ASSOCIATION OF METIS AND NON-STATUS INDIANS
OF SASKATCHEWAN

A DISCUSSION PAPER

THE NATURE OF INDIAN TITLE

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I. INTRODUCTION

Indian nations, prior to the arrival of non-Indians, had absolute authority over their respective lands. However, with the encroachment of various world powers into the Americas, the prior undisturbed possession of the Indians to their home-lands necessarily was disrupted. The result of this disruption was the invention or fabrication of the concept of discovery and subsequent Indian Title. In essence, the Law of Nations evolved to the stage whereby the first civilized nation (Christian) reaching the Americas could claim sovereignty over a vast amount of territory, as long as it followed up with effective occupation. They also conceded that the heathen populations (Indians) retained a right to remain in possession of their lands until that right was extinguished. This right was labelled a "usufructuary right" by the Judicial Committee of the Privy Council in 1888.[1]

This native interest in the land has received different labels over the years including, "Indian Title", "aboriginal title", "original title", "native title", "right of occupancy", "right of possession", and so on.[2] To date, this native interest in the land has not been defined by either the legislatures or the Courts. This paper will attempt to pull together some of the written material and see how the Courts and the governments have dealt with it so far.

II. WHAT ARE THE INCIDENTS OR THE NATURE OF INDIAN TITLE?

A. HOW HAVE THE COURTS DEALT WITH THIS ISSUE?

Canadian Courts have barely touched this issue so we have to look to the Courts of other countries, notably the U.S.A. and the Commonwealth.

A brief historical review is necessary so that the rulings of other courts can be tied into our judicial system.

To begin with, the basis of the rights of Indians is traced to Spain, especially to the jurist, Francisco de Vitoria. In 1532, de Vitoria delivered two lectures at the University of Salamanca in which he defended the rights of the Indians. As a result of these lectures, the Indian rights that he was espousing received papal support by the Bull, Sublimis Deus, proclaimed in 1537 by Pope Paul III.

The rights of Indians were next protected by Spanish Law itself, which in 1594, provided that lands which may be granted to Spaniards, must be without prejudice to the Indians. It also provided that where land had been granted, to their prejudice and injury, that they be restored.[3]

Cohen, in describing the Spanish origin of Indian rights in United States law uses three arguments.[4] He begins by stating that Indian Law originated as a branch of international law, which was originated principally in the lectures De Indis by de Vitoria, who on December 23, 1933, was acclaimed by the seventh Pan-American Conference as the man who established the foundations of modern international law. His theories, according to Cohen, were cited in the earlier opinions of the United States Supreme Court on Indian cases, which referred to statements by Grotius and Vattel, which were copied or adopted from de Vitoria.

As a second reason, Cohen states that many of the early court opinions cite Spanish decisions, statutes and other authority.

As a third argument, Cohen states that the British and Americans realized the value of Indian allies and therefore followed the example of Spain so as to win the acceptance of the Indians.

> Thus, in acceptance, the doctrine of Indian rights first advanced by Vitoria had such an appeal to the Indians that Britain and the United States both felt compelled to accept it as a basis for bargaining.[5]

The French also saw great benefit in having Indians as allies, they however didn't explicitly advocate any special Indian rights. The French were predominantly concerned with acquiring territory as well as establishing settlements and a lucrative fur trade. They, therefore, allied themselves with specific tribes to ensure conquest of territory and a fur trade monopoly.[6]

This view, however, has been somewhat made questionable by the research of Brian Slattery, current Research Director of the Native Law Centre in Saskatoon. In discussing the concept of sovereignty and American Indigenous Peoples, Mr. Slattery appears to lead one to the conclusion that France recognized the sovereignty of Indian Nations.

> A study by the present writer of French practice in relation to North America from 1524 to 1603 indicates that the only effective modes of acquisition envisaged by the French Crown and its agents in this period were treaty, conquest or some actual taking of possession involving settlement and the establishment of real control. "Discovery", symbolical appropriation, and token occupation were not recognized or even contemplated as the basis of any sort of title, inchoate or otherwise.[7]

The British, on the other hand, recognized the concept of aboriginal rights very early in their dealings with the Indians.[8] These have been reaffirmed by the Royal Proclamation of 1763, issued as a result of the defeat of the French by Great Britain.

> Just as the leading American cases on aboriginal rights developed from an analysis of the policies of the colonizers of North America, the leading Canadian document on Indian rights, the Proclamation of 1763, reflects the pre-existing policies and practices of the British Government and Colonists.[9]

The Royal Proclamation was passed prior to the American Revolution and covered all of North America not occupied by the Spaniards. During this same period, Britain also had colonies in other parts of the world, such as Africa, India and later New Zealand and Australia. These countries also held indigenous peoples and the concept of "Native Rights" was also applied to them, as "an 'inseverable' imperial policy applying to all natives, of whatsoever description, that the imperial power comes in contact with; ..."[10]

From this brief description of the international scope of Aboriginal or Indian Title, we can proceed on the basis that Commonwealth and U.S.A. court decisions can be tied into Canadian judicial decisions. Commonwealth cases have a relevant bearing on our law, especially cases decided by the Judicial Committee of the Privy Council, which was the highest Court of Appeal for Canada until 1949. American cases on the other hand, although they originally set the pace for the concept of aboriginal title can only be used as examples and used as persuasive arguments. However, in a very recent decision, the Federal Court of Canada, Trial Division, stated that the American cases are more appropriate than the Privy Council cases dealing with Africa and Asia.[11] Going further, the Justice states that:

> The value of early American decisions to a determination of the common law of Canada as it pertains to aboriginal rights is so well established in Canadian courts, at all levels, as not now to require rationalization.[12]

(i) Commonwealth Cases:

There have been a great many cases heard with respect to African, Asia, New Zealand, Australia and some other colonies. A few of the more relevant cases will be selected.

Justice Chapman of the New Zealand Supreme Court in the case of the Queen v. Symonds[13] in 1847, gives a rather good

account of the susceptibility of native people with respect to fraud, while at the same time, allowing that native peoples there had property rights, although somewhat less than the English system fee simple.

> The legal doctrine as to the exclusive right of the Queen to extinguish the native title, though it operates only as a restraint upon the purchasing capacity of the Queen's European subjects, leaving the natives to deal among themselves, as freely as before the commencement of our intercourse with them, is no doubt incompatible with that full and absolute dominion over the lands which they occupy, which we call an estate in fee. But this necessarily arises out of our peculiar relations with the native race, and out of our obvious duty of protecting them, to as great an extent as possible, from the evil consequences of the intercourse to which we have introduced them, or have imposed upon them. To let in all purchasers, and to protect and enforce every private purchase, would be virtually to confiscate the lands of the natives in a very short time. The rule laid down is, under the actual circumstances, the only one calculated to give equal security to both races. Although it may be apparently against what are called abstract or speculative rights, yet it is founded on the largest humanity; nor is it really against speculative rights in a greater degree than the rule of English law which avoids a conveyance to an alien. In this Colony, perhaps a few better instructed Natives might be found who have reduced land to individual possession, and are quite capable of protecting their own true interests; but the great mass of the Natives, if sales were declared open to them, would become the victims of an apparently equitable rule; so true it is, that "it is possible to oppress and destroy under a show of justice": Hawtress. The existing rule then contemplates the native race as under a species of guardianship. Technically, it contemplates the native dominion over the soil as inferior to what we call an estate in fee: practically, it secures to them all the enjoyments from the land which they had before our intercourse, and as much more as the opportunity

> of selling portions, useless to themselves, affords. From the protective character of the rule, then, it is entitled to respect on moral grounds, no less than to judicial support on strictly legal grounds.[14]

This same court, thirty years later, again dealt with the Treaty of Waitangi and the original native title. Here, Chief Justice Prendergast stated that although the Treaty was a nullity and New Zealand was a settled colony, Masri customary land rights were still recognized.

> So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which jure gentium, vested in and devolved upon the Crown under the circumstances of the case.[15]

These obligations were "to respect native proprietary rights."[16]

As seen in the introduction, several years later, the Privy Council in the St. Catherines Milling case in Canada, stated that Indian Title or native title was only a "usufructuary right." The Privy Council again had an opportunity to deal with this issue in 1901 in the case of Tamaki v. Baker.[17] Here again the Court side-stepped the issue as to the content of aboriginal title.

> The Court is not called upon in the present case to ascertain or define as against the Crown the exact nature or incidents of such title, but merely to say whether it exists or existed as a matter of fact, and whether it has been extinguished according to the law.[18]

The Court, however, does state that the case of Wi Parata v. Bishop of Wellington[19] is wrong when it states that the customary laws of the Maoris can't be recognized by the Courts of Law. Therefore, where it is important to determine the form or content of a tenure of land under custom and usage, the court can look to native customary law. In this particular situation, by Article 2 of the Treaty of Waitangi (February 6, 1840), the Queen of England "confirms and guarantees .... full,

exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties ..." as long as they wish to retain them, subject to "the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate, ... at a price to be agreed upon."[20]

This right was then confirmed by S.2 of the Land Claims Ordinance, 1841, which stated that all unappropriated lands within New Zealand, "subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants"--are Crown lands and pre-emption from the aboriginals can only be exercised by the Crown. After reviewing this piece of history, the Privy Council appears to reinforce the Common Law notion of aboriginal title.

> No doubt this Act of the Legislature did not confer title on the Crown, but it declares the title of the Crown to be subject to the "rightful and necessary occupation" of the aboriginal inhabitatns, and was to that extent a legislative recognition of the rights confirmed and guaranteed by the Crown by the second Article of the Treaty of Waitangi. It would not of itself, however, be sufficient to create a right in the native occupiers cognizable in a Court of Law.[21]

In a later case,[22] the Privy Council had an opportunity to deal with lands that belonged to an African Chief or King, who had been recognized by Britain to be the sovereign ruler of what is now known as Southern Rhodesia. The people were tribal and in 1894, Lobengula died after having waged war against neighboring tribes and disrupting British trade. There was no sovereign ruler after this date. Prior to this, in 1889, the British Government granted a Charter to the British South Africa Company. Aside from commercial purposes, the Company was also to effect settlement of lands in Africa, including Southern Rhodesia. The officials of the Company entered into several agreements with Lobengula. In 1893, the Company joined the battle against Lobengula and he subsequently

fled. In 1894, he was reported to be dead so the Company took over the country. In 1914, the aboriginal members argued that they were still the owners of the unalienated lands as ownership hadn't been divested by legislation, nor had they given their consent to it. They further argued that if the Company had title, which was denied, that it was only a title of trustee, the beneficial interest remaining in the natives and the legal title and right to possession reverting to them whenever the Company ceases to govern the country.

The Court, however, didn't take this view and concluded that in 1894, native sovereignty was gone and that ... "Whoever now owns the unalienated lands, the natives do not."[23] This decision was based on the theory of conquest and the Company's action of not giving out grants of land were capable of supporting an interpretation that the new Government (Crown) intended to not respect the prior property rights, whether they were in the nature of private rights or not.

In coming to this conclusion, the Court again alluded to native rights, without actually giving a specific definition, nevertheless giving them some force of law.

> It seems to be common ground that the ownership of the lands was "tribal" or "communal", but what precisely that means remains to be ascertained. In any case it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them.
>
> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It

> would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make such and every person by a fictional inheritance a landed proprietor "richer than all his tribe." On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.[24]

With respect to the natives of Southern Rhodesia, the court concluded that they fit in toward the lower end of the two applicable propositions, i.e., the lower end of the scale in development akin to the English system.

In another African case[25] the Privy Council had to decide whether the Government in appropriating property of a native community has to compensate the Chief in his own capacity as owner of the land or to the community as a whole with the Chief acting as agent. The court held that native title or usufructuary title vested in the community, i.e., it was a communal right.

They stated that:

> As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the sovereign where that exists. In such cases the title of the sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the analogy of English jurisprudence. ...

> The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but it may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in such case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.[26]

Here again the Court speaks in terms of "right of beneficial user", and doesn't deal to what extent property can be used and for what purposes. Although they do continue to utilize the term "usufructuary right", they don't seem to have realized a need to be more specific as to its meaning, even though it had been about 23 years since they first adopted it. The only thing that they appear to be certain about is that it is a communal right as opposed to an individual right.

> That title, as they have pointed out, is prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the sovereign to one which only extends to comparatively limited rights of administrative interference. ... The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances.[27]

Here again the Court is inferring that the native community may be at such a stage of resource or property utilization that the only thing the Crown can do with respect to native lands is to act in an administrative capacity. Of course, to determine which communities would fit into this category, a study would have to be made.

It is also interesting to note that the Court in referring to private rights of property, with respect to native families or individuals, states that a cession of the ultimate fee or change of sovereignty wouldn't affect their rights. Arguably this would mean that private land holders would be capable, legislation permitting, to develop their lands or utilize their resources as they see fit. In this historical situation, a number of Chiefs made a treaty with Britain after being satisfied that their private property would become more valuable to them.

> No doubt there was a cession to the British Crown, along with the sovereignty, of the radical or ultimate title to the land, in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place.[28]

The Privy Council went on to qualify this by stating that:

> Where the cession passed any proprietary rights they were rights which the ceding King possessed beneficially and free from the usufructuary qualification of his title in favour of his subjects.[29]

They did, however, add that a "mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly."[30] It would therefore appear that if the Indigenous people who were ceding their ultimate title or their sovereignty were organized into individual private land owners, then their land rights wouldn't be disturbed, unless of course the new sovereign confiscated or expropriated their property. They would, however, have a course of action for that, namely compensation.

> On the basis that "natives" dwelling in British territory are British subjects, it is submitted, with respect, that in the

> absence of comprehensive statutory provisions excluding the common law, they have a common law right to compensation for compulsory acquisition of their land. Where the Crown has a right to acquire land compulsorily by virtue of its prerogative it must pay for the privilege. Lord Pearce in Nissan v. A. G., dealing with the seizure of property in Cyprus, said:
>
> > It is confusing to describe the aspect of the prerogative here in question as a right to take. It is a right to take and pay.
>
> In the Burnal Oil Company case, the House of Lords decided that even in time of war or imminent danger to the state, there was no general prerogative right in Great Britain or its colonies to take or destroy private property without paying for it.[31]

(ii) United States Cases:

Felix S. Cohen in describing the concept of Indian Title, in what is now the United States, interprets the transactions between the U.S. government and other European sovereigns as being merely the purchase of the political power to govern the area and not a purchase of the real estate still in the ownership of Indians.[32] With specific reference to the purchase of Louisana Territory from Napoleon in 1803, Cohen states that the U.S. paid $15,000,000.00 for the governmental control and then paid 20 times that amount to the Indian inhabitants for such lands in their possession as they were willing to sell.[33] Cohen goes on to state that even though Napoleon gave up all his connections to the territory, the Indians were wise enough when ceding territory to retain or reserve[34] sufficient lands to bring them an income that each year exceeds the total payment to Napoleon.[35] Cohen also includes the purchases of governmental powers or sovereignty from Britain, Spain, Mexico and Russia, along with France, as totalling a figure of close to $50,000,000.00. In reference to the amounts

paid to Indians for lands by the U.S. government, Cohen states that a conservative estimate would be somewhat in excess of $800,000,000.00. On this basis, Cohen concludes that, ... "the keynote of our land policy has been recognition of Indian property rights."[36]

The judicial starting point is 1810 which sets the scene for a number of classic cases on Indian title delivered by Chief Justice Marshall of the United States Supreme Court. The case of Fletcher v. Peck[37] attempted to describe the status of Indian tribes, while at the same time resolving the main issue being the conflict over possession and alleged ownership of the land by both the federal and state governments. In holding that the disputed territory, occupied by an Indian tribe, fell within the state, Marshall did say that until the tribal title was legitimately extinguished, that it was not repugnant to a seisin in fee on the part of Georgia.

> It was doubted, whether the state can be seised in fee of lands, subject to Indian title, and whether such a decision that they were seised in fee might not be construed to amount to a decision that their grantee might maintain an ejectment for them, not withstanding that title. The majority of the court is of the opinion, that the nature of Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished is not such as to be absolutely repugnant to seisin in fee on the part of the state.[38]

In a dissenting opinion, Justice Johnson stated that Indian nations held the land as fee simple absolute proprietors, with a higher title than either the state or the federal government.[39] During the course of arguing this case, Joseph Story and John Quincy Adams submitted that while Indian tribes were independent nations, they "had no idea of property in the soil." They admitted the political sovereignty of the tribes, but in terms of property rights--if any--they submitted that the tribe had

but a "mere occupancy for the purpose of hunting."[40] Both the opinions of the majority and minority rejected that theory concerning the nature of tribal title, holding that tribal title existed as a recognizable and protectable property right. The two opinions, however, differed as to the source of the property right. For the majority, Marshall attempted to establish a tribal title as a system of tenurial rights distinct from the existing Anglo-American tenurial system. On the other hand, Justice Johnson attempted to tie the Indian tribal title into the existing federal tenurial system under which the Indians had a fee-simple absolute title.[41] Because of their conclusion, the majority of the court did not have to elaborate on the precise nature of tribal title, other than that it was a recognizable and protectable property right.

According to Youngblood Henderson, this case set the stage for a long line of judicial reasoning, which as we will later see, ended up being misunderstood or misinterpreted and misapplied.

> It was conceptually impossible for Georgia to have a fee simple interest in the land under Anglo-American law. This was the thrust of Johnson's analytical opinion. With clear and exceptional logic, Justice Johnson established that if the land were under the possession and control of a sovereign Indian nation or tribe under the Anglo-American land tenure system, that interest was fee simple in nature. Unfortunately, Johnson had misperceived the arguments of Chief Justice Marshall in the majority opinion, but had nevertheless cast the riddle of tribal title which would continue to haunt later courts. The majority opinion had not attempted to incorporate tribal title into the land tenure system of the federal or state governments. On the contrary, it had suggested that the tribal tenurial system was compatible with other American tenurial systems until the tribal title was extinguished, presumably by statutory purchase. Until

> such time, however, the courts were bound to respect tribal title as an equally valid and legitimate title to either federal or state systems.
>
> This difference between Justice Johnson's opinion and that of the majority opinion turned on whether tribal title was viewed as within or equal but separate to the American tenurial system of land. Both the logic and the reasons given in Johnson's opinion would be extremely valid if tribal title was placed totally under federal land tenure, i.e., the tribal title would be a fee simple title. But the majority decision strongly implied that the legal recognition of tribal title was neither dependent upon nor within the land tenure of the United States. The tribes were independent nations with a distinct land tenure system which was to continue separate from American land tenure systems until extinguished.[42]

Having given judicial birth to a complex area, namely the rights of Indian tribes, the United States Supreme Court in 1823 in the case of Johnson & Graham's Lessee v. M'Intosh[43] had an opportunity to restate and clarify their judgement in the Fletcher v. Peck case. Chief Justice Marshall again delivered the judgement of the Court and he goes to great lengths in dealing with the concept of discovery, the law of nations and the compatibility of Indian title and ultimate fee in the Government.

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim on ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them

civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consumated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

The relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. <u>They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion</u>; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[44]

And further on, at pages 591 - 592, that:

> However extravagent the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.

Chief Justice Marshall also had to come to grips with the necessary consequences which Government (sovereign) action may produce as the holder of the ultimate fee, and the rights of the Indians. He dealt with it in this way:

> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.
>
> . . . .
>
> The power now possessed by the government of the United States to

> grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.[45]

Felix Cohen interpreted this judgment as follows:

> ... Chief Justice Marshall's doctrine was that the Federal Government and the Indians both had exclusive title to the same land at the same time. Thus a federal grant of Indian land could convey an interest, but this interest would not become a possessory interest until the possessory title of the Indians was terminated by the Federal Government. The Indians were protected. The grantees were protected. The grantees were protected, --assuming that the Federal Government went ahead to secure a relinquishment of Indian title. The power of the Federal Government was recognized. And the needs of feudal land tenure were fully respected.[46]

Youngblood Henderson however states that Cohen failed to understand the full impact of what Chief Justice Marshall was saying. He attributes this to the fact that Cohen was too preoccupied in trying to merge Indian title under federal title, as had Justice Johnson in Fletcher v. Peck.

> Much of the riddle of aboriginal title in Federal Indian Law (Cohen's Book) surrounds this misreading of

> M'Intosh. M'Intosh was read as establishing a principle of federal title and as not recognizing tribal title.
>
> While teaching at Yale Law School, Cohen re-evaluated the riddle of tribal title. "[T]he dismissal of the plaintiff's complaint in this case was not based upon any defect in the Indian's title", Cohen acknowledged in his article, "Original Indian Title", concerning M'Intosh, "but solely upon the invalidity of the Indian deed through which the white plaintiffs claimed title." He failed to explain that the deed was not invalid, but that the subsequent unrestricted treaty abrogated all rights the white plaintiffs held under tribal dominion. His preoccupation with the unite of federal title hindered his discernment of the separate tenurial system inherent in the classic paradigm.[47] "[T]he federal government and the Indians both had exclusive title to the same land at the same time", was the Pickwickian conclusion Cohen elucidated from the decision in M'Intosh. Hence, a federal grant of Indian lands could convey an interest, but this conveyed interest was not possessory interest until the federal government extinguished the possessory interest of the tribes. The insight that the extinguishment of tribal title was necessary before the federal government could convey an interest remained, but in a different form than before, i.e., in terms of possession, not title. This step is important to an understanding of the paradigmatic shift in tribal title.[48]

Youngblood Henderson himself interpreted the case of M'Intosh in this manner.

> The first issue was whether tribal title could be recognized in the courts of the United States. Another logically related issue was whether the tribes had the power to give, and private individuals to receive, a title that could be sustained in the courts of this country. The Court affirmed both these issues.

> In attempting to deal with the validity of whether it could be given to an individual, the Court resorted to the land tenure theory. This strategem is obvious where the Court applied a mixed form of law to resolve these issues. The first form of law was the principles of abstract justice which regulates the rights of civilized nations; the second form was those principles "which our own government has adopted in the particular case and given us as the rule of decision." The resort to both international and domestic law reflects and argues for the proposition that legal recognition of tribal title was under a tribal tenurial system and did not depend on its conformity to federal tenure systems. This proposition also reflected the Court's concept of the land tenure theory, i.e., "the right of society to prescribe those rules by which property may be acquired and preserved" is "a function of the law of nations in which they lie" in "the rights of civilized nations." This position probably was taken by the Court in order to distinguish this decision from the unity of federal title theory raised in the dissenting opinion of Justice Johnson in Fletcher v. Peck.[49]

It is also important to note that the U.S. Government at this point in time was also addressing this issue in a policy position designated Seneca Lands.[50] The A. G., speaking to the federal government on the issue of tribal title, concluded that:

> So long as a tribe exists and remains in possession of his land, its title and possession are sovereign and exclusive ... Although the Indian title continues only during their possession, yet that possession has been always held sacred, and can never be disturbed but by their consent. They do not hold under the states, nor under the United States; their title is original, sovereign, and exclusive.[51]

These three decisions of the Supreme Court and the Federal government of the United States form the springboard for a long line of cases which are still being heard today. However, before the United States achieved its independence, the British Government and its judicial system, including the Privy Council, had an opportunity to deal with some issues relating to tribal rights. The first of these was the case of Mohegan Indians v. Connecticut, which has been called "the greatest cause ever ... heard at the Privy Council Board."[52]

This case became necessary because the Mohegan tribe petitioned to the Queen in Council in respect to lands they were being deprived of, land which had been reserved to them by treaty with the royal colony of Connecticut. The case began in 1703 and in 1705, the first Royal Commission held for the Mohegan Tribe. On appeal to the Queen in Council, the Privy Council upheld that decision, stating that the status of the Mohegan Tribe was as a sovereign nation which was not subservient to the colony. However, on the issue of costs of the action, a second Royal Commission was set up to review that issue. This second Royal Commission of 1738 was a total failure. The third Royal Commission was set up in 1743 and reheard the entire issue. This Royal Commission referred to itself as the "Court of Commissioners." This body, so far as available research portrays, was the first regal court to deal with the legal status of Indian tribes within the British Empire.

The colonists argued that the Indians were subjects of Great Britain, and as subjects, the Indian's title must therefore be determined either by the laws of Great Britain or of the colony. The Court of Commissioners rejected this argument and the majority of the court held that:

> The Indians, though living amongst the King's subjects in these countries, are a separate and distinct people from them. They are treated with as such, they have a policy of their own, they

> make peace and war with any nation of Indians, when they think fit, without countroul from the English. It is apparent the Crown looks upon them not as subjects, but as a distinct people, for they are mentioned as such throughout Queen Anne's and his present majesty's commissions by which we now sit. And it is as plain, in my conception, that the Crown looks upon the Indians as having, the property of the soil of these countries; and that their lands are not, by his majesty's grant of particular limits of them for a colony, thereby impropriated in his subject till they have made fair and honest purchases of the natives ... So that from hence I draw this consequence, that a matter of property in lands in dispute between the Indians as a distinct people (for no act has been shown whereby they became subjects) and the English subjects, cannot be determined by the law of our land, but by a law equal to both parties, which is the law of nature and nations; and upon this foundation, as I take it, these commissions have most properly issued ... And now to maintain that the tenants in possession of the land in controversy are not bound to answer the complaint before this court, is to endeavor to defeat the very end and design of our commission; for surely it would be a very lame and defective execution of it, to hear only the matter of complaint between the tribe of Indians and this government.[53]

It is important to note that here the Commissioners were directly addressing themselves to the issue of Indian sovereignty, tribal tenure and title, the concept of fair and honest purchases and the adjudication of tribal conflicts in the law of nature and nations. As we have seen these were the same issues which dominated the opinion of Marshall in the M'Intosh case. This decision of the Court of Commissioners was confirmed by the Privy Council, which as we have already noted, was the highest judicial power in the British Empire.

In another opinion to the Crown by the Privy Council with respect to the validity of tribal title as a source of title in the Empire, the Privy Council concluded that:

> In respect to such places as have been, or shall be, acquired by treaty, or grant, from any of the Indian princes, or government, your majesty's letters patent are not necessary; the property of the soil vesting in the grantees, by the Indian grants subject only to your majesty's right of sovereignty over the settlements, as English settlements, and over the inhabitants, as English subjects, who carry with them your majesty's laws, wherever they form colonies, and receive your majesty's protection, by virtue of your royal charters.[55]

As will be noticed in this opinion, the Privy Council recognized the Indian tribes' title to grant lands "subject only to your majesty's right of sovereignty over the settlement, ..." In M'Intosh, Marshall doesn't rule out the fact that Indians had a land tenure system which was capable of recognition, but merely, as did the Privy Council, ruled that the ultimate Crown, or in M'Intosh, the American Government. In M'Intosh, Marshall concluded that Great Britain and subsequently America (U.S.A.) had an "absolute title" which was "subject only to the Indian right of occupancy ..." As we will see, later courts have interpreted this "subject to" inference as meaning an inferior title. However, in the final analysis what Marshall was attempting to assert was that the absolute title of Britain and America consisted of the exclusive entitlement to purchase Indian or aboriginal title. Therefore, both the tribal tenure system and the land tenure law could co-exist, both being absolute under their respective systems, until such time as the tribal title was extinguished.

The U.S. cases which will follow, add a bit of a twist to the decisions in the preceding examples and the greater majority will involve legislation of the U.S. Government. It

has also been suggested by Ken Lysyk that when dealing with the content of Indian Title, the U.S. cases don't help.

> Little assistance is to be obtained from such observations as that repeated in many United State's decisions to the effect that the Indian title is "as sacred as the fee simple of the whites."[56] Such statements pertain to the policy of recognizing and vindicating the Indian title, not to its content.[57]

This, however, is not the belief or interpretation applied to the cases by Youngblood Henderson who stated that:

> ... under the M'Intosh theory, ..., the tribe regulated its own domain. This is a much different position than that ordinarily assumed by the courts and commentators.[58]

In fact, Youngblood interprets the early Privy Council opinions and the Marshall judgments as recognizing an Indian tribal title which included a proprietary [59] interest or power.

> These examples clearly illustrate that the tribes were considered as sovereign nations with the rights to their territories. The combination of political sovereignty and proprietary powers establish a theory of dominion. The regulation of land under the distributional preferences of a sovereign with proprietary powers establishes the essence of a theory of land tenure. As a result, it could clearly be supported, in the laws of nations and nature of both the British Empire and America, that the Indian tribes not only had tribal dominion, but also had a recognized and separate land tenure system.[60]

Support is found for Youngblood's point of view in several other decisions given by Marshall. In two well known Cherokee cases, Marshall again affirmed the theory of tribal title which he advanced in M'Intosh. However, while confirming tribal title, Marshall in Cherokee Nation v. Georgia[61]

placed Indian sovereignty or political status in a questionable state.

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned rights to the lands they occupy, and that right shall be extinguished by a voluntary cession to our government, yet it may be doubted whether the tribes within the acknowledged boundaries of the United States can, with strict accuracy, be dominated by foreign nations [within the sense of the Federal Constitution]. They may, more correctly perhaps, be designated domestic dependant nations. They occupy a territory to which we must assert a title independent of their will, which must take effect in point of possession when their right to possession ceases. Their relation to the United States resembles that of a ward to his guardian.[62]

In this decision, Marshall implicitly in the above quote, reaffirms the principle of discovery; i.e., the Indians "occupy a territory to which we must assert a title independent of their will, which, etc." He also introduces the analogy of "ward to his guardian" in describing the Indian nations' relationship to the United States, although he still calls them "domestic dependant nations." Marshall does not explain what he means by "ward to his guardian" except as follows:

> They look to our government for protection; rely upon its kindness and its powers; appeal to it for relief of their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form political connection with them, would be considered by all as an invasion of our territory and an act of hostility.[63]

According to Professor Noyes, under Roman law, "wardship" was political status, which saw a weaker dependent people attach themselves to a stranger for the purposes of economic and political advantages.[64] As well, the concept of "ward" was derived from the Roman word "tetela", which means "to protect".[65] This would seem to be in conformity to the preceding quote in which Marshall says the Indian nations look to U.S. Government "for protection."

In the following year, Marshall in the case of Worcester v. Georgia[66] explained more fully what he meant by protection, although he didn't address the area of wardship. Protection, the Court said, as applied to the Cherokee Nation "involved, practically, no claim to [their] land, [and] no dominion over their person."[67] It merely bound the tribe to the U.S. as a "dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character ... Protection does not imply the destruction of the protected."[68]

Marshall, as well, in this case, qualified his statement in Cherokee Nation v. Georgia that they [Indians] were a "domestic dependent nation" by stating that:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial ...[69]

There were a number of other cases between 1832 and 1872; however, they virtually followed the same line of reasoning and in dealing with the Indians' aboriginal title as being a proper subject of treaty-making, the Court in Holden v. Joy characterized this title in these terms:

> Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their

> original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakably their title was absolute, subject only to the pre-emption right to purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs.[70]

After this period in time until 1946, Indian cases were complicated by various pieces of legislation and consequent judicial interpretation.

> Although Congress created a forum, the Court of Claims, for the adjudication of certain claims against the United States, the Court was barred by the Act of March 3, 1863, from hearing claims growing out of or dependent on any treaty entered into with foreign nations or with Indian tribes. As a consequence, tribes were required to go to Congress for special jurisdictional acts to sue the United States. These jurisdictional acts varied, and the ability to make a claim for the extinction of aboriginal title depended on judicial interpretation of the breath of the jurisdictional act. Between 1881 and the passage of the Indian Claims Commission Act in 1846, 142 claims were litigated. The proceedings were tortuous and dealt primarily with the subtleties of subordinate issues, such as the scope of the jurisdictional act.[71]

The Indian Claims Commission Act of 1946 authorized the Commission, inter alia, to determine "claims based upon fair and honourable dealings that are not recognized by any rule of law or equity ..."[72] There is no counterpart to this Act in Canada, which prompted the Federal Court in the Baker Lake Case[73] to state that the judgments rendered by the Indian Claims Commission must be approached with considerable caution.[74] In

the final analysis this caution may not be warranted, especially if the correct interpretation of the classic decisions of Marshall are applied. In any event, the U.S. Supreme Court did have an opportunity to deal with the nature or content of Indian title prior to 1946. An example of two cases which dealt with this issue is contained in the following excerpt from an article written by Felix S. Cohen.

> 8. The Scope of Indian Title: United States v. Shoshone Tribe.
>
> Whether original Indian title comprises all elements of value attached to the soil or whether such title extends only to such surface resources as the Indians knew and used was the central question decided in the Shoshone case. While the case involved a treaty, the treaty was silent on the question of whether the "lands" which were reserved to the Indians included the timber upon, and the minerals below, the surface. The argument of the case therefore turned primarily on the extent of the Indian tenure prior to the treaty. The Government, represented by Solicitor General (now Mr. Justice) Reed, argued that the Shoshones had a mere right of occupation, which was "limited to those uses incident to the cultivation of the land and the grazing of livestock," and that the Government had an "absolute right to reserve and dispose of the (other) resources as its own." This view was further developed in the Government's main brief, signed by Solicitor General (now Mr. Justice) Jackson, urging that original Indian title was something sui generis, comprising only a "usufructuary right", and that such right "to use and occupy the lands did not include the ownership of the timber and mineral resources thereon." This view was considered and rejected by the Court, Mr. Justice Reed dissenting. The Court took the view that original Indian title included every element of value that would accrue to a non-Indian landowner. It concluded that the treaty did not cut down the scope of the title of

the Indians, "undisturbed possessors of the soil from time immemorial," and declared:

> "For all practical purposes, the tribe owned the land. The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee.
>
> "Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple title. Cherokee Nation v. Georgia, 5 Pet. 1, 48. Worcester v. Georgia, supra, 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial." (At pp. 116 - 117).
>
> At the same session of court the Supreme Court applied the identical rule, in the case of the Klamath Indians, to Indian ownership of timber. The Klamath and Shoshone cases, take together, overturned prevailing views as to the ownership of timber on Indian reservations. Earlier decisions of the Supreme Court in United States v. Cook, and Pine River Logging Co. v. United States, to the effect that the Federal Government could replevin logs sold without authority or recover the value thereof, had been widely misconstrued as a denial of Indian rights to timber. When this misinterpretation was set at rest in the Shoshone and Klamath cases, Congress ordered that the proceeds of the judgement in the Pine River case, which had been deposited to the credit of the Government, should be transferred to the credit of the Indians. These two decisions delivered a death blow to the argument that aboriginal ownership extends only to products of the soil actually utilized in the stone age culture of the Indian tribes.[75]

A central issue which had to be decided was the involuntary loss of Indian occupancy followed by the takeover by a

non-Indian grantee of the full occupancy. Was this to be recognized as a compensable right? This issue was finally answered in 1946 in the Tillamooks Case, by the U.S. Supreme Court.

> It has long been held that by virtue of discovery the title to lands occupied by Indian tribes vested in the sovereign. This title was deemed subject to a right of occupancy in favor of Indian tribes, because of their original and previous possession. It is with the content of this right of occupancy, this original Indian title, that we are concerned here.
>
> As against any but the sovereign, original Indian title was accorded the protection of complete ownership; but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. Termination of the right by sovereign action was complete and left the land free and clear of Indian claims. Third parties could not question the justice or fairness of the methods used to extinguish the right of occupancy. Nor could the Indians themselves prevent a taking of tribal lands or forestall a termination of their title. However, it is now for the first time asked whether the Indians have a cause of action for compensation arising out of an involuntary taking of lands held by original Indian title.
>
> We cannot but affirm the decision of the Court of Claims. Admitting the undoubted power of Congress to extinguish original title compels no conclusion that compensation need not be paid. In speaking of the original claims of the Indians to their lands, Marshall had this to say: "It is difficult to comprehend the proposition ... that the discovery ... should give the discoverer rights in the country discovered, which annulled the pre-existing right of its ancient possessors. ... It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. ... The king

> purchased their lands, ... but never coerced a surrender of them." Worcester v. Georgia, 6 Pet. 515, 543, 544, 547, (1832). In our opinion, taking original Indian title without compensation and without consent does not satisfy the "high standards for fair dealing" required of the United States in controlling Indian Affairs. United States v. Santa Fe Pacific R. Co., 314 U.S. 339, (1941). The Indians have more than a merely moral claim for compensation.
>
> A contrary decision would ignore the plain import of traditional methods of extinguishing original Indian title. The early acquisition of Indian lands, in the main, progressed by a process of negotiation and treaty. The first treaties reveal the striking deference paid to Indian claims, as the analysis in Worcester v. Georgia, supra, clearly details. It was usual policy not to coerce the surrender of lands without consent and without compensation. The great drive to open Western lands in the 19th Century, however productive of sharp dealing, did not wholly subvert the settled practice of negotiated extinguishment of original Indian title. In 1896, this Court noted that "...nearly every tribe and band of Indians within the territorial limits of the United States was under some treaty relations with the government." Marks v. United States, 161 U.S. 297, 302 (1896). Something more than sovereign grace prompted the obvious regard given to original Indian title.[76]

The result of this case, in conjunction with the Klamath and Shoshone cases, prompted Cohen in his article to unequivocably state that the theory that Indians only were recognized as having the right to eke a living off the land, without other recognizable property rights, was finally dead.

> The Alcea case gives the final coup de grace to what has been called the "menagerie" theory of Indian title, the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the

> relation that animals bear to the areas in which they may be temporarily confined.[77]

This case, however, and Cohen's utterances were short lived as the U.S. Supreme Court in Tee-Hit-Ton v. U.S.[78] held that the property rights established by occupancy "since time immemorial" by the natives of Alaska were not legal property rights under American law: rather, that such occupancy was permissive occupancy.[79] Under this distinction, the rights of occupancy could be cancelled unilaterally by Congress at its discretion, without compensation to the native tribes. With respect to the nature of Indian title, i.e., aboriginal title, the Court held that it,

> ... means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty" as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusions by third parties but which rights of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligations to compensate the Indians.[80]

This decision has been analyzed by Youngblood Henderson to be completely contrary to the judgment of Chief Justice Marshall in M'Intosh, although that is the authority used by the Tee-Hit-Ton court to arrive at its decision.

> Here, then, is precisely the problem with the decision in Tee-Hit-Ton. The Court confused the aboriginal title of occupancy with the American concepts of occupancy and possession, which have their own technical connotations in American tenurial interests in real property, particularly in juxtaposition with the terms "fee simple" and "proprietary". In short, the

> Court employed the American terms to the concept, which the Marshall Court so studiously avoided doing, and the American terms bear only a superficial resemblance to the meanings of the tribal concepts. "All proprietary rights are not equal in sanctity," warned Justice Tawney, "merely because identical in name."[81]
>
> . . . .
>
> It is submitted that there is no way to unite the paradigm inherent in the Tee-Hit-Ton opinion with its authority, i.e., "the great case" of M'Intosh. In both legal and economic effect, the classic paradigm is not only different from the modern paradigm but the better of the two. The classic paradigm, on the one hand, grants the tribe both proprietary and governmental power, i.e., tribal dominion. The modern paradigm, on the other hand, establishes the theory that proprietary powers are derivative of the federal government's recognition, not the original natural rights of tribes. Moreover, the modern paradigm holds that aboriginal title is of no economic value, or at the most of little value. Ironically, the economic value of aboriginal property in the modern paradigm is the equivalent of owning a dream.[82]

The Indian Claims Commission in the early 1960's dealt with the issues faced by the Alcea and Tee-Hit-Ton Cases and ruled against the Lipan Apache Tribe. However, the Court of Claims in 1967 reversed that decision and stated that:

> To the extent that the Commission and the appellee believe that affirmative governmental recognition or approval is a prerequisite to the existence of original title, we think they err. Indian title based on aboriginal possession does not depend upon sovereign recognition or affirmative acceptance for its survival. Once established in fact, it endures until extinguished or abandoned.[83]

There have also been some cases dealt with by the Indian Claims Commission and the Court of Claims which may give some useful guidelines which could be adopted, even if they may flow from the 1946 Act which allows the adjudicators to act under the spirit of equity and morality, i.e., to determine "claims based upon fair and honourable dealings that are not recognized by any rule of law or equity ..."

In 1967, the Court of Claims in the U.S. v. Seminole Indians of the State of Florida[84] case noted that although proof of Indian title depends on a showing of actual, exclusive and continuous use and occupancy for a long time by the Indian tribe in question, it is also necessary to consider the nature of the use: whether primarily for agriculture, hunting, or trade, whether utilized seasonally or nomadically, and the like. Actual possession in the strict sense, the Court ruled, is not essential and Indian title may be established through the tribe's intermittent contacts in areas they control. The Court of Claims also noted that the use and occupancy essential to the recognition of Indian title "does not demand actual possession, whereas the key to Indian title lies in evaluating the manner of land-use over a period of time." "Physical control or dominion over the Land," the court asserted, "is the dispositive criterion."

In a more enlightened decision, the Court of Claims dealt with a suit against the U.S. by the Tlingit and Haida Indians of Alaska.[85] This suit was for land and property rights taken by the U.S. without the consent of the Indians. During the course of this long drawn-out case, the court rejected the government's contention that a "value to the Indians" formula, which would tend to exclude the value of minerals and other resources not used by the Indians prior to the coming of the white man, should be used by the court in awarding damages. The court held instead for a "fair market value" of the property which it defined, "in the absence of an actual market," as "the estimated or imputed fair market value based on sufficient evidence which justifies a conclusion as to the fair

market value which would be established when an informed seller disposes of his property to an equally informed buyer."

The "fair market value" formula, required that proper consideration be given to the natural resources of the land, including mineral resources, whether or not they were of economic value at the time of cession, or merely of potential value. The court asserted, moreover, that the value of the land was the same, whether it was held by aboriginal title or in fee simple. The value of land held by Indian title, in other words, was not merely "the value of its primitive occupants relying upon it for subsistence."

(iii) Canadian Cases:

As we have seen from the review of the material dealing with the area now known as the U.S.A., and by the quotes on pages 12-35 supra, the Royal Proclamation embodied the British Crowns' acknowledgement of the existence of certain native title to the land.

> While such recognition was not always honoured, it gained increasing legal force in colonial times: in the policy of treating with the Indians to acquire lands for settlement, in colonial statutes, in instructions transmitted to colonial governors, and eventually with full Imperial authority in the Royal Proclamation of 1763.[86]

The Proclamation[87] makes numerous references to land, cession and purchase. It would appear that what is to be purchased from the Indians is not only their right to hunt, but also the actual land itself. Although the first part, the "whereas" or preamble part, utilizes the words "their Hunting Grounds"[88] to describe the land not ceded or purchased from the Indians and reserved for them, the following portion of the Proclamation states that,

> ... any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the

said Indians, or any of them.[89]

In the second "Whereas" part, the Proclamation speaks of the "Great Frauds and Abuses" committed in purchasing "Lands of the Indians." It then makes a prohibition against purchase of these lands by private persons and directs that if the Indians decide to dispose of their lands then it "shall be Purchased only for Us, in our Name, at some public meeting or Assembly of the said Indians, ..." In a final directive giving the colonial officers the authority to enter the "Territories reserved as aforesaid for the use of the said Indians", for the purpose of arresting Persons fleeing the colony for specified crimes, the Proclamation doesn't in any way restrict the way Indians could "use" the land. By using the term "Use", the Proclamation doesn't necessarily imply that the Indians don't own the land. They also use this same term when dealing with the Proprietary Governments, and the purchase of Indian lands.

> ... and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, ...[90]

This Proclamation has been held to have the force of an Imperial statute in Canada and has never been repealed.[91]

The initial and major case dealing with Indian title in Canada is the St. Catherine's Milling Case.[92] This case went through three Canadian Courts and ended up in a final appeal to the Judicial Committee of the Privy Council. The background to this case is quite interesting from a historical and legal perspective which warrants a brief description. When the existing colonies or provinces united in Confederation in 1867, there were settled policies within each of them. However, only Ontario (Upper Canada) had entered into treaties with the Indians and established reserves. The problem here, however, is that the boundary between Ontario and Rupert's Land to the west wasn't accurately established, and in 1870, when Manitoba joined Confederation, a boundary dispute between the Federal

Government and Ontario ensued. The issue wasn't settled at the time Treaty 3 was concluded in 1873. The issue was submitted to arbitration and most of the area covered by Treaty 3 was held to be part of Ontario. This, however, didn't satisfy the Federal Government and in 1881 the Federal Government extended the boundaries of Manitoba, which consequently included the area held to be part of Ontario by the arbitration. In 1883, the St. Catherine's Milling Co. received a license to cut timber in the disputed area. By 1884, the Privy Council confirmed that the 1878 arbitration was correct, and the Imperial Parliament, in 1889, passed the Canada (Ontario) Boundary Act, thereby legislatively implementing that decision. As a result of this decision, 30,500 square miles of land covered by Treaty 3 fell within the boundaries of Ontario.

The British North America Act, 1867, provided that the provinces would own the lands and natural resources and in the Northwest Territories, the Federal Government would own them. The Federal Government was always under the impression that the area under Treaty 3 belonged to them, hence the issuing of the timber licence. Of course, the final settlement of the boundary dispute proved the Federal Government wrong. This final settlement prompted the Province to ask the Courts to order the Company to cease its operations and to pay the Province the value of the timber already cut.

The Province based its argument on S.109, of the B.N.A. Act, 1867, which provides that:

> All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are or arise subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

The Federal Government was invited by the Privy Council to intervene in this issue as it involved a constitutional point. In its submission, the Federal Government contended that "from the earliest times the Indians had, and were always recognized as having, a complete proprietary interest, limited by an imperfect power of alienation."[93] They submitted that the "imperfect power of alienation" meant that the Indians by virtue of the Royal Proclamation and S.91(24) of the B.N.A. Act, 1867, could only dispose of their proprietary interest to them [the Federal Government]. They argued that by virtue of Treaty 3, the ownership of the ceded land vested in them. Treaty 3 provides:

> The Salteaux tribe of the Ojibkeway Indians and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and Her Successors forever, all rights, titles and privileges whatsoever, to the lands included within the following limits .... [94]

This excerpt from the Treaty, which is reflective of all or at least most of the Treaties, certainly leads one to believe that the Indian Peoples were, in fact, giving up rights which were more than mere Hunting, fishing and trapping rights. According to the Indian Claims Commission,

> Since Confederation, recognition of aboriginal title has been expressed in the major treaties, in which various Indian tribes agreed to "cede, release, surrender, and yield up" their interest in the land; and in a substantial number of government agreements, Orders in Council, policies, and legislation pertaining to land in general and to native peoples.[95]

The Privy Council, however, ruled that the Royal Proclamation by its terms showed the Indian's tenure (aboriginal title) to be "a personal and usufructuary right, dependent upon

the good will of the sovereign."[96] They went on to state that they did not have to express any opinion as to the precise quality of the Indian right, however, stating that:

> It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.[97]

This expression then is similar to that of Chief Justice Marshall and is basically a restatement of the doctrine of Indian or Aboriginal rights. Although no cases since then have dealt with the content of aboriginal title, Justice Strong in his dissenting opinion in that case at the Supreme Court of Canada level gives some interpretation to its meaning.

> It may be summarily stated as consisting in the recognition by the Crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the Crown itself, in whom the ultimate title was ... considered as vested.[98]

The Privy Council also said that, in fact, the unsurrendered lands are vested in the Crown, that is the ultimate fee is vested in the Crown with an attached burden, that being Indian title. They further state that this Indian title was under S.109 of the B.N.A. Act, "an interest other than that of the Province in the same."

> But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land, upon which

> the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province of the same," within the meaning of Sect. 109; and must now belong to Ontario ...[99]

Basically, the Privy Council ruled that the Crown had the absolute fee and the Indians an usufructuary right of use. That, at the time of the Union, in 1867, that land remain vested in the Crown, but once it was surrendered by the Indians, it went under Ontario ownership by virtue of S.109.

Although the case doesn't define the Indian right of use, it does speak about the issue of whether the province or the Federal Government acquires the beneficial use of the land that the Indians cede. Both argue,

> ... that the legal effect of extinguishing the Indian title has been to transmit to itself the entire beneficial interest of the lands, as now vested in the Crown, freed from incumbrance of any kind, save the qualified privilege of hunting and fishing mentioned in the treaty.[100]

The judgment then goes on to make the following observations:

> The treaty leaves the Indians no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown, ...[101]
>
> . . . .
>
> The fact, that it still possess exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario.[102]

From this case and these references, we can conclude that the Crown had the ultimate fee and the Indians the right to the

use of it. Upon this surrender, the beneficial use or interest[103] went to the province. It would seem reasonable that prior to the cession the Indians possessed the beneficial interest to the timber, which "now" becomes vested in the Crown for the benefit and use by and for the province. It can also be inferred from this case that the Indians in their Treaty retained the right (although qualified) to hunt over the surrendered area. If they were only surrendering their hunting grounds, i.e., the right to hunt over that land base, then they can only be seen to be bargaining for what they already had.

The Privy Council in the A.G. for Canada v. A.G. for Quebec, (Star-Chrome) Case[104] had an opportunity to define what they meant by the "personal" nature of Indian title. Duff, J., explained that it is "a personal right in the sense that it is in its nature inalienable except by surrender to the Crown.[105]

There are several other decisions[106] by the Privy Council dealing with the lands surrendered by Indian Nations, including the case of Ontario Mining Co. Ltd. v. Sezbold[107] in which Lord Davey restated the principles enunciated in St. Catherine's Milling and which puts the terms of "beneficial interest" and "Proprietary interest" in clearer perspective.

> The lands in question are comprised in the territory within the province of Ontario, which was surrendered by the Indians by the treaty of October 3, 1873, known as the North-West Angle Treaty. It was decided by this Board in the St. Catherine's Milling Company's case that prior to that surrender the province of Ontario had a proprietary interest in the land, under the provisions of section 109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the land subject only to such qualified privilege of hunting and fishing as was reserved by the Indians in the treaty.[108]

From the interpretation of these cases, it would seem that the Federal Crown, and after 1867 the provinces, had the "proprietary interest" in the land and that the Indians had the beneficial interest, usufructuary right, until there was a cession by treaty. With the cession by treaty, the beneficial interest then went to the proprietary owner, the province of Ontario. This beneficial interest was interpreted as being "an interest other than that of the province in the same" as found in S.109 of the B.N.A. Act, 1867. Therefore, it has to be a right or interest enforceable by law, not being a mere moral obligation.

> On the other hand, 'an interest other than that of the province in the same' appears to (their Lordships) to denote some right or interest in a third party, independent of and capable of being vindicated in competition with the beneficial interest of the old province.[109]

In the more recent Calder Case,[110] Justice Hall of the Supreme Court of Canada, reiterated the principle of aboriginal title. He stated that the appellants (Nisga Indian Nation) were not denying that the Crown and now the Province of British Columbia had fee title to the lands, but merely that they had still retained an aboriginal title to it.

> The appellants do not dispute the Province's claim that it holds title to the lands in fee. They acknowledge that the fee is in the Crown. The enactments just referred to merely state what was the actual situation under the common law and add nothing new or additional to the Crown's paramount title ....[111]
>
> . . . .
>
> ... what they had to cede was their aboriginal right and title to possession of the lands, subject to the Crown's paramount title.[112]

With respect to the content of Aboriginal title itself, Hall stated that,

> The exact nature and extent of the Indian right or title does not need to be precisely stated in this litigation.[113]
>
> . . . .
>
> ... This is not a claim to title in fee but is in the nature of an equitable title or interest ..., a usufructuary right and a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in any way deny the Crown's paramount title as it is recognized by the law of nations. Nor does the Nishga claim challenge the federal Crown's right to extinguish that title. Their position is that they possess a right of occupation against the world except the Crown and that the Crown has not to date lawfully extinguished that right.[114]

In order to prove the continued existence of their aboriginal title, the claimants introduced the private papers of Governor Douglas as well as despatches and many other historic documents. This was done through the Archivist for B.C.[115] It is interesting to note that Governor Douglas in a letter to the Colonial Secretary, March 25, 1861, used the following terms. That, they (Indians of Vancouver Island) "have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain districts," and they would view white settlement, "unless with the full consent of the proprietary tribes, as national wrongs; ..."[116] Douglas also mentioned that he had always made it a practice "to purchase the native rights in the land" prior to settlement and that now the expense would be somewhat greater, "as the land has since then, increased in value, ..."[117]

Although Hall does not define the exact nature of Indian title he does, however, at a number of places refer to "ownership." At page 185, he adopts the principle of law as expressed by Cheshire and Megarry and Wade that: "Possession is of itself at common law proof of ownership." A bit further on he states that:

> In enumerating the *indicia* of ownership, the trial judge overlooked that possession is of itself proof of ownership. *Prima facie*, therefore, the Nishgas are the owner of the lands that have been in their possession from time immemorial and, therefore the burden of establishing that their right has been extinguished rests squarely on the respondent. (B.C.).
>
> What emerges from the foregoing evidence is the following: the Nishgas in fact are and were from time immemorial a distinctive cultura entity with concepts of ownership indigenous to their culture and capable of articulation under the common law having, in the words of Dr. Duff, "developed their cultures to higher peaks in many respects than in any other part of the continent north of Mexico."[118]

Hall also adopts the reasoning of Johnson, J.A. in R v. *Sikyea*[119] which was affirmed by the Supreme Court of Canada.[120] That case involved the hunting of migratory birds and while upholding the applicability of the Migratory Birds Convention Act, the court nevertheless stated that hunting for food on unoccupied Crown lands was always recognized--in the early days "as an incident of ther ownership of the land, and later by the treaties by which the Indians gave up their ownership right in these lands."[121]

We must, however, keep in mind that Hall's reasoning is not contained in a majority judgment. In fact, two other judges concurred in Hall's judgment which basically held that Indian title still existed in B.C., while two other judges concurred in a judgment by Judson, which stated that Indian title had existed, but was now extinguished. The seventh Judge held that the Indians didn't have a fiat to sue the Crown therefore the Court had no jurisdiction to give the remedy asked for. Judson and the two other judges agreed with him, therefore the Nishgas lost the case by a technicality, but in essence were still victorious in that it now opened the door to negotiations.

Although Judson did conclude that the Indian title was extinguished by legislative enactments, which portrayed an intention that no interest would survive, he nevertheless introduces an added dimension to the issue of the nature of aboriginal title. He states that:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in socieities and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it it a "personal or usufructuary right." What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the good will of the sovereign."[122]

Since this decision, there have been three major cases dealing with Aboriginal title. The first two[123] have run their course through the judicial system. The third one, the Baker Lake case[124] may still be appealed.

Shortly after the Supreme Court of Canada dealt with the Calder Case, a number of Chiefs in the MacKenzie Valley of the North West Territories filed a caveat against further development of their lands. This action was successful at trial level, The Supreme Court of the North West Territories. However, in both the Appeal Court and in the Supreme Court of Canada, the Chiefs lost; however, merely on the technicality that a caveat under the N.W.T. Land Titles Act, could not be filed on unpatented Crown land. The Supreme Court of Canada didn't overrule any of the statements made with respect to Aboriginal title. In following the decision of Hall, J., in Calder, Justice Morrow in this case stated:

> From these authorities I conclude that there are certain well-established characteristics of Indian legal title if the Indians or aborigines were in occupation of the land prior to colonial entry. These are,
> (1) Possessory right - right to use and exploit the land.
> (2) It is a communal right.
> (3) There is a Crown interest underlying this title--it being an estate held of The Crown.
> (4) It is inalienable--it cannot be transferred but can only be terminated by reversion to the Crown.
> I am satisfied on my view of the facts that the indigenous people who have been occupying the area covered by the proposed caveat came fully within these criteria and that, in the terms of the language of Hall, J., in the Calder case, may therefore be "prima facie the owners of the lands."[125]

In the case of Kanatewat v. James Bay Dev. Corp. was prompted by the Government's plan to develop the area for hydro-electricity. The Indians were not consulted and most of their homeland was to be flooded. They applied for an interim injunction which was granted by the Que. S.C. on November 15, 1973. However, on November 23, 1973, the Que. C.A. lifted this injunction pending hearing of the appeal. On November 21, 1974, they held that the rights being invoked by the Indians were insufficiently clear to warrant a preliminary injunction. This issue and that of the existence and content of aboriginal title didn't have to be further litigated because an agreement had been reached between the Indians and the government negotiators.

The last and most recent case, as mentioned above, is the Baker Lake case. Here the issue revolves around the aboriginal title of the Inuit of the Baker Lake area. More specifically, the Baker Lake Inuit were seeking a declaration that they have "rights previously acquired" and are "holders of surface rights" within the meaning of the pertinent mining laws. In the process of deciding this issue, Justice Mahoney

of the Federal Court, Trial Division, refers to and adopts the working definition of Indian title expressed by Judson, J., in the Calder case and concludes that:

> The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish and survive. The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did.[126]

As a necessary consequence, he decided that the Inuit did not have surface rights, again based on legislation and caselaw interpretation.

> Canadian Courts have, to date, successfully avoided the necessity of defining just what an aboriginal title is. It is, however, clear that the aboriginal title that arises from The Royal Proclamation is not a proprietary right. (St. Catherine's Milling). If the aboriginal title that arose in Rupert's Land independent of The Royal Proclamation were a proprietary right then it would necessarily have been extinguished by the Royal Charter of May 2, 1670, which granted the Hudson's Bay Company ownership of the entire colony. Their aboriginal title does not make the Inuit "holders of surface rights" for purposes of the section.[127]

In the process of reaching this decision, the Judge also made references which may lead the courts to treat Inuit title and Indian title differently. Mahoney states that there are obviously great differences between the aboriginal societies of Indians and Inuits, due mainly to the environment.[128] He went on to state that the nature and extent of the aborigines' presence on the lands they occupied, "required by the law as an essential element of their aboriginal title" is to be determined by a subjective test, in each case.[129] In addition,

Mahoney adopted the statement made by Dickson, J., in the case of Kruger & Manuel v. R,[130] that when deciding an issue of aboriginal title, one should look at specific areas and not on any global basis.[131]

There is a possibility that this issue may be settled in a pending case to be heard in the Ontario Supreme Court.[132] In this particular action, the Bear Island Indian Band is claiming about 6,400 square kilometres of land and the Province is seeking a ruling that the land is public and that Indian consent is not required for their disposal. The Province is also seeking a ruling that the Indians have no rights to the land or at least a definition of what interests they may have. It is expected that the trial will begin about March, 1980. One can now only wait to see if the Courts will deal with the definition and content of Indian title.

B. LEGISLATIVE ENACTMENTS

Although the Government has never legislatively defined the content of aboriginal title, they nevertheless have legislatively recognized Indian title. They have also, by section 91(24) of the B.N.A. Act, recognized that Indians and Indians' lands have to be treated separately from other lands and citizens. The Privy Council have held that "the lands reserved for Indians" doesn't only mean Reserve lands, but as well, all lands reserved by virtue of the Royal Proclamation.[133] Taking this further, one can say that section 91(24) refers to all lands to which Indian title has not been extinguished.

In conformity with the authority vested in Parliament by S.91(24), the Federal Government after acquiring the interest of the Hudson's Bay Company to Rupert's Land, enacted several pieces of legislation. This legislation clearly exempted lands of which the Indian title was unextinguished. This is reflected in the Manitoba Act, 1870,[134] and is embodied in the Dominion Lands Act, 1872.

> 42. None of the provisions of this Act respecting the settlement of Agricultural lands, or the lease of Timber lands, or the purchase and sale of Mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished.[135]

This position exempting unsurrendered Indian lands was continued in the Act until 1908 and, until the Act was repealed in 1950, it contained some provision dealing expressly with the topic of the extinguishment of Indian title.

While these, and other similar Acts and legislation exempt Indian lands, there is no specific indication as to what the rights to the land itself entails.

C. INDIANS' UNDERSTANDING OF THE LEGAL CONTENT OF ABORIGINAL TITLE

The majority of Native organizations believe that what they have or had was complete sovereignty over their respective lands, that they were outright owners of the land, in the sense that its resources were there for their use. This is best summed up by the National Indian Brotherhood in a statement before the Standing Committee on Indian Affairs and Northern Development.

> Indian title as defined by English law connotes rights as complete as that of a full owner of property with one major limitation. The tribe could not transfer its title; it could only agree to surrender or limit its right to use the land. English law describes Indian title as a right to use and exploit all the economic potential of the land and the waters adjacent thereto, including game, produce, minerals and all other natural resources, and water, riparian, foreshore, and off-shore rights. The colonial legal systems called this kind of title a "usufructuary right." To the extent that the use of the concept of "usufructuary right" limited Indian rights as they had been understood by

> the Indian peoples it was an arbitrary and self-serving action of the colonial legal system.[136]

III. CONCLUSION

It can be seen from this paper that the issue of the legal content of Indian title is certainly far from clear. However, some of the Canadian court decisions give an indication of what they may do. Most notable is the statement or definition of Indian title given by Judson in Calder. This definition would seemingly restrict the Court to look at the level of development of the particular Indian tribe or nation at the time they were "discovered" or when the discovering state exercised jurisdiction over the area. Judson also stated that it did not help matters by referring to the nature of Indian title as being a "usufructuary or personal" right.

The Supreme Court of Canada, in the Kruger case, as seen above, also stated that when dealing with Indian title, one should only look at a specific area, as opposed to proceeding on a global basis. This would all seem to make the issue of the content of Indian title narrowed down to a specific tribe and tribal territory and to its particular way of life and stage of resource development when first encountered by the white man. This reasoning was adopted in the Baker Lake case, where Mahoney said that one would have to use a subjective test to determine the extent of the use of the land by the aboriginal people involved. He went on to conclude that the aboriginal title of the Inuit was different than that of the Indians. On this basis, it is also open to the Courts to find that the content of Indian title from one tribe to another varies.

The St. Catherine's Milling case proposes that the Indians don't have a proprietary interest in the lands, however, the majority of writers feel that Indian Nations do in fact have property rights. According to Professor Howard McConnell,

> The important point to be noted, however, is that the acquisition of title either through discovery or through discovery and occupation did not ipso facto diminish the private proprietary rights of the inhabitants living in the territory at the time of discovery.
>
> . . . .
>
> ... Prior discovery, accordingly, allocated public, sovereign rights among European powers, but it did not extinguish the private property rights held by the natives who were enjoying tranquil possession at the time of the discovery.[137]

It is also popularly expressed that the nature of Indian title should be determined from the point in time that the title is to be extinguished not from the first contact between the two races. This is not only morally persuasive, it is also the most economically feasible for Indian nations. Support for this is found in the Dorion Report.

> Moreover, the Dorion Commission Report has made the observation that as other means of subsistence have begun to replace hunting and fishing for many native people, the content of Indian title should be expanded to include the other benefits of land ownership. The Report makes clear its view that the Indians' position in the twentieth century is very different from what it was in 1763, and that, following this, the content of Indian title must also be considered as transformed to suit modern realities.[138]

FOOTNOTES

1. St. Catherine's Milling v. R, (1889) 14 A.C. 46.

   Note: The Privy Council was the last Court of Appeal for all Commonwealth countries, and for Canada until 1949.

2. Lysyk, The Indian Title Question in Canada: An Appraisal in the Light of Calder, (1973) Ll The Canadian Bar Review 450.

3. Felix S. Cohen, The Spanish Origin of Indian Rights in the Law of the United States, (1942) 31 Geo. Law Jr. 1, at 12.

4. Ibid., at 16 - 20.

5. Ibid., at 20.

6. Cumming and Mickenberg, Native Rights in Canada, 2nd Ed., 1972, at 75.

7. B. Slattery, The Indigenous Peoples of Canada in International Law, 1973, unpublished paper.

8. Supra, note 6, at 67.

9. Ibid., at 23. See page 30 as well.

10. W. H. McConnell, Some Comments on the Nunavut Proposal, College of Law, U of S.

11. Baker Lake v. Min. of Indian Affairs & Northern Development and Others, unreported as of yet, decision of Nov. 15, 1979, at 45.

12. Ibid., at 45.

13. 1847 N.Z.P.C.C. 387.

14. Ibid., at 391. (Emphasis added)

15. Wi Parata v. The Bishop of Wellington (1877) 3 N.Z. Jurist 72, at 78.

16. Ibid.

17. (1901) A.C. 561.

18. Ibid., at 578.

19. Supra, note 15.

20. Ibid., at 566 - 67.

21. Ibid., at 567.

22. 'In re Southern Rhodesia' (1919) A.C. 211.

23. Ibid., at 235.

24. Ibid., at 233 - 34.

25. Amodu Tijani v. The Secretary, Southern Nigeria (1921) 2 A.C. 211.

26. Ibid., at 403 - 404.

27. Ibid., at 409 - 410.

28. Ibid., at 407.

29. Ibid.

30. Ibid.

31. John Hookey, The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?, 5 Federal Law Review 85 (1972), at 105.

    - Nissan v. A.G. (1970) A.C. 179, at 227.
    - Burmah Oil Co. Ltd. v. Lord Advocate (1965) A.C. 75, at 76 and 102.

32. Felix S. Cohen, Original Indian Title, (1947) Minnesota Law Review 28, at 34 - 35.

33. Ibid., at 35.

34. Ibid., ft. note 17. "Indian reservations acquired their name from the fact that when Indians ceded land they commonly made "reservations" of land to be retained in Indian ownership. This practice goes back at least to 1640, when Uncas, the Mohican chief, deeded a large area to the Colony of Connecticut, out of which he carved a reservation for himself and his tribe. See 1 Trumbull, History of Connecticut, (1818) p. 117.

35. Ibid., at 35 - 36.

36. Ibid., at 36 - 37.

37. 10 U.S. (6 Cranch) 87 (1810).

38. Ibid., at 142 - 143.

39. Ibid., at 147.

40. Ibid., at 121 - 123.

41. Ibid., at 147.

42. J. Youngblood Henderson, Unraveling the Riddle of Aboriginal Title, 5 Am. Ind. L.R. #1, 75 at 86 - 87.

43. (1823) 8 Wheaton 543.

44. Ibid., at 572 - 573. (Emphasis added)

45. Ibid., at 587 - 588.

46. Supra, note 32, at 49.

47. A paradigm is a set of shared conceptions held by any academic or professional community concerning what is possible. It defines the boundaries of acceptable inquiry and the limiting assumptions within a discipline: It is a set of implicit assumptions, concepts, theories, and postualtes held in common by several members of a community, which enables them to explore a well-defined and delimited area of inquiry and to communicate in a specialized language about the subject.

48. Supra, note 42, at 106 - 107.

49. Ibid., at 88 - 89.

50. 1 Op. Att'y Gen. 465 (1821).

51. Ibid.

52. J. Smith, Appeals to the Privy Council From the American Plantations 418 (1950).

53. Ibid., at 434.

54. Ibid., at 441 - 442.

55. Chalmers, Opinions of Eminent Lawyers on the Colonies, 204.

56. See, e.g., Michel v. U.S. (1835) 9 Pet. 711, at 746; The Cherokee Nation v. The State of Georgia (1831) 5 Pet. 1, at 48.

57. Supra, note 2, at 473.

58. Supra, note 42, at 100.

59. Definition of "proprietary interest".
Black's Law Dictionary - Revised 4th Edition.

- proprietary:

  noun - A proprietor or owner.
  adj. - Belonging to ownership.

- proprietary rights;

  Those rights which an owner of property has by virtue of his ownership.

- Proprietas: (Latin) Property; ownership.

  - Proprietas plena - full property, including not only the title, but the usufruct, or exclusive right to the use.

  - Proprietas nuda - naked or mere property or ownership; the mere title, separate from the usufruct.

- Interest:

  Property; the most general term that can be employed to denote a property in lands or chattels. More particularly, it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title; a partial or undivided right; a title to a share. The terms "interest" and "title" are not synonymous.

From these definitions then a "proprietary interest" could mean: (a) the property in the land or (b) the right to the use of the property, but less than title.

60. Supra, note 42, at 101.

61. 30 U.S. (5 Pet.) 1 (1831).

62. Ibid., at 17.

63. Ibid., at 17 - 18.

64. Noyes, The Institution of Property, at 80 - 82.

65. Ibid., at 81.
66. 31 U.S. (6 Pet.) 515 (1832).
67. Ibid., 552.
68. Ibid., at 552 and 559.
69. Ibid., at 559.
70. Holden v. Joy (1872) 17 Wall. (84 U.S.) 211 at 244.
71. Monroe Price, Law and the American Indian, (The Bobbs-Merrill Co., Inc; New York) 1973 at 458 - 459.
72. Public Law 79 - 959, August 13, 1946; (1946) 60 Stat. 1049.
73. Supra, note 11.
74. Ibid., at 45.
75. Supra, note 32, at 55.
76. U.S. v. Alcea Band of Tillamooks (1946) 329 U.S. 40 at 46 - 48.
77. Supra, note 32, at 57 - 58.
78. (1954) 348 U.S. 272.
79. Ibid., at 275.
80. Ibid., at 279.
81. Supra, note 42, at 117. Justice Tawney's statement is found in Summers & C. Howard, Law: Its Nature, Functions and Limits 679 (1972).
82. Ibid., at 119.
83. Lipan Apache Tribe v. U.S. (1967) 180 Court of Claims 487 at 492.
84. 180 Ct. Cl. 375.
85. Tlingit and Haida Indians of Alaska v. U.S. (1959) 147 Ct. Cl. 315.
86. Indian Claims Commission, Indian Claims in Canada, (Information Canada, Ottawa) 1975 at 6.
87. Royal Proclamation, reproduced in Appendix #1.
88. Ibid.
89. Ibid.
90. Ibid. Note: The Hudson's Bay Company is an example of a proprietary government.
91. Campbell v. Hall (1774) 1 Comp. 204; Rex v. Lady McMaster (1926) Ex. C.R. 68 at 72.
92. Supra, note 1.
93. Ibid., at 48.
94. Alexander Morris, The Treaties of Canada with the Indians (Coles Publishing Co., Toronto) 1971 at 324.

95. Supra, note 85, at 7.

96. Supra, note 1, at 54.

97. Ibid., at 55. The following definitions are found in Native Rights in Canada, note 6, at page 33 ft. note 51.

- plenum dominium is defined as: "Full ownership; the property in a thing united with the usufruct."
- usufruct is the "right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, providing it be without altering the substance of the thing."

See Appendix #2 for more on "usufruct".

98. (1887) 13 S.C.R. 577 at 608. (Emphassis added) It is also interesting to note that Strong, J. quoted extensively from Johnson v. M'Intosh and other American cases.

99. Supra, note 1, at 58.

100. Ibid., at 52. (Emphasis added)

101. Ibid., at 60. (Emphasis added)

102. Ibid.

103. See footnote 59 for definition of "interest".

Definitions of "beneficial use" and "beneficial interest".

Use:

Noun - Act of employing everything, or state of being employed; .... A use regards principally the beneficial interest; ... Re: Civil Law - A right of receiving so much of the natural profits of a thing as is necessary to daily sustenance. It differs from "usufruct", which is a right not only to use, but to enjoy.

Beneficial Use:

The right to use and enjoy property according to one's own liking or so as to derive a profit or benefit from it, including all that makes it desirable or habitable, as light, air, and access; as distinguished from a mere right of occupancy or possession.

Beneficial Interest:

Profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.

- Black's Law Dictionary, Revised 4th Edition.

104. (1921) 1 A.C. 401.

105. Ibid., at 408.

106. Star-Chrome Case, supra, note 103; Indian Annuities Case, (1894) A.G. 199; Dominion of Canada v. Province of Ontario (1910) A.C. 637.

107. (1903) A.C. 73.

108. Ibid., at 79. (Emphasis added).

109. A. G. Canada v. A. G. Ontario (1897) A.C. 199 at 210 - 211.

110. Calder v. A. G. of B.C. (1973) S.C.R. 313, (1973) 34 D.L.R. (3d) 145.

111. Ibid., at 214.

112. Ibid., at 217.

113. Ibid., at 173.

114. Ibid., at 173 - 174.

115. Ibid., at 177 - 178.

116. Ibid., at 215. (Emphasis added)

117. Ibid.

118. Ibid., at 189 - 190.

119. (1964) 43 D.L.R. (2d) 150; 46 W.W.R. 65 (N.W.T.C.A.)

120. (1964) S.C.R. 642; (1965) 44 C.R. 266.

121. Supra, note 109, at 205.

122. Ibid., at 156.

123. Paulette v. R (1976) D.L.R. (3d) 161 (S.C.C.); (1975) 63 D.L.R. (3d) 1 (N.W.T.C.A.); (1973) 39 D.L.R. (3d) 45 (N.W.T.S.C.); (No. 2) (1973) 42 D.L.R. (3d) 8 (N.W.T.S.C.) 4.

Kanatewat v. James Bay Development Corporation (unreported) Que. S.C. at Mtl. no. 05-04841-72, 15 Nov. 1973.

124. Supra, note 11.

125. Paulette v. R (1973) 6 WWR 97 at 135. (N.W.T.S.C.)

126. Supra, note 11, at 43.

127. Ibid., at 63.

128. Ibid., at 44.

129. Ibid., at 45.

130. (1977) 4 WWR 300; 75 D.L.R. (3d) 434 (S.C.C.).

131. Supra, note 11, at 43 - 44.

132. See Appendix No. 3.

133. Supra, note 1, at 59.

134. Manitoba Act, S.C. 1870, c.3.

135. S.C., 1872, c.23.

136. House of Commons, Issue No. 8, Thursday, March 29, 1973.

137. Howard McConnell, The Calder Case in Historical Perspective, 38 Sask. Law Review (1973 - 74) 88, at 96 - 97.

138. Supra, note 6, at 41.

A P P E N D I C E S

APPENDIX NO. 1

Excerpts from the Royal Proclamation of 1763.*

And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds — We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be Known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for the Purpose first obtained.

And, We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the Great Prejudice of our Interests, and to the Great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for the Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or

* Reprinted in R.S.C. 1970, Appendix, at pp. 124-30

they shall think proper to give for the Purpose. And We do, by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade.

And We do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

And We do further expressly enjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the Use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper Guard to the Colony where the Crime was committed of which they stand accused, in order to take their Trial for the same.

Given at our Court at
St. James's the 7th Day
of October 1763, in the
Third Year of our Reign.

GOD SAVE THE KING

APPENDIX NO. 2

RYAN, Introduction to Civil Law

USUFRUCT

The limited real rights (other than security interests) admitted by Roman law and the modern civil law were classified by Justinian's codifiers as personal servitudes and real or praedial servitudes, the former being vested in and indissolubly tied to an individual person, and the latter being attached to the ownership of a thing.[1] The most important of the personal servitudes in Roman law was usufruct. This was defined by Paulus as the right of using and enjoying the things of another, their substance remaining unimpaired. This definition is reproduced in Art. 578 C.C., and the same concept is expressed in the relevant articles of the B.G.B.

The modern law of usufruct possesses three major characteristics. First, whatever the position may have been in classical Roman law, usufruct is regarded by modern civilians as a *pars dominii*, as a modification of ownership. Its constitution or reservation results in a dissociation of the *usus* and *fructus* from the *abusus*, the former being vested in the usufructuary, and the latter (termed by French jurists the "bare ownership") in the owner. The usufructuary thus has the right to derive the full economic benefit from the property. He is entitled to its possession[2] and to the profits to be gained from its exploitation, but he has no power to dispose of the property itself. Secondly, the object of the right of usufruct may be a corporeal or incorporeal thing, a movable or an immovable, a patrimony or a single object.[3] When the object of the usufruct is consumable goods, in which the right of enjoyment is equivalent to the right of consuming or disposing of them, the codes follow the later Roman law solution that the usufructuary becomes the owner of the goods, subject to an obligation to restore things of the same quantity or quality or their value to the person who constituted the usufruct. Thirdly, the usufruct is inseparably linked to the person vested with it. We have seen that it was a major feature of the Roman law of property that the rights of the owner were to be as free from restrictions as possible; but Roman law could not ignore altogether the endowment function of property. Roman testators were no less anxious than those of later times to provide for the maintenance of their widows while leaving their estate to their children. In the later Republic, therefore, the usufruct developed as a means of settling property in favour of an individual. Since the need to provide maintenance could not extend beyond the life of the usufructuary the settlement could be only for his life or for a term not exceeding his life. The same concern to confine the scope of usufruct appears in the modern civil law. A usufruct is determined by the death of the usufructuary[4] or, by the prior expiration of the term for which it is constituted. It is also determined by the total destruction of the subject-matter, by surrender or by merger,[5] and in France, by non-exercise of the right for thirty years.

In Roman law, a usufruct was inalienable, though the actual enjoyment could be disposed of.[6] This solution was incorporated into the B.G.B. (Art. 1059) though the Code Civil had adopted a different rule. Its major disadvantage is that the rights of the person to whom there has been conveyed the "exercise of the usufruct" last only so long as the usufruct itself,[7] and hence may be defeated by a surrender by the usufructuary. An amendment made in 1935[8] permits alienation of a usufruct in certain circumstances when the usufructuary is a legal person. The Code Civil, on the other hand, permits a usufructuary "even to sell or alienate his right gratuitously" (Art. 595 C.C.). The assignee becomes usufructuary *pur autre vie*, his interest ceasing at the latest upon the death of the assignor and his rights being those of the assignor.

In neither system has the usufructuary the right to dispose in any way of the property subject to the usufruct, and his powers of administration (for example, to grant leases) are limited. In France, a lease granted by the usufructuary will bind the owner after the termination of the usufruct for a period not exceeding nine years (Art. 595 C.C.). In Germany, the rules

1 Schulz, p. 382.

2 This will normally be direct possession, but it may be indirect—for example, if the property is leased.

3 Art. 581 C.C.; Arts. 1030, 1068, 1085 B.G.B. A usufruct over a patrimony is essentially a sum of usufruct rights over the particular objects: R.G.Z. 153, 31.

4 Where the usufructuary is a legal person, the usufruct ceases after thirty years in France (Art. 619 C.C.), but only on the liquidation of the legal person in Germany.

5 In German law merger occurs only in relation to movables; it does not occur if the owner has a legal interest in the continuance of the usufruct: Art. 1063 B.G.B.

6 Buckland, p. 269.

7 There is an exception to this where the usufructuary has created a lease (see below).

8 Incorporated into the B.G.B. as Art. 1059 (a)-(c).

relating to the rights of lessees upon a sale of the demised land are in general applied (Art. 1056 B.G.B.). The results are the same as those which accompanied the English strict settlement, namely, maladministration of the property and its inalienability. Since the usufructuary's rights are not inheritable, he will have little incentive to improve the property.[9] The effect of creation of a usufruct will probably be an immobilisation of the property during the life or term of the usufructuary. While the owner will have the right to dispose of the property, the purchaser will take it subject to the claims of the usufructuary. Normally, of course, a purchaser will be anxious to obtain the property free of all other interests, and so will be reluctant to acquire it. It must be remembered, however, that on the one hand a civil law settlement by way of usufruct cannot tie up property as effectively as did a strict settlement, and on the other that the usufructuary cannot be given the express powers which settlors usually granted to life tenants.

[9] Art. 599(2) C.C. expressly provides that the usufructuary cannot claim any compensation upon the termination of the usufruct for any improvements he had made.

APPENDIX NO. 3

LEADER-POST, Thursday, November 22, 1979.

Land trial will establish record

NORTH BAY, Ont. (CP) — For the Bear Island Indian Band, a forthcoming land claims trial should not only settle a long-standing dispute, but also establish a modern-day record of the Indian in Canadian history.

The Bear Island Foundation has laid claim to 32 townships in the Temagami area — about 6,400 square kilometres of land — and its righ to the lands is to be determined in a hearing before the Supreme Court of Ontario.

Bruce lark, legal counsel for the band, says the hearing should start by March, and will examine Indian land rights from the time of Jacques Cartier's first exploration in the area.

Pre-trial proceedings

The two sides in the land dispute — the band and the Ontario government — now are involved in pre-trial proceedings known as examinations for discovery, in which each presents points in favor of its case and allows the other to question its witnesses.

The Indians' case rests on the claim that they have held the land from time immemorial, and since Cartier first brought the white man to this area in 1540, they have never ceded their rights to it.

Clark says that throughout the 18th and 19th centuries there was much interaction between whites and Indians, and part of the Indians' case rests on correspondence between officials about the land.

The correspondence, he sa s, confirms the agreement that Indians would not have land taken from them without their consent. That fact was accepted in earlier days when the power balance was not so overwhelmingly in favor of whites, says Clark.

But land was taken over by whites before the turn of the century, he said, and since 1900, there has been little contact between Indians and hites and people have forgotten the promises made about the land.

"We have to present the facts to the courts," says Clark. The facts a an unwritten chapter of Canadian history, at least unwritten in the sense that they're not in the history books."

Clark says history books are written as i the Canadian Indian never existed.

The hearing, to be held in Toronto, is expected to be lengthy, he said and the location will result in staggering costs for the band.

Although he thinks it a derogation of responsibility, he said the federal government has not appeared eager to get involved and loans are unavailable.

The Quakers in Toronto have offered to provide housing for the band and Clark says he hopes other religious groups will also assist.

Meanwhile, preparation involving more than 400 years of history goes on because the band wishes to have the issue settled as soon as possible.

The province's legal position is clear. It is seeking a declaration that the disputed lands are public and the province has the right to dispose of them without the Indians' consent.

The province also seeks a ruling that the Indians have no rights to the land or at least a definition of what interests they may have.

The Indian case dates to the Royal Proclamation of 1763 and the principle that rights of indigenous people would be acknowledged in recognizing their native title.

They also argue that the lands are "ndaki-menan," (our land) and have never been sold or ceded in any way.

The province claims neither the Indians nor their precedessors ever h d a right, title or interest to the lands, except the reserve at Bear Island, about 100 kilometres northwest of North Bay.

The chief of the reserve says the case is providing his people with a deepened awareness of their ancestry.

"We are Indian and we are going to remain Indian no matter what it costs," says Chief Gary Potts. "We are going to do things to ensure our survival."

Potts, 35, has worked more than six years on the land claim question.

He is acutely aware he is no longer a pr vate individual, a trapper from Bear Island going about his everyday life. He says he feels a link with what he calls the contact chiefs, Indians who first dealt with the whites.

Not prepared

They weren't prepared to relinquish their lands and were concerned with preserving them for their descendants, he says. Indian people have always had that concern for their links to the land, he says.

However, he says Canadians have been unaware of that concern and Indians have not known what steps to take to protect their property.

But now, the Teme-Augama Anishnabai (Deep-Water People) are staking claim in the courts to land they consider theirs.