and as such had the right to a share of reserve lands, the right to live on a reserve and the right to participate in band-elections. This way of defining Indians, although it matched its goal of determining who had Indian status, came under criticism⁶⁷ for several reasons. It made indigenous peoples the object of an administration in which they had no say; it ignored Indian custom by focusing on the European-style core-family, ignoring the importance of extended fam-

⁶² Ibid.

⁶³ Ibid., at 1108.

⁶⁴ Ibid., at 1115.

⁶⁵ See below at note 237 et seq.

⁶⁶ *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at para. 39.

⁶⁷ For an account of the reform movement see Elliot (note 1), 4 (d), at 11 et seq.

ilies in Indian society; moreover, the attachment of status to the male line upset traditions of matriarchal aboriginal societies as well as international⁶⁸ ideas of gender equality.⁶⁹

Bill C-31,⁷⁰ in force as of 17 April 1985, responded to the criticisms by changing the eligibility system in a way that eliminated the sexually discriminatory provisions and reinstated status to those who had previously lost it. Responding to demands for participation in the administrative system, it also allowed for the transfer of control of many criteria for band membership to the bands themselves, with the result of frictions between Indian status and band membership criteria. This led to an extraordinary complexity of the new system which now establishes transferable and partly transferable status, automatic, conditional and discretionary band membership, and many other differentiations. Also, reinstatement of status led to a sharp increase in the Indian population⁷¹ which puts a severe strain on already dire reserve resources.

Inuit, Métis and non-status Indians are not covered by the Indian Act. Since there is no comparable registration requirement for these people, courts have to look into the affiliation of these persons with an aboriginal group on a case-to-case basis.

This can be especially difficult in the case of the Métis, who are descendants of mixed marriages between people of Indian and European descent.⁷² Some pre-1982 provincial statutes expressly asked for a minimum of "not less than one-quarter of Indian blood" for a person to be Métis.⁷³ It seems, however, that such a formal requirement would nowadays be in conflict with section 35 (1). Consequently, the Ontario Court (Provincial Division) has recently held that "a Métis is a person of aboriginal ancestry, who self-identifies as a Métis, and who is accepted by the Métis community as a Métis."⁷⁴

II. Group status: Self-government

The Supreme Court has so far explicitly left open the widely debated question⁷⁵ whether there is an inherent right of self-government protected as an aboriginal right under section 35 of the Constitution Act, 1982.

⁶⁸ See *Lovelace v. Canada*, [1983] Can. Human Rts. Yearbook 305, where the U.N. Human Rights Committee found that the Act discriminated on the basis of sex, and other ongoing violations of the Universal Declaration of Human Rights.

⁶⁹ As to sexual equality and aboriginal law, see below note 127 and accompanying text.

⁷⁰ R.S.C. 1985, c. 32 (1st Supp.).

⁷¹ Between 1985 and 1994, some 95 thousand people gained Indian Act status through reinstatement. Three quarters of these were women.

⁷² Elliot (note 1), 5 (c), at 14.

⁷³ Section 2 (a) of the Alberta Métis Betterment Act, R.S.A. 1970, c.233 (revived 1982, c.26, repealed and superseded by the Métis Settlements Act, S.A. 1990, c. M-14.3); Section 2 (1) of the Alberta Fishery Regulations, C.R.C. 1978, c.823.

⁷⁴ *R. v. Powley*, [1999] 58 C.R.R. (2d), 149.

⁷⁵ See B.A. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-government in Canada*, Montreal et al., 1992; A.-M. Mawhiney, *Towards Aboriginal Self-government: Relations between Status Indian Peoples and the Government of Canada*, New York, 1994.

In *R. v. Pamajewon*, where the defendants had advanced this thesis, the Supreme Court held that “assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is nonetheless that laid out in *van der Peet*”,⁷⁶ and dismissed the appeal on the ground that it failed to satisfy this standard.⁷⁷ The same happened in *Delgamuukw*, where the Court, due to incoherent pleadings by the defendants, blatantly refused “to grapple with these difficult and central issues”.⁷⁸ The issue was thus remanded to the Court of Appeal,⁷⁹ which has yet to decide on the matter.

The issue would be clear, had the constitutional amendments assembled under the title “Charlottetown Accord” passed the 1992 referendum. A new section 35.1 would have explicitly recognized the indigenous peoples’ “inherent right of self-determination within Canada” as an enforceable aboriginal right.⁸⁰ The Charlottetown Accord was, however, defeated and it remains doubtful, whether the mere fact that all the provinces’ first ministers and territorial leaders agreed upon the proposed amendment entails legal recognition of such a right.⁸¹

The Supreme Court’s reticence in matters of “inherent” self-government seems to reflect a deep-rooted cautiousness to having a court decide on the territorial and organizational subdivision of the Canadian state as opposed to having such matters regulated in a negotiated settlement.⁸² Indeed the most advanced⁸³ rights to self-government that are recognized in today’s Canada are enshrined in the modern land claims agreements⁸⁴ between indigenous groups and the government. The self-government rights agreed to in such a settlement as “treaty rights” enjoy the same level of constitutional protection under section 35 as a genuine aboriginal right.

⁷⁶ *R. v. Pamajewon*, [1996] 2 S.C.R. 821 at para. 24.

⁷⁷ *Ibid.* at para. 30.

⁷⁸ [1997] 3 S.C.R. 1010, at para. 171: “The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal selfgovernment. The degree of complexity involved can be gleaned from the Report of the Royal Commission on Aboriginal Peoples, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach.”

⁷⁹ *Ibid.*

⁸⁰ For further detail see Hogg (note 13), at s.27.11, at 702 et seq.

⁸¹ In this vein *ibid.*, at s.27.11, at 703.

⁸² This can also be neatly illustrated by the Supreme Court Reference *re Secession of Quebec*, [1998] 2 S.C.R., 217, esp. at margin notes 89 to 105, where the Court held that even in the event of demonstrated majority support for Quebec secession, there is a constitutional duty to negotiate on it.

⁸³ In the Nunavut Agreement (below at note 200), the Canadian government even agreed to create a new territory with self-government rights that compare to those of a province for the Inuit of Nunavut.

⁸⁴ See below at note 200.

Some rights to self-government have also been granted by statute. The Indian Act has always known elements of self-government,⁸⁵ which have been strengthened since the eighties of this century⁸⁶. A central element of self-government under the Indian Act is the recognition of the authority of band councils, which may, but need not necessarily be democratically elected by the band members.⁸⁷ About one third of the 592 band councils in Canada are not elected but rest on native custom in their formation.⁸⁸

Band councils have legislative and administrative responsibilities which have been described as "municipal-type".⁸⁹ This is undisputed insofar as it means that band councils are essentially empowered to regulate matters rooted in the local native community and, eventually, relating to the reserve. There is some disagreement, however, as to whether this power is solely delegated power originally vested in the Minister of Indian Affairs⁹⁰ or whether it is at least partially a genuine governmental power.⁹¹

Substantially, band councils are empowered to regulate topics like traffic on reserves, water supply, fishing and hunting, the observance of law and order, or the construction, repair and use of buildings on the reserve.⁹² Since 1988, band councils have a right to raise taxes on reserve property.⁹³ Bands also have an option to assume control of their membership, which has been exercised by about two fifths of all Indian bands.⁹⁴ It has further been recognized that they can conclude contracts, even where there is no express provision to do so in the Act.⁹⁵

In recent times, the self government regime of the Indian Act has been partially replaced by band specific self-government acts which are the result of negotiations between the Canadian government and the bands concerned.⁹⁶

⁸⁵ See the detailed account of "Band government under the Indian Act", in: Woodward (note 4), at 151 et seq., especially 164 et seq.

⁸⁶ David Crombie, Minister of Indian Affairs and Northern Development from 1984 to 1986, said: "Instead of making communities fit our legislation, we will make legislation that fits the community", Hansard, Vol. 128, No. 223, 10585.

⁸⁷ Section 74 of the Indian Act recognizes elected Band Councils as well as customarily established councils. The Minister for Indian Affairs has, however, discretionary authority to dissolve non-elected band councils and ask for elections "whenever he deems it advisable for the good government of a band".

⁸⁸ Woodward (note 4), at 166, note 69.

⁸⁹ Elliott (note 1), part 11, at 127.

⁹⁰ In this vein, see the Alberta Court of Appeal in *Paul Band v. R.*, [1984] 2 W.W.R., 540 at 549.

⁹¹ This seems to be the position of the Supreme Court of British Columbia in *Joe v. Findlay*, [1987] 12 B.C.L.R. (2d) 166, at 172.

⁹² Section 81 of the Indian Act.

⁹³ Section 83 (2) of the Indian Act.

⁹⁴ Elliott (note 1), part 1, at 13, note 56 and accompanying text.

⁹⁵ *Cache Creek Motors Ltd. v. Porter* (1981), 14 B.C.L.R. 13.

⁹⁶ Cree-Naskapi (of Quebec) Act, S.C. 1984, c. 18; Sechelt Indian Band Self-Government Act, R.S.C. 1985, c. 20 (2nd Supp.).

III. Recognition of special status in other areas of law

Apart from provisions dealing directly with personal and group status of aboriginals, there are many norms in Canadian law which recognize that indigenous peoples have in certain limited respects to be treated differently from other citizens. Out of the multitude of norms,⁹⁷ only two examples will be examined here, namely taxes and criminal justice.

1. Tax law

Section 87 of the Indian Act exempts from taxation “(a) the interest of an Indian or a band in reserve or surrendered lands; and (b) the personal property of an Indian or band situated on reserve lands.” The original purpose of the provision has been held to be the insulation of property interests of Indians in their reserve lands from the intrusion and interference by the larger society so as to ensure that Indians are not dispossessed of their entitlements.⁹⁸ As such, it is in principle strictly limited to Indians in reserves and property on reserves.

This protective aim has been interpreted generously in *Williams v. Canada*⁹⁹, where the question was whether subsection (b) also applied to employment insurance benefits which were paid by the Canada Employment and Immigration Commission’s regional computer centre in Vancouver (definitely off-reserve) to an Indian on a reserve. Faced with the decision whether the intangible property right to unemployment benefits had to be considered as “on-reserve” or “off-reserve”, the Court held it to be “on-reserve” and tax-exempt, since it arose after the end of an employment that was performed on the reserve for an employer who was located on the reserve, and for which the appellant had been paid on the reserve. The entitlements created by the Indian’s employment on the reserve would otherwise be eroded.

The Court, however, rejected a proposal practically to do away with the “on-reserve” requirement. In *Union of New Brunswick Indians*¹⁰⁰ the question arose whether Indians were required to pay a provincial sales tax on goods purchased off the reserve for consumption on the reserve. The respondents had argued that the sales tax is a consumption tax collected out of convenience at the time of purchase but levied in respect of the consumption or use of property which occurs on the reserve. They further argued that section 87 was intended to protect Indians from taxation in respect of their use of property on-reserve. Where Indians are obliged to purchase most of their goods off-reserve, as most are in New Bruns-

⁹⁷ For an overview of all the Federal housing, subsidy, lending, health, drug abuse, education, farm and other regulation providing for special treatment of native people, see Woodward (note 4), at 383 et seq.

⁹⁸ *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at 133.

⁹⁹ *Williams v. Canada*, [1992] 1 S.C.R. 877.

¹⁰⁰ *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161.

wick, this protection would be eroded. Therefore, section 87 should be read as applying to a sales tax levied off-reserve on goods purchased by Indians for use on the reserve. The Court, however, rejected both arguments¹⁰¹ and held that Section 87 of the Indian Act applies only to property physically located on a reserve at the time of taxation or property whose paramount location is on a reserve at the time of taxation.¹⁰²

2. Criminal justice

The specific problems encountered in criminal procedures involving aboriginal people have often attracted public attention¹⁰³ and the law has made several attempts to deal with the phenomenon.

Section 718.2 (e) of the Canadian Criminal Code provides that all available sanctions other than imprisonment, that are reasonable under the circumstances, should be considered by a judge for all offenders "with particular attention to the circumstances of aboriginal offenders." In *Gladue* the Supreme Court has recently had to deal with this provision.¹⁰⁴ It held that the purpose of Section 718.2 (e) was to ameliorate the serious problem of over-representation of aboriginal people in prisons¹⁰⁵ and to encourage sentencing judges to have recourse to a restorative approach in sentencing.¹⁰⁶ The Court noted that circumstances of aboriginal people are unique and if there is no alternative to imprisonment, the length of the term must be carefully considered.¹⁰⁷ Nevertheless, the section is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders,¹⁰⁸ but the jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offense.¹⁰⁹ Furthermore, the Court held Section 718.2 (e) to apply to all aboriginal persons wherever they reside, even if they do not live within an aboriginal community, but rather in an urban area, as was the case for the accused.

In *Williams*¹¹⁰ the Supreme Court had to address another issue, namely whether the evidence of widespread bias against aboriginal people in the community raises a realistic potential of partiality, so that the defence in a criminal case is entitled to challenge potential jurors for cause on the ground of partiality against aboriginal people. It specifically acknowledged "the destructive potential of subconscious ra-

¹⁰¹ *Ibid.*, at paras. 32 and 46.

¹⁰² *Ibid.*, at para. 48.

¹⁰³ Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*, Ottawa, 1996.

¹⁰⁴ *R. v. Gladue*, Judgment of April 23, 1999, File No.: 26300, not yet reported.

¹⁰⁵ *Ibid.*, at para. 87.

¹⁰⁶ *Ibid.*, at para. 50.

¹⁰⁷ *Ibid.*, at paras. 79 and 93 (under 8).

¹⁰⁸ *Ibid.*, at para. 88.

¹⁰⁹ *Ibid.*, at para 93 (under 12).

¹¹⁰ *R. v. Williams*, [1998] 1 S.C.R. 1128.

cial prejudice”¹¹¹ and rejected as unduly restrictive¹¹² the prosecution’s contention that there need be some evidence of bias of a particular nature and extent against aboriginal persons, or even further, that racial prejudice in the community must be linked to specific aspects of the trial. The court explicitly rejected the adoption of U.S. rules on jury selection¹¹³ and opted for a flexible approach, declaring a “realistic potential for partiality” to be the appropriate evidentiary standard on applications to challenge for cause based on racial prejudice. It thus gave considerable discretion to judges to determine whether such potential exists in a given case. To ease the burden on the defense, however, it indicated that the potential for partiality would be irrefutable where the prejudice can be linked to specific aspects of the trial, such as a widespread belief that people of the accused’s race are more likely to commit the crime charged.¹¹⁴ It also indicated that, absent evidence to the contrary, where widespread prejudice against people of the accused’s race is demonstrated at a national or provincial level, it will often be reasonable to infer that such prejudice is replicated at the community level.¹¹⁵

Yet another issue is whether members of aboriginal groups who are witnesses in criminal trial can be forced to comply with their duties as witnesses like any other Canadian citizen. The Alberta Provincial Court in a recent judgement held that indigenous peoples are to be treated differently from others in criminal court proceedings in that special attention has to be paid to their traditional norms of behaviour. If these forbid an indigenous person to publicly speak against another aboriginal or command him not to make a statement when he feels to be on unknown territory, the prosecution may be hindered to force the person into the witness stand.¹¹⁶

IV. Special status and equality

For a long time there was an idea in Canada that the treaty regimes and the Indian Act run counter to the idea of equality and would in the long run become obsolete, as the indigenous peoples would sooner or later be absorbed into the general body politic.¹¹⁷ Backed by a favorable Supreme Court decision,¹¹⁸ this

¹¹¹ Ibid., at para. 22.

¹¹² Ibid., at para. 27. See also at para. 22: “Where doubts are raised, the better policy is to err on the side of caution and permit prejudice to be examined.”

¹¹³ Ibid., at margin notes 12, 13 and 52: “In my view, the rule enunciated by this Court in *Sheratt*, supra, suffices to maintain the right to a fair and impartial trial, without adopting the United States model or a variant on it.”

¹¹⁴ Ibid., at para. 27.

¹¹⁵ Ibid., at para. 41.

¹¹⁶ *R. v. Twoyoungmen*, [1998] 51 C.R.R., 88.

¹¹⁷ A famous statement in 1920 by Duncan Campbell Scott, poet, essayist and Deputy Superintendent General of Indian Affairs, encapsulates the prevailing attitude of his day: “Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian department.”

¹¹⁸ In *R. v. Drybones*, [1970] S.C.R. 282, the Supreme Court of Canada held that section 95 of the Indian Act, which punished intoxication of an Indian on reserves more harshly than under general

movement cumulated in a government White Paper which sought abolishment of Indian status, Indian reserves, Indian Treaties, the Indian Department and the Indian Act.¹¹⁹ It was then when Prime Minister Trudeau declared: "It is inconceivable, I think, that in a given society one section of the society have a treaty with the other section of the society. We must all be equal under the laws and we must not sign treaties amongst ourselves."¹²⁰

The idea of abolishing special status, however, met with firm resistance among Indian and other indigenous populations and finally gave way to the recognition and subsequent constitutionalization of aboriginal rights existing at common law.¹²¹ Less clear than the unanimous political will of all relevant forces in today's Canada to respect special status is the legal situation underlying this *de facto* exemption from the equality guarantees.

Canadian federal constitutional law contains two guarantees of "equality before the law"; one is section 15 (1) of the Constitution Act, 1982,¹²² the other is section 1 (b) of the Canadian Bill of Rights. Both specifically forbid discrimination based on race. The creation of special legislative, administrative and constitutional regimes for defined aboriginal groups at first glance seems to run counter to these provisions.¹²³ Although one "obvious"¹²⁴ purpose of section 25 is to prevent section 15 equality rights from overriding the special status and rights of aboriginal peoples, this provision may not shield aboriginal rights from the equality guarantee of the Bill of Rights. It has been pointed out that aboriginal special status may be understood as affirmative action under section 15 (2)¹²⁵ of the Constitution Act, 1982, or as a limitation under the general limitation clause of section 1.¹²⁶ As

laws, violated the equality guarantee of the Bill of Rights. Later cases tended to confine *Drybones* to the facts; see Hogg (note 13), at s.27.1 (d), at 676 et seq., esp. note 31.

¹¹⁹ Department of Indian Affairs and Northern Development, Statement of the Government of Canada on Indian Policy, 1969 ("The White Paper").

¹²⁰ Quoted after P.A. Cumming/N.H. Mickenberg, *Native Rights in Canada*, 2nd ed., (1972) at 331.

¹²¹ For a detailed account of the developments from World War II until 1983, D. Sanders, *The Renewal of Indian Special Status*, in: A. Bayefsky/M. Eberts, *Equality Rights and the Canadian Charter of Rights and Freedoms*, Toronto et al., 1985 at 529 et seq.

¹²² Section 15 reads:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¹²³ Hogg (note 13), at s.27.1 (d), at 676 et seq.

¹²⁴ McNeil (note 25), 255 at 262.

¹²⁵ Section 15 (2) reads: "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

¹²⁶ Hogg (note 13), at s.27.1 (e), at 677.

far as these thoughts also apply to the Bill of Rights, they might perhaps save the special regimes from challenge under this equality guarantee.

Interestingly, the far-reaching *de facto* exemption from the principle of formal equality does not apply with regard to sexual equality.¹²⁷ Section 35 (4) of the Constitution Act, 1982, as amended by the Constitution Amendment Proclamation, 1983, reads: "Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons." As seen above,¹²⁸ gender equality was also one of the key arguments in the Indian Act reform. Moreover, within the aboriginal group, formal equality seems to apply. The Federal Court held that section 77 (1) of the Indian Act, restricting the vote in band elections to band members "ordinarily resident" on the reserve, is an infringement of section 15 (1) of the Charter.¹²⁹

C. Rights of Indigenous Peoples under Canadian Law

I. Sources of indigenous rights

1. Native Custom

Customary rights arise from social organization and distinctive cultures of aboriginal peoples prior to European settlement, in which case they are referred to as aboriginal rights.¹³⁰ A special group of aboriginal rights are rights to land. They are based on the occupation of land prior to the time at which the Crown asserted sovereignty over it. This group of rights is named aboriginal title.

a) Aboriginal rights other than aboriginal title

Aboriginal rights other than rights to land can be manifold and entitle their holders to perform all sorts of customary practices, the most prominent ones being hunting, fishing and trapping. The concept, however, has no substantive limits. In principle, any activity can be part of native custom, if the existence of a corresponding tradition is evidenced. Since extrinsic evidence is widely accepted, the risk of abuse looms large. In considering whether a claim to a customary aboriginal right has been made out, courts have therefore looked at whether the practices, customs or traditions do in fact arise from the claimant's distinctive culture and society.

¹²⁷ See generally L.E. Kroesenbrink-Gelissen, *Sexual Equality as an Aboriginal Right: The Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters 1982-1987*, Saarbrücken et al., 1991.

¹²⁸ Note 68 and accompanying text.

¹²⁹ *Corbiere v. Canada*, [1994] 1 C.N.L.R. 71.

¹³⁰ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 74.

(1) *Distinctiveness*

In *van der Peet* the Supreme Court has most precisely formulated the relevant test for an assessment of aboriginal rights, holding that in order to be recognized as to be an aboriginal right, an activity must be “an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”¹³¹ To meet this requirement, the “central significance” of the activity to the aboriginal culture has to be evidenced. It must be demonstrated “that the practice, custom or tradition was one of the things which made the culture of the society distinctive – that it was one of the things that truly made the society what it was.”¹³² Practices that are merely incidental to an integral practice do not qualify.¹³³

It is on the basis of this test of distinctiveness that native activities have repeatedly failed to be recognized as a constitutionally protected exercise of an aboriginal right. In *van der Peet* the defendant, a member of the Sto:lo First Nation, had sold 10 salmon caught under the authority of an Indian food fish licence, contrary to section 27(5) of the British Columbia Fishery (General) Regulations, which prohibited the sale or barter of fish caught under such a licence. The Supreme Court found that the exchange of salmon for money or other goods, while certainly taking place in Sto:lo society prior to contact, was not a significant, integral or defining feature of that society.¹³⁴ Similarly, the Supreme Court applied this test in *Pamajewon*, holding that high stake gambling with bingo games on reserves failed to satisfy this standard.¹³⁵ The Court acknowledged that Ojibwa culture¹³⁶ had traditionally known elements of gaming. However, it was not satisfied that these elements were of central importance to Ojibwa culture.¹³⁷

¹³¹ *Ibid.*, at para. 46, relying on a suggestion in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1099 (“The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture”).

¹³² *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 55 (emphasis in the original).

¹³³ *Ibid.*, at para. 70: “Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.”

¹³⁴ *Ibid.*, at para. 86.

¹³⁵ *R. v. Pamajewon*, [1996] 2 S.C.R. 821 at para. 30.

¹³⁶ *Ibid.*, at para. 27.

¹³⁷ *Ibid.*, at para. 28: “In fact, the only evidence presented at either trial dealing with the question of the importance of gambling was that of James Morrison, who testified at the *Pamajewon* trial with regard to the importance and prevalence of gaming in Ojibwa culture. While Mr. Morrison’s evidence does demonstrate that the Ojibwa gambled, it does not demonstrate that gambling was of central significance to the Ojibwa people.”

(2) *Continuity*

There further has to exist continuity between the time before European contact¹³⁸ and the time when the claim is made.¹³⁹ The standard of proof for the requirement of continuity is, however, relatively low and approaches a plausibility test.¹⁴⁰ The concept of continuity also allows for interruption of exercise.¹⁴¹

Continuity further allows for evolution of the right's scope and content over time.¹⁴² This evolutionary aspect of aboriginal rights has been condensed in the formula that there are no "frozen rights".¹⁴³ That which is reasonably incidental is something which allows the claimant to exercise the right in the manner that his or her ancestors did, taking into account acceptable modern developments or unforeseen alterations in the right. In *Sundown*¹⁴⁴ the Supreme Court relied on the "no frozen rights"-approach, holding that a right¹⁴⁵ to expeditionary hunting, which had traditionally encompassed only the right to build a moss-covered lean-to or a tent, would nowadays also contain a right to build a small log cabin, because such a cabin is "an appropriate shelter for expeditionary hunting in today's society".

One aspect in *Pamajewon*¹⁴⁶, however, shows that this evolutionary approach is not always taken into account. The Ojibwa gaming practices had traditionally consisted in informal gambling activities taking place on a small scale.¹⁴⁷ The activities organized by the defendants, however, amounted in the eyes of the Court to a commercial high-stake lottery. This was deemed to be a twentieth century phenomenon and never part of the means by which native societies were tradi-

¹³⁸ For evident reasons, the Court has left open whether pre-contact practice must also be shown in a case involving Métis, an aboriginal group which formed after European settlement through intermarriage between Europeans and Natives, *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 67.

¹³⁹ *Ibid.*, at para. 60.

¹⁴⁰ *Ibid.*, at para. 62: "The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact."

¹⁴¹ *Ibid.*, at para. 65: "I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right."

¹⁴² *Ibid.*, at para. 64: "Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times."

¹⁴³ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1093.

¹⁴⁴ *R. v. Sundown*, Judgment of 25 March 1999, File No.: 26161, not yet reported, at para. 33.

¹⁴⁵ The right in question was a treaty right, the court, however, relied directly on *Sparrow* and *van der Peet*.

¹⁴⁶ *R. v. Pamajewon*, [1996] 2 S.C.R. 821.

¹⁴⁷ *Ibid.*, at margin notes 28 and 29: "Moreover, his evidence in no way addresses the extent to which this gambling was the subject of regulation by the Ojibwa community. His account is of informal gambling activities taking place on a small scale; he does not describe large-scale activities, subject to community regulation, of the sort at issue in this appeal."

tionally sustained or socialized.¹⁴⁸ It seems that a possible evolutionary aspect of the alleged aboriginal right to gamble was not really considered in this context.

(3) Summary

In sum, the Supreme Court has been open-minded in recognizing aboriginal rights especially when it comes to hunting, fishing or trapping for subsistence. In this area it has also been friendly to evolutionary approaches, e.g. allowing use of modern day hunting techniques. The Court has, however, been more restrictive when money was involved through trading or gambling. It was then more willing to classify the respective practices as “not distinctive” for the respective native culture. One has to see clearly that this approach, while probably appropriate for avoiding abuse of the concept, invites the Court to impose its perception of what native culture really is on the aboriginal peoples. There is as yet no power to self-define native culture in a way that would guarantee constitutional recognition.

b) Aboriginal title

Aboriginal title is a special aboriginal right in relation to land.¹⁴⁹ The Supreme Court has repeatedly held that native land rights are in a category of their own, and that traditional real property rules therefore do not aid in resolving a case dealing with aboriginal title.¹⁵⁰ The concept of aboriginal title is much older than the concept of aboriginal rights and has always elicited debate. In the last century aboriginal title was believed to derive from the recognition of Indian rights in the Royal Proclamation of 1763,¹⁵¹ in which King George III of England had ordered his subjects in the colonies in America to respect Indian reserves, lands and hunting. The protection provided by this document was an expression of the King’s “Will and Pleasure” and as such an honorable gesture of a victorious monarch towards a vanquished people. It reflected the predominant attitude of settlers towards natives in colonial times. A late 19th century ruling of the Privy Council accordingly described Indian land rights as entirely dependent upon the good will of the Sovereign.¹⁵²

¹⁴⁸ *Ibid.*, at para. 29.

¹⁴⁹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R., 1010, at para. 137: “although aboriginal title is a species of aboriginal right recognized and affirmed by s. 35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land was of a central significance to their distinctive culture”.

¹⁵⁰ *St. Mary’s Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657 at para.14, confirming *Guérin v. The Queen*, [1984] 2 S.C.R. 335, *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, and *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344.

¹⁵¹ R.S.C., 1985, Appendix II, No.1.

¹⁵² *St. Catherine’s Milling and Lumber Co. v. The Queen*, [1888] 14 A.C. 46 at 54 (P.C.); expressly criticised by the British Columbia Court of Appeal in *Delgamuukw v. R.*, [1993] 5 W.W.R. 97. Compare also Annex, VIII., in this issue.

This attitude prevailed until the Supreme Court on 31 January 1973, in its revolutionary judgement on the *Calder* case recognized aboriginal title to exist at common law independently of the Royal Proclamation.¹⁵³ The judgment was heavily influenced¹⁵⁴ by the U.S. Supreme Court's 1823 decision in *Johnson v. M'Intosh*.¹⁵⁵ The *Calder* doctrine was endorsed in the 1984 *Guérin* case.¹⁵⁶ In *Delgamuukw*, the Supreme Court has recently confirmed this approach and held that, although aboriginal title was recognized by the Proclamation, it arises from the prior occupation of Canada by aboriginal peoples.¹⁵⁷

Some features of aboriginal title are still unclear, especially regarding rights to natural resources on title-lands.¹⁵⁸ The Supreme Court, however, has clarified many important aspects of aboriginal title in recent judgments.

(1) *Right to exclusive use*

In *Delgamuukw*, the Supreme Court has defined aboriginal title to encompass "the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes".¹⁵⁹ In an important contrast to the concept of aboriginal rights it was clarified that these purposes "need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures."¹⁶⁰ "Distinctiveness" is therefore not a criterion in defining aboriginal title. Although the use must not be distinctive, it nevertheless is subject to certain inherent limits.¹⁶¹

Aboriginal title is *sui generis*, and so distinguished from other proprietary interests. The first important distinction from real property is that it is inalienable and cannot be transferred, sold or surrendered to anyone other than the Canadian government.¹⁶² The second important distinction lies in the fact that aboriginal

¹⁵³ *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at 390: "aboriginal Indian title does not depend on treaty, executive order or legislative enactment."

¹⁵⁴ *Ibid.*, at 380: "The case most frequently quoted with approval dealing with the nature of aboriginal rights is *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543, 21 U.S. 240. It is the locus classicus of the principles governing aboriginal title."

¹⁵⁵ *Johnson and Graham's Lessee v. M'Intosh*, (1823) 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681.

¹⁵⁶ *Guérin et al. v. The Queen*, [1984] 2 S.C.R. 535, at 377–378: "In recognizing that the Proclamation is not the sole source of Indian title, the *Calder* decision went beyond [*St. Catherine's Milling and Lumber Co. v. The Queen*] [...] In this respect *Calder* is consistent with the position of Chief Justice Marshall in the leading American cases."

¹⁵⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R., 1010, at para. 114.; the Court, however, continues to see the Proclamation as a cumulative source of aboriginal title.

¹⁵⁸ R.H. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights*, Calgary, 1986; K. Coates (ed.), *Aboriginal Land Claims in Canada: A Regional Perspective*, Toronto, 1992; C. Notzke, *Aboriginal Peoples and Natural Resources in Canada*, North York, 1994; recent land claims agreements specifically include detailed regulations on water rights, see e.g. article 13 and 20 of the Nunavut Agreement, below note 200.

¹⁵⁹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R., 1010, at para. 117.

¹⁶⁰ *Ibid.*

¹⁶¹ See below at note 231 and accompanying text.

¹⁶² *Delgamuukw v. British Columbia*, [1997] 3 S.C.R., 1010, at para. 113.

title is a group right held communally and 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 such land therefore have to be made by the aboriginal community.¹⁶³

(2) *Occupation*

Aboriginal title derives from indigenous occupation of land prior to the assertion of Crown sovereignty over that land. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group.¹⁶⁴ In considering whether occupation sufficient to ground title is established, the group's size, manner of life, material resources and technological abilities, and the character of the lands claimed are taken into account.¹⁶⁵

Similar to the criterion of continuity in ascertaining aboriginal rights, "occupation" asks the aboriginal group asserting title to demonstrate that the land was occupied prior to sovereignty¹⁶⁶ and that there was continuity between present-day and pre-sovereignty occupation.¹⁶⁷ Evidentiary standards are relatively low, allowing aboriginals to rely on present occupation to support allegations of pre-sovereignty occupation,¹⁶⁸ and freeing them from the need to establish an unbroken chain of continuity between present and prior occupation.¹⁶⁹ Also, the fact that the nature of occupation has changed will not normally preclude a claim for aboriginal title, "as long as a substantial connection between the people and the land is maintained".¹⁷⁰

Moreover, occupation before Crown sovereignty must have been exclusive.¹⁷¹ Here too, evidentiary standards are low. Trespass by other aboriginal groups does not as such undermine the exclusive occupation by the aboriginal group asserting title.¹⁷²

The continuous character of occupation does not preclude the adoption of an evolutionary approach to aboriginal title. The Supreme Court has confirmed that Indian interest in reserve lands is "very broad and incorporates present-day needs"¹⁷³. Aboriginal title in some instances encompasses mineral rights, and

¹⁶³ *Ibid.*, at para. 115.

¹⁶⁴ *Ibid.*, at para. 128.

¹⁶⁵ *Ibid.*, at para. 149, relying on B. Slattey, *Understanding Aboriginal Rights*, (1987) 66 Can. Bar Rev. 727, at 758.

¹⁶⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R., 1010, at para. 144 et seq.

¹⁶⁷ *Ibid.*, at para. 152 et seq.

¹⁶⁸ *Ibid.*, at para. 152.

¹⁶⁹ *Ibid.*, at para. 153.

¹⁷⁰ *Ibid.*, at para. 154.

¹⁷¹ *Ibid.*, at para. 155 et seq.

¹⁷² *Ibid.*, at para. 157.

¹⁷³ *Ibid.*, at para. 121.

lands held pursuant to aboriginal title are sometimes capable of exploitation, although such a use is not traditional.¹⁷⁴

(3) *Summary*

It has been clarified that aboriginal title derives from the simple fact of occupation of lands by native peoples prior to the establishment of Crown sovereignty. It does not depend for its legal force on recognition in the Royal Proclamation, 1763, although the Proclamation is now a further source for title to lands held by aboriginal peoples.¹⁷⁵ If it can be established that indigenous peoples exclusively used the relevant lands in pre-sovereignty times and, in principle, throughout colonial times until now, this is sufficient for aboriginal title. There is no test of whether the use made is integral to the distinctive culture of the aboriginal group. The Courts have thus been more liberal in recognizing aboriginal title than aboriginal rights, maybe because the risk of abuse is not as large. Although dwelling, like hunting or fishing, *per se* corresponds to an image of native subsistence-culture, the judges have not refrained from adopting an evolutionary approach to aboriginal title incorporating present-day needs and uses.

c) Relationship between aboriginal title and aboriginal rights

It has already been pointed out that aboriginal rights and aboriginal title are related concepts in a sense that aboriginal title is a sub-category of aboriginal rights which deals solely with rights to land.¹⁷⁶ Also, as seen above, many elements necessary to establish aboriginal title are broadly similar to those needed to establish an aboriginal right. "Occupation" and "continuity" have similar traits, and both rights and title in principle rely on facts that have existed from times before colonization continuously until now.

The identification of aboriginal rights to engage in particular activities and the test for the identification of aboriginal title are, however, distinct in two ways.¹⁷⁷ First, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy. Second, whereas the time to be considered for the identification of aboriginal rights is the time of first contact, the time to be considered for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.

The relationship between rights and title is even more complex in that many customary aboriginal rights, like the right to hunt or the right to fish, presuppose the existence of some stretch of land on which they can be exercised. Conversely,

¹⁷⁴ *Ibid.*, at para. 122.

¹⁷⁵ *Ibid.*, at para. 114, speaks of a "second source", referring to occupation.

¹⁷⁶ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 74.

¹⁷⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R., 1010, at para. 142.

occupation which gives rise to aboriginal title is, as we have seen, defined by the uses to which the land has been put by indigenous peoples. These uses may, though they need not,¹⁷⁸ constitute the exercise of an aboriginal right.

The Supreme Court has addressed this interdependence of land rights and other rights in *Delgamuukw* and has developed a three-tier model:¹⁷⁹

“The picture [...] is that the aboriginal rights which are recognized and affirmed by s. 35 (1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the ‘occupation and use of the land’ where the activity is taking place is not ‘sufficient to support a claim of title to the land’ [...]. Nevertheless, those activities receive constitutional protection.

In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. [...] Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land.

At the other end of the spectrum, there is aboriginal title itself. [...] aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself.”

d) Summary

The Canadian legal system recognizes constitutionally protected aboriginal rights to perform certain activities and land rights which are essentially based on customary exercise of these rights. The attitude has been very liberal, especially when dwelling, hunting, and fishing for subsistence are to be protected. It has been more hesitant in matters involving commercial activities. Here the test of distinctiveness works as a two-edged sword cutting off abusive claims to aboriginal rights at the price of cutting into aboriginal cultural self-determination.

¹⁷⁸ See above at note 160.

¹⁷⁹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R., 1010, at para. 138.

2. *Treaties*

A treaty between the government of Canada and an aboriginal group is not the same type of agreement as an international treaty between two sovereign states,¹⁸⁰ but neither is it merely a contract in the ordinary sense.¹⁸¹ The Supreme Court has confirmed that such a treaty is unique and an agreement *sui generis* which is neither created nor terminated according to the rules of international law.¹⁸²

a) Evolution of treaty-types

Generally speaking, a treaty is any solemn agreement between a group of indigenous peoples¹⁸³ and a representative¹⁸⁴ of the government¹⁸⁵ intended to create obligations for both parties.¹⁸⁶ This broad definition covers a wide array of commitments of all sorts.¹⁸⁷ In *Sioui*, the Supreme Court found a safe conduct guarantee for the Lorette Hurons to be a treaty although the guarantee was only one paragraph long and had not even been signed by the Hurons.¹⁸⁸ Such extreme cases are, however, the exception. Certain typical forms of treaties have emerged over time.

¹⁸⁰ In *R. v. Vincent*, [1993] 2 C.N.L.R. 165 the Ontario Court of Appeal has explicitly stated that the term "treaty" in s. 35 (l) of the Constitution Act, 1982 means treaties entered into between the British Crown and the Indians and not international treaties entered into between the British Crown and another sovereign state.

¹⁸¹ In *R.v. Sundown*, Judgment of 25 March 1999, File No.: 26161, not yet reported. The Supreme Court said at para.24: "Treaties may appear to be no more than contracts. Yet they are far more. They are a solemn exchange of promises made by the Crown and various First Nations. They often formed the basis for peace and the expansion of European settlement". See also *Hay River v. R.*, (1979) 101 D.L.R. (3d) 184 at 186 (Fed. T.D.).

¹⁸² *R. v. Simon*, (1985) 24 D.L.R. (4th) 390 at 404.

¹⁸³ Canadian law defers to aboriginal rules for the question who may represent and bind a band in treaty negotiations. The Ontario Court of Appeal found that one chief has the power to bind a band if he is generally regarded as the spokesman for his people, *Attorney General of Ontario v. Bear Island Foundation*, (1989) 2 C.N.L.R. 73.

¹⁸⁴ The Hudson's Bay Company stood in the place of the government in many treaties; treaties entered into by the company are binding on the Crown, *R. v. White*, (1965) 52 D.L.R. (2d) 481.

¹⁸⁵ It is the federal government (before Confederation the British Crown) which negotiates and enters into aboriginal treaties. The provinces are not parties to treaties, they may only assist or participate in the negotiations, as has been held by the Ontario District Court in *R. v. Batisse*, 1977) 19 O.R. (2d) 145.

¹⁸⁶ In *Attorney General of Quebec v. Sioui*, [1990] 1 S.C.R. 1025, at 1044 the Supreme Court said that "what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity".

¹⁸⁷ For the texts see Canada: Indian Treaties and Surrenders: From 1680 to 1890, 2 Vol., Saskatoon, 1993, Facsimile reprint (originally published: Ottawa 1891); many texts are also reprinted in Reiter (note 9).

¹⁸⁸ *Attorney General of Quebec v. Sioui*, [1990] 1 S.C.R. 1025; the Court stressed that despite the brevity of the formulation, the commitment addressed fundamental issues such as freedom of movement, customs, trade and religion.

(1) Peace treaties/maritime treaties

Beginning with the earliest forms of French and English settlement in the maritime provinces Newfoundland and Quebec, native peoples and settlers have entered into a number of treaties and surrenders, which were usually simple one-page documents of friendship and peace¹⁸⁹ granting the Indians fishing and hunting rights in return for promises not to disturb settlers or aid enemies of the Crown.¹⁹⁰ These so-called maritime treaties did not usually involve any cession of lands.¹⁹¹

(2) Single payment cessions

This changed in the two last decades of the eighteenth century when "single payment cessions" emerged in which Indian lands were surrendered for one-time cash or merchandise grants.¹⁹² This practice spread with the westward expansion of European settlement throughout the first half¹⁹³ of the nineteenth century and many lands were surrendered in this way,¹⁹⁴ the price paid by the Crown being often shamelessly low. In one instance, 50,212 acres of land were traded for 110 shillings.¹⁹⁵

(3) Reserve treaties

In the second half of the nineteenth century, native peoples began to transfer large areas of lands to the Crown in return for cash or annuities plus hunting and fishing rights, plus a reservation of a part of the transferred lands for their own purposes.¹⁹⁶ The eleven treaties concluded from 1871 to 1921, which were numbered consecutively from 1 to 11, brought this model to a peak. In addition they provided for education guarantees, farming implements and, in Treaty 6, also for

¹⁸⁹ It has been pointed out by Woodward (note 4), at 408 sub 21.1 (e) that this is a sign of Indian treaties' speciality: "This type of treaty illustrates the unique nature of Indian treaties in our law. The law normally would not tolerate such an agreement between subjects and the Crown, since it is already the duty of subjects to maintain the peace."

¹⁹⁰ New Brunswick and Nova Scotia Treaties of 1725 (with the Penobscots and others), 1728 (with the St. Johns and others), 1749 (with the Chineto), 1752 (with the Micmacs), and 1779 (with the Merimichi).

¹⁹¹ A notable exception is the 1794 treaty with the Micmacs and Miramichi which cedes to the Indians a small portion of land "for their own use and for future generations".

¹⁹² The first of these treaties seems to have been the Chippewas Mississaguas Treaty of 9 May 1781, trading land in return for 300 suits of clothing. For the following treaties see Reiter (note 9), chapter V, 29–51.

¹⁹³ The movement reached a climax with the Vancouver Island Treaties, which were concluded from 1850 to 1854, see *ibid.*, chapter VI, 1–27.

¹⁹⁴ See *ibid.*, chapter V, 52–76.

¹⁹⁵ Treaty No. 38 with the Six Nations of 8 February 1834, see *ibid.*, chapter V, 66.

¹⁹⁶ This began with the Robinson Superior Treaty No.60 of 7 September 1850 with the Ojibwa.

medical care free of charge. Too often, however, the government did not keep its promises.¹⁹⁷

(4) *Land claims agreements*

The treaty-making activities stopped with the transition to sovereignty in the 1920s, leaving large portions of Canadian territory which were occupied by indigenous peoples without treaties.¹⁹⁸ There followed a pause of fifty years during which no treaties were concluded.

After that pause emerged the modern day “Land Claims Agreements”, the first being the 1975 James Bay and Northern Quebec Agreement.¹⁹⁹ These agreements,²⁰⁰ which mostly cover the parts of Canada where no treaty-making had taken place before, were negotiated and concluded after the recognition of aboriginal rights by the Supreme Court in the *Calder* case²⁰¹ gave the aboriginal peoples a much better stand in negotiations. Consequently, these agreements usually reserve indigenous peoples large areas of land, called settlement lands, which are not reserves administered by the government but largely self-governed territorial units. Additionally, large sums of money are distributed to the indigenous peoples in return for the surrender of aboriginal title over the stretches of land covered which are not turned into settlement lands by the agreement. Very often the agreements, which may cover many hundred pages, contain detailed regulations on land-use planning, resource management, fishing and hunting (now called fish and wildlife harvesting), forestry, self-government, taxes and many other topics.

¹⁹⁷ For example, the reserves promised under Treaties 8 and 11 were never created; for a general account of treaty performance problems, see R. Fumoleau, *As Long as this Land Shall Last*, Toronto, 1973.

¹⁹⁸ These included Indian peoples in Northern Quebec, British Columbia and the Territories as well as the Inuit in Labrador and in the Northwest Territories.

¹⁹⁹ Signed on 11 November 1975 with the Cree-Naskapi Indians of Quebec (implemented by the Cree-Naskapi of Quebec Act, S.C. 1984, c.18).

²⁰⁰ The major land claims agreements are: the Northeastern Quebec Agreement of 1978 with the Naskapi Indian band of Schefferville (implemented by the Northeastern Quebec Agreement Regulation SOR/78-502, of February 23, 1978); the Western Arctic (Inuvialuit) Agreement, signed on 5 June 1984 with 25000 Inuvialuit (“Eskimos”) in the Western Arctic; the Gwich’in Agreement, signed on 22 April 1992 with 2200 Gwich’in Indians in the Northwest Territories (implemented by the Gwich’in Land Claims Settlement Act, S.C. 1992, c.53); the Nunavut Agreement, signed on 25 May 1993 with 17500 Inuit (“Eskimos”) in the Northwest Territories (implemented by the Nunavut Land Claims Agreement Act, S.C. 1993, c.29); the Vuntut Gwitchin, Champagne and Aishihik, Teslin Teslin Tlingit, and Na-cho Ny’a’k dun Agreements, signed on 29 May 1993 with 2500 Indians of different groups in the Yukon Territory (implemented by the Yukon First Nations Land Claims Settlements Act, S.C. 1994, c. 34, the Yukon First Nations Self-Government Act, S.C. 1994, c. 35, and the Yukon Surface Rights Act, S.C. 1994, c. 43); the Sahtu Dene and Métis Agreement, signed on 6 September 1993 with 1600 Métis and Dene in the Northwest Territories (implemented by the Sahtu Dene and Métis Land Claims Settlement Act, S.C. 1994, c. 27).

²⁰¹ See note 153.

b) Interpretation of treaties

The *sui generis* nature of aboriginal treaties has brought about very special and distinct rules of interpretation.²⁰²

It has been recognized early this century by the courts that an Indian treaty is to be interpreted in a manner that does not dishonour the Crown.²⁰³ This formula has later led the courts to assume that, where a treaty was negotiated by parties of grossly unequal bargaining strength, an interpretation must not be allowed to prevail that suggests sharp dealing or trickery.²⁰⁴ This approach is evidently of considerable importance in the interpretation of single payment cessions, where the terms of the deals were sometimes outrageous.

This tendency to protect the Indians as the weaker part in negotiations has led to a general approach under which aboriginal treaties are to be construed liberally.²⁰⁵ The principle of liberal construction means that treaties must be interpreted not according to the technical meaning of the words but in the sense in which they would be understood naturally by the Indians, and that doubtful expressions should be construed in favour of the Indians.²⁰⁶ This principle has been confirmed by the Supreme Court in *Nowegijick*.²⁰⁷ The Court, however, cautioned in a later case that the principle may have limited applicability in the context of the modern day land claims agreements.²⁰⁸ This seems logical since the principle rests, in the case of historic treaties, upon the unique vulnerability of the aboriginal parties, a feature absent in the case of modern land claims agreements.²⁰⁹ Likewise, the Federal Court of Appeals has made clear that, while the interpretation of modern agreements must be generous, "it must also be realistic, reflect a reasonable analysis of the intention and interests of all the parties who

²⁰² The principles of interpretation to be followed in considering treaties signed with the First Nations have been summarized by the Supreme Court in *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41: "First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. ... Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of 'sharp dealing' will be sanctioned. ... Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. ... Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be 'strict proof of the fact of extinguishment' and evidence of a clear and plain intention on the part of the government to extinguish treaty rights."

²⁰³ *R. v. Wesley*, (1932) 4 D.L.R. 774 at 788; *R. v. White*, (1965) 52 D.L.R. (2d) 481 (S.C.C.); *R. v. George*, [1966] S.C.R. 267; *R. v. Taylor*, (1981) 34 O.R. (2d) 360.

²⁰⁴ *R. v. Taylor*, (1981) 34 O.R. (2d) 360; *R. v. Batisse*, (1977) 19 O.R. (2d) 145 (Ont. Dist. Ct.).

²⁰⁵ *Boyer v. R.*, (1979) 102 D.L.R. (3d) 602 at 613 (Fed. T.D.).

²⁰⁶ *Nowegijick v. R.*, [1983] 1 S.C.R. 29.

²⁰⁷ *Ibid.*

²⁰⁸ *R. v. Howard*, [1994] 2 S.C.R. 299, at para. 10.

²⁰⁹ Woodward (note 4), at 407 sub 21.1 (c). Indigenous peoples were often misrepresented in these dealings by the most outstanding Canadian legal scholars, such as Peter Hogg, see Hogg (note 13), at s.27.11, at 702, note 164.

signed it and take into account the historical and legal context out of which it developed".²¹⁰

Another feature strengthening the position of indigenous peoples is the admission of extrinsic evidence when it is asserted that the written text of a treaty diverges from the understanding of the indigenous peoples based on oral discussion at the time of signing.²¹¹ In *Horse*, the Supreme Court of Canada held that extrinsic evidence of what has been orally agreed upon may be brought before a court to aid in the interpretation of a treaty.²¹² There are dramatic accounts of cases in which the text of an early treaty in no way reflects what has orally been agreed upon.²¹³

In a way very similar to what has been established for aboriginal rights and title, the courts have recognized an evolutionary approach also in the interpretation of treaty rights. It has been held that treaties, since they impose and confer "continuing obligations",²¹⁴ must be interpreted meaningfully in the present day despite their often ancient language. A provision guaranteeing the right to hunt "as before" is therefore not to be interpreted as meaning that only traditional hunting techniques may be used.²¹⁵ Consequently, the Alberta Provincial Court held an Indian who hunted moose by discharging a firearm to be exercising a right to hunt under Treaty 8 in a "contemporary manner".²¹⁶

c) Termination of treaty obligations

Aboriginal treaties are as a rule concluded for an unlimited period of time. It is unclear, however, whether a treaty obligation might be terminated by the breach of a fundamental treaty provision. In the *Simon* case,²¹⁷ involving a maritime peace treaty, the Crown had argued that the treaty had been terminated by hostilities instigated by the Micmac Indians the year following the signing of the treaty.

The Supreme Court of Canada was sceptical about this argument, noting that the termination of a treaty by hostilities is a concept from international law and

²¹⁰ *Eastmain Band v. Robinson*, [1993] 3 C.N.L.R. 55.

²¹¹ *R. v. Sundown*, Judgment of 25 March 1999, File No.: 26161, not yet reported: "In many if not most treaty negotiations, members of the First Nations could not read or write English and relied completely on the oral promises made by the Canadian negotiators. There is a sound historical basis for interpreting treaties in the manner summarized in *Badger*. Anything else would amount to be a denial of fair dealing and justice between the parties"; see also Brian Slattery, *Understanding Aboriginal Rights*, (1987) 66 Can. Bar. Rev. 727 at 730.

²¹² *R. v. Horse*, [1988] S.C.R. 187. In *R. v. Sioui*, [1990] 1 S.C.R. 1025, the court applied extrinsic evidence also in determining the legal nature of a document relating to Indians.

²¹³ Michael Jackson, *The Articulation of Native Rights in Canadian Law*, (1994) 18 U.B.C.L. Rev. 255, at 263 recounts a drastic divergence between the land cession clause in Treaty 6 and the statement of Chief Crowfoot during the negotiations: "the land we cannot give".

²¹⁴ *Hay River v. R.*, (1979) 101 D.L.R. (3d) 184 at 186 (Fed. T.D.).

²¹⁵ *R. v. Simon*, [1985] 2 S.C.R. 387; *R. v. Sioui*, [1990] 1 S.C.R. 1075.

²¹⁶ *R. v. Norm* (1990), [1991] 3 C.N.L.R. 135.

²¹⁷ *R. v. Simon*, (1985) 2 S.C.R. 387.

may not be applicable in the case of Indian treaties.²¹⁸ As the government did not prove that there actually had been hostilities, the point required no decision and was left open.

d) Beneficiaries of treaties

Treaty rights are group rights. They are given to a band or tribe as a collectivity which does not have a separate legal existence from its members under ordinary principles of law.²¹⁹ This unique feature of treaty rights has given the Canadian courts some difficulties to deal with.

There have been divergent rulings on the question whether the contracting party to a treaty is the Indian tribe or nation,²²⁰ or the collectivity of all individual Indians.²²¹ This legal uncertainty entails delicate legal problems when determining whether a given claimant can derive rights from a treaty concluded some 250 years ago. It is not clear whether treaty rights are transmitted to the family descendants of the individuals²²² as original parties to the treaty or to their successors in band membership.²²³ This leads to problems since descendants of the original signatories may cease to be part of the band by marriage into another tribe or by dilution of Indian parentage to the point where they are no longer considered to be Indians. Also, people who are not related to the original signatories may become members of the signing band by marriage or adoption. After several generations it may safely be assumed that descendants and successors are actually quite different people.²²⁴

The Supreme Court dealt with the issue in the *Simon* case²²⁵, in which the accused relied on a right flowing from the Treaty of 1752 with the Micmacs. He himself was a member of the Shubenacadie-Indian Brook Band of Micmac Indians, living in the same area as the original Micmac Indian Tribe but unable to prove his direct descent from any Micmac living in 1752, since the Micmacs, a largely oral culture, did not keep written records. By relying on descent and at the same time recognizing band membership as a proof of descent, the Court blurred the distinction between descendants and successors.²²⁶ The Court recognized that descent had not been conclusively evidenced. However, membership in the succes-

²¹⁸ *Ibid.*, at 402: "An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law."

²¹⁹ Douglas Sanders, *Aboriginal Peoples and the Constitution*, (1981) 19 Alta. L. Rev. 410 at 417.

²²⁰ *R. v. Blackfoot Band of Indians*, [1982] 4 W.W.R. 230 at 239 (Fed. T.D.).

²²¹ *Boyer v. R.*, (1979) 102 D.L.R. (3d) 602 at 612.

²²² Descent was considered essential in *R. v. Simon*, [1985] 2 S.C.R. 387 and *R. v. Bardeman*, (1984) 55 B.C.L.R. 78 (C. A.).

²²³ Band membership or legal succession was considered essential in *Hay River v. R.*, (1979) 101 D.L.R. (3d) 184 at 186 (Fed. T.D.) and *R. v. Moses*, [1970] 3 O.R. 314 (Dist. Ct.).

²²⁴ In this vein Woodward (note 4), at 410 sub 21.3.

²²⁵ *R. v. Simon*, (1985) 2 S.C.R. 387.

²²⁶ Woodward (note 4), at 411 sub 21.3.

sor band and dwelling on the same land were considered to be sufficient indications for descent, since otherwise no Micmac Indian would be able to establish descendency.²²⁷

3. *Relationship between custom and treaty*

As a general rule, a treaty will confer treaty rights on the aboriginal people in substitution for any surrendered aboriginal rights and in addition to any unsurrendered aboriginal rights.²²⁸ The surrendered aboriginal rights are extinguished²²⁹, whereas the others are not affected by the treaty.²³⁰ Rights flowing from custom and treaty rights are therefore either alternative or cumulative, depending on precisely which aboriginal rights have been surrendered upon signature of a given treaty. The question whether a given aboriginal right has been surrendered through a given treaty is therefore a question of treaty interpretation. It must be answered on a case-to-case basis according to the general interpretative rules set out above.

II. Limits to indigenous rights

Indigenous rights, whether based on treaty or custom, are guaranteed constitutionally, but this guarantee is not limitless. There are inherent limits in the right itself. Legislation can abridge rights, and rights can be extinguished.

1. *Inherent limits to aboriginal title*

In *Delgamuukw*, the Supreme Court held uses of land under aboriginal title to be “subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples”.²³¹ The Supreme Court sees this inherent limit as deriving from the requirement of occupation:

“Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group’s distinctive culture. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to de-

²²⁷ “To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this treaty”, *R. v. Simon*, (1985) 24 D.L.R. (4th) 390 at 407.

²²⁸ *Hogg* (note 13), at s.27.5 (c), at 689.

²²⁹ This was the case in *R. v. Howard*, [1994] 2 S.C.R. 299.

²³⁰ This was the case in *R. v. Denny*, [1990] 55 C.C.C. (3d) 322.

²³¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R., 1010, at para. 166.

stroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).²³²

The Court, however, cautioned that the “importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the government in exchange for valuable consideration.”²³³ It is, therefore, not impossible for aboriginals to use land in a way that transcends the inherent limits of aboriginal title. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, “they must surrender those lands and convert them into non-title lands to do so”.²³⁴

2. *Infringement by legislation*

As indicated above,²³⁵ section 35 is situated outside the Charter of Rights and thus not subject to the Charter’s general limitation clause in section 1. In *Sparrow*, however, the Supreme Court found that aboriginal rights are nevertheless subject to limitation by federal regulation if the regulation meets a standard which is in effect very similar to the standard of section 1.²³⁶

Aboriginal rights may thus be infringed by the federal government if the infringement furthers a compelling and substantial legislative objective and is consistent with the special fiduciary relationship between the Crown and the aboriginal peoples.²³⁷

As such compelling and substantive interests, the Court has recognized, in a non-exhaustive list, “the development of agriculture, forestry, mining and hydro-electric power, the general economic development, protection of the environment or endangered species, and the building of infrastructure”.²³⁸

If a compelling interest is found, the fiduciary relationship between government and aboriginal peoples demands that there be “as little infringement as possible in order to effect the desired result”,²³⁹ that “in a situation of expropriation, fair compensation would be available”²⁴⁰, and that “the aboriginal group in question has been consulted with”.²⁴¹

²³² *Ibid.*, at para. 128.

²³³ *Ibid.*, at para. 131.

²³⁴ *Ibid.*

²³⁵ Note 22 and accompanying text.

²³⁶ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1113.

²³⁷ *Ibid.*; adapted to aboriginal title in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R., 1010, at para. 161 and 162.

²³⁸ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R., 1010, at para. 165.

²³⁹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1119.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

If any of these requirements are not met, the legislation is unconstitutional and void. In essence, this amounts to a proportionality test. These three aspects of the second part of the *Sparrow* test (minimal infringement, compensation, and consultation) have been confirmed and concretized in the context of aboriginal title in *Delgamuukw*.²⁴²

3. Extinguishment

Section 35 (1) of the Constitution Act, 1982, only protects “existing” aboriginal rights. The Supreme Court in *Sparrow* held that “existing” means “unextinguished”.²⁴³ Aboriginal rights can be extinguished by surrender in a treaty, by legislation, and by constitutional amendment. In all three instances, extinguishment cannot be inferred from unclear language. In *Sparrow*, the Supreme Court held that only evidence²⁴⁴ of “a clear plain intention” to extinguish will suffice.²⁴⁵

The surrender of an aboriginal right by way of a treaty with the government must be consensual and voluntary. There have been several cases in which aboriginal rights were relied on which had earlier been surrendered to the government, and thus, extinguished. An aboriginal right to fish was extinguished by surrender in *Howard*²⁴⁶ as well as in *Bear Island*, where the court found Temagami land rights to be extinguished by the Robinson-Huron Treaty of 1850.²⁴⁷

Before the coming into force of the Constitution Act, 1982, aboriginal rights could be extinguished by federal legislation. This power has now been removed by section 35 (1), whose function is precisely to protect aboriginal rights against legislation.²⁴⁸

An amendment to the parts of the Constitution Act, 1982, which endorse aboriginal rights is, as seen above,²⁴⁹ subject to a special amendment procedure. Any law-making activity concerning aboriginals is also subject to the government’s fiduciary duty, which would certainly be violated, if the government proceeded to extinguish aboriginal rights by constitutional amendments against the will of the indigenous peoples concerned.²⁵⁰ Constitutional extinguishment, however, occurred before 1982 through the enactment and subsequent constitutionalization of the Natural Resources Transfer Agreements.²⁵¹ In *Horseman*, it was held that

²⁴² *Delgamuukw v. British Columbia*, [1997] 3 S.C.R., 1010, at para. 166 et seq.

²⁴³ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1091.

²⁴⁴ The onus of proof is on the party arguing that a right has been extinguished to provide strict proof of the fact of the extinguishment. The government can discharge this onus of proof by persuasive evidence of extinguishment or by showing the circumstances and events relied on to effect extinguishment, see *Woodward* (note 4), at 408 sub 21.1 (e) (for treaty rights).

²⁴⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1099.

²⁴⁶ *R. v. Howard*, [1994] 2 S.C.R. 299.

²⁴⁷ *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570.

²⁴⁸ Note, however, that a law could still “regulate” aboriginal rights, as long as it does not do away with them, see *Hogg* (note 13), at s.27.8 (h), at 699.

²⁴⁹ At note 27 and accompanying text.

²⁵⁰ *Hogg* (note 13), at s.27.8 (h), at 699.

²⁵¹ See above note 29 and accompanying text.

para. 12 of the Alberta Natural Resources Transfer Agreement modified Treaty No. 6 in two ways: It extinguished the treaty right to hunt commercially, but expanded the geographical areas in which Indians have the treaty right to hunt for food.²⁵² This holding was recently confirmed in *Sundown*, where the Court held that in 1930, the Natural Resources Transfer Agreement between the province of Saskatchewan and the federal government modified Treaty 6 by extinguishing the treaty right to hunt commercially.²⁵³ The same happened to Treaty 8 rights which were not preserved by para. 12 of the Alberta Natural Resources Transfer Agreement.²⁵⁴

4. Compensation for limitation of aboriginal rights

As seen above,²⁵⁵ compensation for infringement is one of the prerequisites for the justification of federal legislation abridging aboriginal rights and title. Failure to compensate will entail the unconstitutionality of the limiting statute.

Additionally, breach of the fiduciary duties of the government in handling surrendered aboriginal lands and reserve lands may entail a right to equitable compensation. In *Guérin* the Supreme Court awarded the Nisga'a Indian band \$10,000,000 in compensation for the Crown's breach of its fiduciary obligation towards the band.²⁵⁶ The modern land claims agreements²⁵⁷ also often provide for detailed regulation of compensation claims, usually through funds and trust-like structures.

Eventually, Canadian Indians tried to sue the British Crown for compensation of damages suffered in colonial times. In 1982, however, the British Court of Appeal determined that there was no residual relationship between Great Britain and Canada's Indians and that any liability towards Canada's Indian people was a liability of the Crown in right of Canada or the Canadian provinces, and not the Crown in right of the United Kingdom.²⁵⁸

²⁵² *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 933: "Although the [Natural Resources Transfer] Agreement did take away the right to hunt commercially, the nature of the right to hunt for food was substantially enlarged. The geographical areas in which the Indian people could hunt were widely extended. Further, the means employed by them in hunting for their food was placed beyond the reach of provincial governments. For example, they may hunt deer with night lights and with dogs, methods which are or may be prohibited for others. Nor are the Indians subject to seasonal limitations as are all other hunters."

²⁵³ *R. v. Sundown*, Judgment of 25 March 1999, File No.: 26161, not yet reported, at para. 8.

²⁵⁴ *R. v. Badger*, (1993) 8 Alta. L.R. (3d) 354, [1993] 5 W.W.R. 7.

²⁵⁵ At note 241 and accompanying text.

²⁵⁶ *Guérin v. The Queen*, [1984] 2 S.C.R. 335, at 364, 391, 394, and 395.

²⁵⁷ See note 200.

²⁵⁸ *R. v. Secretary of State for Foreign & Commonwealth Affairs; Ex parte Indian Assn. of Alta.*, [1982] 1 Q.B. 892, leave to appeal to H.L. refused, [1982] 1 Q.B. 892 at 937.

D. Concluding Remarks

Canada is a common law country with a relatively recent, yet powerful constitutional human rights tradition. The law relating to aboriginal peoples in today's Canada is a typical blend of constitutional rights guarantees with common law traditions.

Canadian law grants the rights of indigenous peoples constitutional status, regardless of whether they are expressly laid down in a treaty or simply based on native custom. The price of this recognition is a certain control of the content of the customary rights which is exercised by the courts under the labels of "distinctiveness" of aboriginal rights and "inherent limits" to aboriginal title.

Equitable obligations of the government towards aboriginal peoples in the form of unique fiduciary duties complement the special constitutional guarantees and aid in their interpretation. The doctrine of fiduciary relationship has helped to develop a *de facto* proportionality test for legislation infringing aboriginal rights.

Although aboriginal rights can be and are enforced in the courts, it should not be overlooked that much of the recent progress in aboriginal matters is the result of consensual agreement between aboriginal peoples and the government in form of the modern day land claims agreements. These agreements provide for comprehensive codes regulating the coexistence of the First Nations with others. The recognition of aboriginal rights by the Supreme Court, however, was an essential precondition for a level playing field in the negotiations which led to such agreements.