AFTER *TSILHQOT'IN NATION*: THE ABORIGINAL TITLE QUESTION IN CANADA'S MARITIME PROVINCES

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I. Introduction 58

II. Site-Specific/Intensive Use vs. Territorial/Exclusive Occupation 59

A. Sufficiency and Exclusivity 61

B. Continuity 66

III. Proof of Title in the Maritime Provinces 67

A. The Marshall and Bernard Decisions 67

B. Historical Occupation 71

C. Title by Treaty 77

IV. Extinguishment of Aboriginal Title 82

A. Voluntary Surrender 83

B. Unilateral Legislation 84

1. Executive and Legislative Authority 84
2. Imperial and Colonial Jurisdiction 86
3. Post-Confederation 92
4. Conclusions on Extinguishment 93

V. Extinguishment in the Maritime Provinces 94

A. Voluntary Surrender 94

B. Unilateral Legislation 96

1. Colonial Authority 98
2. Clear and Plain Intent 99

C. Instances of Possible Extinguishment 102

1. Colonial Legislation 102
2. Imperial Legislation 104
3. Federal Legislation 107

VI. Conclusion 108

I. INTRODUCTION[1]

The Supreme Court of Canada made a declaration of Aboriginal title for the first time in 2014 in its landmark *Tsilhqot'in Nation*[2] decision, a decision with "ground-

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[1] This paper has been adapted from an LLM Thesis: Robert Hamilton, "They Promised to Leave Us Some of Our Land": Aboriginal Title in Canada's Maritime Provinces (LLM Thesis, York University Osgoode Hall Law School, 2015) [unpublished] [Hamilton, Aboriginal Title in Canada's Maritime Provinces].

shifting implications."[3] Governments and First Nations across the country are only beginning to adjust to the consequences of the decision, which may be particularly impactful in areas where it is acknowledged that Aboriginal title has never been ceded, such as the Maritime Provinces.[4] The only Aboriginal title case from the region that has reached the Supreme Court left several important doctrinal questions unanswered and, as will be explained, should not be read as precluding a future finding of title in the region. As such, Aboriginal title in the Maritime Provinces must be assessed in light of the principles articulated in *Tsilhqot'in*. This is particularly important at this time, as unresolved title issues have contributed to disputes over resource development in the region and more conflict is likely while title issues remain outstanding.

This paper analyzes Aboriginal title in the Maritime Provinces in light of the *Tsilhqot'in* decision with the aim of providing insight into how future title litigation emerging from the region may be assessed in the courts. I begin by reviewing the Supreme Court's ruling in *Tsilhqot'in*—specifically, the Court's adoption of the territorial approach to Aboriginal title claims. On the basis of this approach, and referring to case law and relevant historical materials, I argue that Aboriginal title existed in the region at the time of the assertion of British sovereignty. While concluding that title undoubtedly existed in the region, I stop short of attempting to determine *where* it may have existed, for such a determination would require a depth of research not possible here. Having concluded that title existed, I review the legal framework governing the extinguishment of Aboriginal title to assess whether Aboriginal title has been extinguished in the Maritime Provinces. I conclude that Aboriginal title has likely not been extinguished on a large scale, a conclusion which strongly suggests that Aboriginal title continues to exist in the region today. Finally, I point to some further issues raised by this conclusion.

II. SITE-SPECIFIC/INTENSIVE USE VS. TERRITORIAL/EXCLUSIVE OCCUPATION

In *Tsilhqot'in*, the Supreme Court clarified the 'site-specific' and 'territorial' approaches to Aboriginal title.[5] The site-specific approach conceives of title as applying to small tracts or plots of land surrounded by larger areas over which other Aboriginal or treaty rights may exist.[6] The territorial approach, by contrast,

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[2] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 (CanLII) [Tsilhqot'in Nation].

[3] John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in Nation v British Columbia* (2015) 48:3 UBC L Rev 701 at 704 (QL).

[4] This is not to suggest that the numbered treaties, often assumed to have extinguished title, should be assumed to have done so. For an argument challenging the view that Treaty One cedes land, see Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich Publishing, 2013). For the same concerning Treaty Nine, see John S Long, *Treaty No 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal & Kingston: McGill-Queen's University Press, 2010).

[5] For a discussion of site-specific vs. territorial conceptions of Aboriginal title, see Kent McNeil, "Aboriginal Title in Canada: Site-Specific or Territorial?" (2014) 91:3 Can Bar Rev 745.

[6] Such Aboriginal or treaty rights include, for instance, hunting and fishing rights.

conceives of title as applying to broad, contiguous tracts of land. In *Tsilhqot'in*, the unanimous Court held the territorial approach to be correct. The distinction between the approaches, and the differing results that emerge from each, can be seen clearly in how the two standards have been applied by the courts.

The trial judge in *Tsilhqot'in* applied a territorial standard and "held that 'occupation' was established for the purpose of proving title by showing regular and exclusive use of sites or territory."[7] According to the trial judge, title might be found not only to intensively used sites (*e.g.*, villages, fishing holes, and agricultural sites), but also to broad tracts of *exclusively* used or controlled *territory*.[8] The British Columbia Court of Appeal, on the other hand, applied a site-specific standard, requiring proof that "a definite tract of land with reasonably defined boundaries" was used regularly and *intensively*.[9] At the Supreme Court, McLachlin CJC articulated the distinction between the two approaches:

> For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.[10]

Correlative to the territorial approach to title is a shift in emphasis regarding the degree of occupancy required to demonstrate title. The reason for this is clear: Requiring proof of intensive use of land would necessarily limit the scope of territory over which such use could be proven, while an emphasis on control and exclusive occupation of territory necessarily leads title to be recognized to broader areas.

Despite the existence of two clearly different standards, the test for establishing title has, on the surface, remained unchanged since *Delgamuukw*.[11] Title is established by demonstrating occupation at the date of the assertion of British sovereignty.[12] Aboriginal occupation must possess three characteristics at the date of sovereignty in order to ground a finding of Aboriginal title: "It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*."[13] The contrast between the territorial and site-specific conceptions of

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[7] *Tsilhqot'in Nation*, *supra* note 2 at para 27.

[8] *Ibid*.

[9] *Ibid* at para 28.

[10] *Ibid* at para 29.

[11] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 (CanLII) [*Delgamuukw* cited to SCR].

[12] *Ibid* at para 155; *R v Marshall; R v Bernard*, 2005 SCC 43 at para 40, [2005] 2 SCR 220 (CanLII) [*Marshall; Bernard*]; *Tsilhqot'in Nation*, *supra* note 2 at para 25.

[13] *Tsilhqot'in Nation*, *supra* note 2 at para 25 [emphasis in original].

title, then, involves matters of interpretation rather than a wholesale rewriting of the test. In particular, courts applying the territorial conception have emphasized control and exclusive occupation of territory, while those applying the site-specific standard have required intensive use of sites and have placed a greater emphasis on the *degree* of occupation sufficient to establish title.[14]

A. Sufficiency and Exclusivity

The Supreme Court in *Tsilhqot'in* held that, in assessing sufficiency of occupation, courts must look to "both the common law perspective and the Aboriginal perspective."[15] The common law supplies "the idea of possession and control of the lands."[16] The common law is concerned not with the intensive use of a given site, but with the effective control of territory: "At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised."[17] This approach emphasizes *control* as opposed to *use* as the most important factor in establishing the sufficiency of occupation required to prove the existence of Aboriginal title.[18]

Determining "[s]ufficiency of occupation is a context-specific inquiry."[19] Courts must draw on the unique factual circumstances of the Aboriginal group in question to expand the acceptable indicia of occupation beyond merely "the construction of dwellings through cultivation and enclosure of fields" to include the "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources."[20] This inquiry must take into consideration, for example, the carrying capacity of the land in assessing the degree of occupancy required to prove title; if the land could only support 1,000 people, the fact that it was not more densely populated cannot be used as evidence of an absence of use or occupation.[21] As McLachlin CJC stated in *Tsilhqot'in*, "[t]he intensity and frequency of the use [required to establish sufficient occupation] may vary with the characteristics of the

[14] Joshua Nichols, "Claims of Sovereignty—Burdens of Occupation: *William* and the Future of Reconciliation" (2015) 48:1 UBC L Rev 221 at 221 (QL).

[15] *Tsilhqot'in Nation*, *supra* note 2 at para 34; *Delgamuukw*, *supra* note 11 at para 147.

[16] *Tsilhqot'in Nation*, *supra* note 2 at para 36.

[17] *Ibid*.

[18] Kent McNeil, "Exclusive Occupation and Joint Aboriginal Title" (2015) 48:3 UBC L Rev 821 at 828 (QL).

[19] *Tsilhqot'in Nation*, *supra* note 2 at para 37. The purpose of this "context-specific inquiry" is to give substance to the "Aboriginal perspective": *ibid* at para 34.

[20] *Ibid* at para 37, citing *Delgamuukw*, *supra* note 11 at para 149.

[21] *Tsilhqot'in Nation*, *supra* note 2 at para 37.

Aboriginal group asserting title and the character of the land over which title is asserted."[22]

To fulfill the sufficiency requirement, an Aboriginal group must demonstrate "that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes."[23] Though evidence for this cannot be purely subjective or internal to the Aboriginal peoples making the claim, "[t]his standard does not demand notorious or visible use akin to proving a claim for adverse possession."[24] Courts will require objective evidence of

> … a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.[25]

Sufficiency of occupation is determined not with reference to the *use* of the land, but with respect to "acts of occupation" which demonstrate that the territory "belonged to" or was "controlled by" the Indigenous peoples making the claim.[26] The 'acts of occupation' that may suffice to demonstrate such possession and control will vary from group to group. As the Supreme Court held in *Tsilhqot'in*, "[c]ultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation."[27] Instead, the Court adopted an analogy to the common law concept of general occupancy, holding that occupation can be demonstrated where a group asserts possession of territory "over which no one else has a present interest or with respect to which title is uncertain."[28]

While the common law requirement of possession remains, that requirement must be informed in a "culturally sensitive" manner by the "Aboriginal perspective" of the group in question, a perspective which may be ascertained with reference to "its laws, practices, size, technological ability and the character of the land claimed."[29] Occupation, then, is sufficient to ground title where the group bringing a title claim can demonstrate that it asserted possession of the territory in question at the date of sovereignty, an assertion which can be supported by bringing evidence of

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[22] *Ibid*.

[23] *Ibid* at para 38.

[24] *Ibid*.

[25] *Ibid*.

[26] *Ibid*.

[27] *Ibid*.

[28] *Ibid* at para 39, citing *R v Marshall*, 2003 NSCA 105 at para 36, 218 NSR (2d) 78 (CanLII), Cromwell JA [*Marshall* (NSCA)], citing Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Pres, 1989) at 198–200 [McNeil, *Common Law Aboriginal Title*].

[29] *Tsilhqot'in Nation*, supra note 2 at para 41. I discuss the 'Aboriginal perspective' in more detail below.

acts of occupation which indicate control or exclusive stewardship, the indication of which must be assessed with reference to the Aboriginal perspective. On the basis of this understanding of sufficiency, the Court in *Tsilhqot'in* concluded:

> There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.[30]

The territorial conception of title, then, seeks an intention to retain exclusive control over the land.

In addition to *sufficiency* of occupation, a court will also look to the *exclusivity* of historical occupation in assessing title. Exclusivity can be demonstrated by illustrating "the intention and capacity to control the land" over which title is asserted.[31] Exclusivity is based not on *use* of the land, but on *control* of it. This is reflected in Lamer CJC's (as he then was) statement in *Delgamuukw*:

> Finally, at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to <u>exclusive</u> use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right.[32]

Put otherwise, since a finding of Aboriginal title confers a right to exclusive occupation, such occupation is required to prove the existence of such title. The intention to control the land which characterizes exclusive occupation can be demonstrated by proving "that others were excluded from the land" or "that others were only allowed access to the land with the permission of the claimant group."[33] This is the sense in which exclusivity was assessed at trial in *Tsilhqot'in*, where Vickers J "found that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it," and "concluded from this that the Tsilhqot'in treated the land as exclusively theirs."[34]

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[30] *Ibid* at para 42.

[31] *Ibid* at para 48.

[32] *Delgamuukw*, *supra* note 11 at para 155 [emphasis in original].

[33] *Tsilhqot'in Nation*, *supra* note 2 at para 48.

[34] *Ibid* at para 58.

As with the sufficiency analysis, the assessment of exclusivity must be based on the common law and Aboriginal perspectives.[35] Courts have had some difficulty in this regard and, as a result, the 'Aboriginal perspective' has been defined and applied unevenly.[36]

In *Delgamuukw* and *Tsilhqot'in*, the Aboriginal perspective is discussed in two important ways. First, incorporation of the Aboriginal perspective requires that courts interpret historical facts in a manner that does not unfairly prejudice Aboriginal claimants (*e.g.*, by looking to the carrying capacity of territory in interpreting what population numbers say about the intensity of land use).[37] Second, it requires that Aboriginal laws and legal traditions inform the characteristics of title itself. As Lamer CJC stated in *Delgamuukw*, Aboriginal title is "*sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems."[38] In other words, the characteristics of the interest protected by Aboriginal title are shaped in part by Aboriginal legal systems.

Indigenous laws can also serve to demonstrate exclusivity of occupation. In *Delgamuukw*, Lamer CJC employed terms such as 'trespass' and 'permission' while discussing the role of Indigenous laws.[39] Lamer CJC recognized that access to Indigenous lands was regulated by Indigenous laws: "aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation."[40] It

[35] *Ibid* at para 49; *Delgamuukw*, *supra* note 11 at para 156.

[36] For a discussion of the problematic manner in which the "Aboriginal perspective" was conceived in *Marshall; Bernard*, see Nigel Bankes, "*Marshall and Bernard*: Ignoring the Relevance of Customary Property Laws" (2006) 55 UNBLJ 120. Bankes argues at 127 that "while the court recites the relevant approach it pays little more than lip service to the importance of considering the aboriginal perspective precisely because the majority opinion decontextualizes the aboriginal practices from their normative setting."

[37] *Ibid* at 126. See also *Tsilhqot'in Nation*, *supra* note 2 at paras 35–38; *Marshall; Bernard*, *supra* note 12 at paras 45–50.

[38] *Delgamuukw*, *supra* note 11 at para 112.

[39] *Ibid* at paras 156–157.

[40] *Ibid*. The question may be raised as to why it is only the granting of permission to other *Aboriginal* groups to use or occupy land that may reinforce the exclusivity of occupation in this manner. This requirement would seem to tether the test for Aboriginal title not to the date of sovereignty, as required, but instead to the date of contact as in respect of "lesser" Aboriginal rights. If granting permission to *non-Aboriginal* groups could strengthen a claim in the same manner as granting permission to *Aboriginal* groups can, the Acadian presence should be carefully assessed. Olive Dickason, for example, argues that the Mi'kmaq understood the Acadians to have only a usufructuary right to the lands they occupied in Acadia and that the territory remained part of the Mi'kmaq domain: Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland & Stewart, 1992) at 108 [Dickason, *Canada's First Nations*].

follows that those laws may be invoked to demonstrate the "intention and capacity to retain exclusive control" over the lands.[41]

This consideration was lost in the *Marshall; Bernard* decision, where McLachlin CJC reduced the incorporation of the Aboriginal perspective to a translation of historical practices to contemporary common law rights.[42] The importance of Indigenous laws, however, was revived in *Tsilhqot'in* through the emphasis on effective control of territory and a move away from the process of 'translation' that characterized the analysis in *Marshall; Bernard*.[43] The Aboriginal perspective, in each of the senses discussed above, is essential to the assessment of both sufficiency and exclusivity. Indeed, in *Tsilhqot'in*, McLachlin CJC held that the incorporation of the Aboriginal perspective requires that sufficiency and exclusivity not be assessed as distinct requirements that must be satisfied: "Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established."[44] McLachlin CJC explicitly questioned how conceptually distinct "the three elements of the *Delgamuukw* test" should remain, asking whether to consider each characteristic "independently, or as related aspects of a single concept."[45] In response, she quoted the High Court of Australia's decision in *Western Australia v Ward*,[46] where the Court held that the test for Aboriginal title, when taken as a whole, describes "a particular measure of control over access to land" and that "to speak of 'possession' of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it."[47]

Thus, McLachlin CJC held that, while these concepts are "useful lenses through which to view the question of Aboriginal title,"[48] courts must be cautious not to employ them in such a manner so as "to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts."[49] Sufficiency, continuity, and exclusivity are, therefore, framed as *characteristics* of Aboriginal title that can be used to assist a court in determining whether title existed, not strict *requirements* for proving title. Occupation may be established with reference to both physical occupation, drawing on the common law, and exclusive

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[41] *Ibid* at para 156, citing McNeil, *Common Law Aboriginal Title*, *supra* note 28 at 204.

[42] *Marshall; Bernard*, *supra* note 12 at para 70.

[43] *Tsilhqot'in Nation*, *supra* note 2 at para 50.

[44] *Ibid* at para 32.

[45] *Ibid* at para 31.

[46] *Western Australia v Ward*, [2002] HCA 28, 213 CLR 1 (AustLII) [*Ward* cited to CLR].

[47] *Tsilhqot'in Nation*, *supra* note 2 at para 31, citing *Ward*, *supra* note 46 at para 89.

[48] *Tsilhqot'in Nation*, *supra* note 2 at para 32.

[49] *Ibid*.

control, drawing on both the common law and Indigenous law.[50] The role of Indigenous legal systems, then, is central both in shaping the type of occupation required to prove title and as evidence of that occupation.

The extent to which sufficiency and exclusivity should be considered "as related aspects of a single concept" is reflected in the similarity between the two concepts in *Tsilhqot'in*. As discussed above, the determination of sufficiency has come to be assessed to a large extent on the basis of whether the claimant group "acted in a way that would communicate to third parties that it held the land for its own purposes" and "that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group."[51] The exclusivity analysis, for its part, looks to the "intention and capacity to control the land."[52] While the analysis of each characteristic remains distinct, the overriding emphasis for the Court is determining whether "the group exercised effective control at the time of assertion of European sovereignty."[53]

B. Continuity

Continuity is required "[w]here present occupation is relied on as proof of occupation pre-sovereignty."[54] In such cases, there must be continuity between pre-sovereignty and present occupation.[55] A court may not infer pre-sovereignty occupation from present occupation. The continuity requirement has sometimes been interpreted to mean that an Indigenous group seeking to establish title must demonstrate continuity between its occupation at the time of the British assertion of sovereignty and its present occupation. However, as Cromwell JA, then of the Nova Scotia Court of Appeal, stated in *Marshall*:

> …continuity of occupation from sovereignty to the present is not part of the test for aboriginal title if exclusive occupation at sovereignty is established by direct evidence of occupation before and at the time of sovereignty. This view is consistent with the basic principle underpinning *Delgamuukw* that title crystalizes at that time. It also responds to the concern that requiring continuity of occupation after sovereignty would undermine the purpose of s. 35 by giving effect to displacement of aboriginals by Europeans as a result of post-sovereignty indifference to aboriginal rights.[56]

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[50] *Delgamuukw*, *supra* note 11 at para 114; *Tsilhqot'in Nation*, *supra* note 2 at para 41; Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can Bar Rev 255 at 270.

[51] *Tsilhqot'in Nation*, *supra* note 2 at para 38.

[52] *Ibid* at para 48.

[53] *Ibid* at para 50.

[54] *Ibid* at para 45.

[55] *Ibid*.

[56] *Marshall* (NSCA), *supra* note 28 at para 181.

In other words, requiring continuity between occupation at the time of sovereignty and occupation in the current day would undermine section 35 by legitimizing the dispossession of Indigenous peoples. Aboriginal title, as a concept, would be fundamentally altered and divorced from its historical roots as a right grounded in pre-sovereignty occupation of territory. A continuity 'requirement' would introduce a new mode of extinguishing title, which would see any displacement of Aboriginal peoples between the date of sovereignty and the present day as validly extinguishing title.[57] Present occupation is evidence that can be relied upon to help prove occupation at the date of sovereignty. Continuity only arises when present occupation is relied on in this manner and is not a requirement for proving title in and of itself.[58]

III. PROOF OF TITLE IN THE MARITIME PROVINCES

A. The Marshall and Bernard Decisions

The unambiguous reliance on the territorial/exclusive occupation approach in *Tsilhqot'in* provides important guidance in assessing both future claims and the precedential value of past decisions. In the Maritime Provinces, courts have applied both the territorial and site-specific standards, with predictably variable results. In the only title case from the region to reach the Supreme Court, *Marshall; Bernard*, the Court rendered a highly ambiguous decision which left the applicable standard unclear. Past decisions of the lower courts and potential future claims in the Maritime Provinces must therefore be assessed in light of the clarification provided in *Tsilhqot'in*. The trial and appellate decisions in the *Marshall; Bernard* litigation, in particular, require revisiting.

At issue in *Marshall; Bernard* were appeals from two cases in which Mi'kmaw[59] individuals were charged with illegally removing timber from Crown lands. *Marshall* emerged from Nova Scotia; *Bernard*, from New Brunswick. In both cases the defence argued that, as the Mi'kmaq held rights to harvest lumber pursuant either to treaty or to Aboriginal title, provincial authorization to do so was not required.[60] The defendants in both cases were convicted at trial. In both cases the

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[57] See also Kent McNeil, "Continuity of Aboriginal Rights", in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing Ltd, 2004) at 127–150.

[58] *Marshall* (NSCA), *supra* note 28 at para 242.

[59] A note on spelling: "The word Mi'kmaq is plural and is also used when referring to the whole nation. For instance: 'The Mi'kmaq of Eastern Canada.' Mi'kmaw is the singular and adjectival form of Mi'kmaq. Examples: 'I am a Mi'kmaw' or 'A Mi'kmaw man told me a story'… It is also used to refer to the language itself": Trudy Sable and Bernie Francis, *The Language of This Land, Mi'kma'ki* (Sydney, NS: Cape Breton University Press, 2012) at 16.

[60] *Marshall; Bernard*, *supra* note 12 at para 3.

Courts of Appeal set aside the convictions, with an order for a new trial in *Marshall* and an acquittal in *Bernard*.[61]

The contrasting holdings at the trial and appellate courts in *Marshall* and *Bernard* were a function of the application of different legal standards for determining the sufficiency of occupation required to prove title and, correlatively, differing views about whether title should apply on a territorial or site-specific basis. As McLachlin CJC stated in the Supreme Court's decision in *Marshall; Bernard*: "The question before us is which of these standards of occupation is appropriate to determine aboriginal title: the strict standard applied by the trial judges; the looser standard applied by the Courts of Appeal; or some other standard?"[62] The distinctions at issue in the *Marshall* and *Bernard* decisions, then, were identical to those which separated the courts in the *Tsilhqot'in* litigation.

The trial judges in both *Marshall* and *Bernard* applied a site-specific/intensive use standard, requiring evidence of regular use of *each specific site* over which title was claimed. As Daigle JA of the New Brunswick Court of Appeal said of the trial judge in *Bernard*, "[i]n finding (para. 107) that he could not conclude that the land at the *locus in quo* (Sevogle area) was used on a regular basis, the trial judge was fixated on requiring evidence of actual physical use of the locus of the alleged offence."[63] The Courts of Appeal in both Nova Scotia and New Brunswick rejected the site-specific/intensive use standard. At the New Brunswick Court of Appeal, Daigle JA concluded that, in applying a site-specific/intensive use standard, the trial judge erred in law when he "failed to comply with the principles set out in *Delgamuukw*"[64] and "when his central concern became the proof of specific acts of occupation and regular use."[65] Daigle JA articulated the distinction between the site-specific and territorial approaches clearly, stating that:

> … the criteria for occupation and the common law analysis … stand for the proposition that the common law concept of occupation requires proof of a "definite tract of land" (i.e. the Northwest Miramichi watershed) over which the Mi'kmaq "habitually and exclusively ranged". To constitute occupation, a specific confined area within the claimed territory need not be "in actual use by them at any given moment". Moreover, the aboriginal perspective on the occupation of and association with their lands must be taken into account. On that basis, the hunting grounds of a hunting and gathering aboriginal community, considering their habits and modes of life and the resulting occupation pattern of their lands, would be as much in

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[61] *Ibid* at para 4.

[62] *Ibid* at para 44.

[63] *R v Bernard*, 2003 NBCA 55 at para 91 (Daigle JA), 262 NBR (2d) 1 (CanLII) [*Bernard* (NBCA)]. The numbering of the paragraphs in this decision restart at the beginning of the reasons for decision provided by each judge. To avoid confusion, I note the name of the judge in parentheses rather than attempting to re-number the paragraphs.

[64] *Ibid* at para 115 (Daigle JA).

[65] *Ibid* at para 118 (Daigle JA); see also paras 123, 124, and 127 (Daigle JA).

> their actual possession and use as their permanent settlements. The common law does not require proof of intensive, regular or physical use of every narrowly confined area within a claimed territory to constitute occupation of that territory.[66]

The same was articulated at the Nova Scotia Court of Appeal by Cromwell JA (as he then was). Cromwell JA framed the question, not as "whether exclusive occupation of *the cutting sites* was established," but as "whether exclusive occupation of a *reasonably defined territory which includes the cutting sites*, was established."[67] The proper standard by which title claims must be assessed looks to the exclusive occupation of territory. As Cromwell JA stated:

> … the courts below erred in requiring proof of regular, intensive use of the cutting sites to establish aboriginal title. In my opinion, this standard of occupation misapplies the common law perspective, fails to give equal weight to the aboriginal perspective, and does not take into account the nature of the land under consideration.[68]

For the Courts of Appeal, the application of the site-specific standard amounted to an error of law.[69]

The Supreme Court in *Tsilhqot'in* explicitly adopted Cromwell JA's reasoning in *Marshall.*[70] In *Tsilhqot'in*, the Supreme Court dismissed the application of the site-specific standard by the British Columbia Court of Appeal, stating that "[t]he alleged failure to identify particular areas with precision likewise only makes sense if one assumes a narrow test of intensive occupation."[71] The evident symmetry between the Supreme Court's *Tsilhqot'in* decision and the decisions of the New Brunswick and Nova Scotia Courts of Appeal in the *Bernard* and *Marshall* decisions, respectively, raises questions about the precedential value of the Supreme Court's decision in *Marshall; Bernard*. Though *Marshall; Bernard* would be directly on point to an Aboriginal title claim in New Brunswick or Nova Scotia, following *Tsilhqot'in* there is good reason to suspect that a future title claim may produce a different result, one more in line with the decisions of the Courts of Appeal in *Marshall* and *Bernard*.

While there is not space here to review the ambiguities of the *Marshall; Bernard* decision in detail, a close reading of the case reveals instances where McLachlin CJC embraced a broad definition of 'occupation' as including more than

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[66] *Ibid* at para 90 (Daigle JA); *Delgamuukw*, *supra* note 11 at para 149.

[67] *Marshall* (NSCA), *supra* note 28 at para 183 [emphasis added].

[68] *Ibid* at para 182.

[69] According to Cromwell JA, the trial judge "erred in law by requiring the appellants to prove intensive, regular use of the cutting sites": *ibid* at para 183.

[70] *Tsilhqot'in Nation*, *supra* note 2 at para 39.

[71] *Ibid* at para 60.

only intensively used sites,[72] instances where the proper standard was left ambiguous,[73] and others still where occupation was tied to the physical occupation of particular sites as in a site-specific approach.[74] In respect of the latter, most indicative was McLachlin CJC's statement that:

> The trial judge in each case applied the correct test to determine whether the respondents' claim to aboriginal title was established. In each case they required proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of assertion of sovereignty.[75]

Here, McLachlin CJC stated, contrary to the findings of the Courts of Appeal, that the trial courts applied the correct legal standard in emphasizing the use *of the cutting sites themselves*. It is difficult to see how this differs, if at all, from the site-specific standard rejected by the Supreme Court in *Tsilhqot'in*. This concern was expressed by LeBel J in his concurring opinion in *Marshall; Bernard* when he wrote that the majority's approach was "too narrowly focused on common law concepts relating to property interests."[76]

In sum, in the period following *Delgamuukw*, two clearly defined standards of occupancy came to be applied in Aboriginal title cases. One, applied by the New Brunswick Court of Queen's Bench in *Bernard* and the Nova Scotia Provincial Court in *Marshall*, was a site-specific standard that would, by dint of the requirement of regular and intensive use, necessarily confine title to small, specific sites. The other, applied by the Courts of Appeal in *Bernard* and *Marshall*, was a territorial standard that would, by its grounding primarily in the *exclusivity* rather than the *intensity* of use, result in the possibility of findings of title over broad territories.

The choice of which standard of occupancy to use has an impact on the types of evidence required to establish title. To satisfy the site-specific standard, a party must bring evidence of regular and intensive use of a particular site. On the territorial standard, by contrast, evidence should demonstrate that "the group exercised effective control" over the territory in question.[77] In terms of demonstrating effective control, there must be an emphasis on the role of Indigenous legal and political traditions as evidencing exclusive occupation. As Professor McNeil stated:

> In future cases … I think it will be important for Aboriginal title claimants to present strong evidence of the existence and application of Aboriginal law in relation to land, in addition to evidence of physical occupation,

[72] *Marshall; Bernard*, *supra* note 12 at paras 64–66.

[73] *Ibid* at para 70.

[74] *Ibid* at para 76.

[75] *Ibid* at para 72.

[76] *Ibid* at para 110.

[77] *Tsilhqot'in Nation*, *supra* note 2 at para 50.

> particularly where they are asserting title over their traditional territory rather than over specific sites.[78]

In respect of the question that animates this section—that is, whether title existed in the Maritime Provinces—four conclusions become clear. First, new litigation should be tried on the standard laid out in *Tsilhqot'in*, which would apply an analysis much closer to that found in the decisions from the New Brunswick and Nova Scotia Courts of Appeal in *Bernard* and *Marshall* than that applied by the Supreme Court in *Marshall; Bernard*. Second, even on the more restrictive site-specific standard, it is very likely that title *could* be proven to specific sites. At the Nova Scotia Provincial Court in *Marshall*, for example, the trial judge stated that "the Mi'kmaq of the 18th century on mainland Nova Scotia probably had aboriginal title to lands around their local communities, but not to the cutting sites."[79] Third, there is good reason to believe that a stronger evidentiary case could be made for title in the region. As Lebel J noted in his concurring opinion in *Marshall; Bernard*, the inability of the Mi'kmaq to prove title was, in his view, largely due to an insufficient evidentiary record.[80] In particular, more evidence of the Mi'kmaq legal and political framework, insofar as it could demonstrate exclusive control of the territory, should have been brought. Fourth, *Marshall; Bernard* should not be taken to foreclose a future finding of title in favour of the Nova Scotia or Miramichi Mi'kmaq, a view that was stated explicitly by Lebel J in his concurring opinion.[81]

These conclusions are reinforced by the historical record. Though it is beyond the scope of this paper to thoroughly engage the historical record pertaining to proof of title, it is worth briefly reviewing some of the salient evidence that demonstrates the likelihood that title could be proved on the basis of the standard articulated in *Tsilhqot'in*. Again, this analysis is not meant to make claims as to the precise geographic areas where title may be demonstrated to have existed. Rather, it is meant only to demonstrate the high probability that title could be proven to have existed in the region.

B. Historical Occupation

Aboriginal title is established with reference to Indigenous occupation of the territory in question at the date of the British assertion of sovereignty. That date was determined by the courts to be 1713 for mainland Nova Scotia, 1759 for New Brunswick, and 1763 for Cape Breton and Prince Edward Island.[82] Assessing the

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[78] Kent McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69:2 Sask L Rev 281 at 308 (QL).

[79] *R v Marshall*, 2001 NSPC 2 at para 143, 191 NSR (2d) 323 (CanLII) [*Marshall* (NSPC)].

[80] *Marshall; Bernard*, *supra* note 12 at paras 141–142.

[81] *Ibid* at para 141.

[82] See *Marshall* (NSPC), *supra* note 79 at para 28; *Bernard* (NBCA), *supra* note 63 at para 171 (Daigle JA). I have accepted these dates here, though that should not be taken as an indication that I consider them settled or correct. Given the importance of the date of sovereignty for determining title, it is an

existence of Aboriginal title in the Maritime Provinces, then, requires assessing whether the Aboriginal peoples of the region exclusively occupied given territories to the extent required to establish title at those dates. Again, it is clear following *Tsilhqot'in* that title claims will be assessed on a territorial/exclusive occupation standard, meaning that title may be proven to broad tracts of land and that each particular site within that territory need not have been intensively used.

That the Mi'kmaq, Wuastukwiuk (Maliseet), and Passamaquoddy physically occupied many sites in the Maritime Provinces at sovereignty is beyond question. As Curran J noted at the Nova Scotia Provincial Court:

> When the British acquired sovereignty in 1713, the only people living in most of mainland Nova Scotia were Mi'kmaq. The Mi'kmaq had lived in Nova Scotia since centuries before Europeans arrived. There is no reason to believe any other aboriginal group lived here during that time or later. There were about 2,500 Acadians in the province, but most of them lived in a few concentrated areas along the Bay of Fundy. Besides that, there was just a small British garrison at Annapolis.[83]

Though Curran J stated that there were almost certainly "substantial tracts of land unclaimed and largely unused between the communities,"[84] he also observed that "[t]he Mi'kmaq communities were not isolated from each other, particularly in the summer. They spoke a common language with little variation in dialect throughout Nova Scotia and beyond. They could and did travel the length and breadth of the mainland using the many interconnected waterways."[85] He concluded that "[t]here is no doubt the Mi'kmaq moved at will throughout mainland Nova Scotia in 1713,

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issue that should be examined closely. For problems identifying the date of sovereignty, see Margaret McCallum "After *Bernard and Marshall*" (2006) 55 UNB LJ 73 at 75 note 7: "Historians may puzzle over the difference between the date of acquisition of sovereignty in New Brunswick and in Cape Breton, especially as the trial judge in *Marshall* concluded that Britain 'probably acquired sovereignty over Cape Breton' in 1758."

[83] *Marshall* (NSPC), *supra* note 79 at para 126.

[84] *Ibid* at para 131.

[85] *Ibid* at para 129. It is useful to compare Curran J's comments to Vickers J's description of Tsilhqot'in occupation at the trial level in *Tsilhqot'in Nation*:

> At the time of sovereignty assertion, Tsilhqot'in people living in the Claim Area were semi-nomadic. They moved up and down the main salmon bearing river, the Tsilhqox (Chilko River), in season. They fished the smaller lakes to the east and west of the Tsilhqox, particularly in the spring season. They gathered berries, medicines and root plants in the valleys and on the slopes of the surrounding mountains. They hunted and trapped across the Claim Area, taking what nature had to offer. Then, for the most part, they returned on a regular basis to winter at Xeni (Nemiah Valley), on the eastern shore of Tsilhqox Biny (Chilko Lake), on the high ground above the banks of the Tsilhqox, and on the shores of adjacent streams and lakes, from Naghatalhchoz Biny (Big Eagle Lake) and eastward into Tachelachíed.

Tsilhqot'in Nation v British Columbia, 2007 BCSC 1700 at para 953, [2007] BCJ No 2465 (QL) (CanLII) [*Tsilhqot'in Trial*].

except perhaps in the Acadian areas and at Annapolis."[86] In respect of the Mi'kmaq in New Brunswick, Daigle JA found "that by 1759 there had been no displacement by Europeans of the Mi'kmaq occupation of their traditional territory,"[87] that "no other aboriginal groups or Europeans challenged the exclusive use and occupation of the Northwest Miramichi watershed by the Mi'kmaq between contact in 1500 and British sovereignty in 1759,"[88] and "that the Mi'kmaq were peaceably and exclusively occupying the Northwest Miramichi watershed."[89]

Curran J similarly found that there had been little displacement of the Mi'kmaq on Cape Breton, stating that "the only European settlement of any consequence other than Louisbourg was a small French community at Port Toulouse (St. Peters)."[90] This led him to the extremely important factual conclusion that:

> [t]he question of exclusiveness really does not arise in this case. There was no other aboriginal group in Nova Scotia in 1713 or 1763. On the mainland in 1713 there were a few Acadian enclaves and one small British outpost. In Cape Breton between the fall of Louisbourg and 1763 there was one small French community and some scattered French settlers. There is no reason to believe there was any European on any of the cutting sites, or for that matter on most of the mainland or in most of Cape Breton, at the relevant times. That leaves the question of occupancy.[91]

Given that this factual finding was not disturbed by a higher court, and recalling how the tests for sufficiency and exclusivity emphasize the exclusive occupation and control of territory, this is an extremely important finding.

The Mi'kmaq were also present on pre-sovereignty Prince Edward Island, which was unquestionably an important part of their traditional territory.[92] While the Mi'kmaq undoubtedly occupied the island before European arrival, the extent of their occupation at the time of the British assertion of sovereignty is more difficult to peg with precision. After the fall of Louisbourg on 26 July 1758, the British decided to evacuate the Acadians and Mi'kmaq from Prince Edward Island, though about 200

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[86] *Marshall* (NSPC), *supra* note 79 at para 131.

[87] *Bernard* (NBCA), *supra* note 63 at para 171 (Daigle JA).

[88] *Ibid*.

[89] *Ibid* at para 148 (Daigle JA).

[90] *Marshall* (NSPC), *supra* note 79 at para 132.

[91] *Ibid* at para 137. In 1703 there were 1,324 Acadians on mainland Nova Scotia: William C Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002) at 103 [Wicken, *Mi'kmaq Treaties*].

[92] Rusty Bitterman, "Mi'kmaq Land Claims and the Escheat Movement in Prince Edward Island" (2006) 55 UNB LJ 172 at 173 [Bitterman, "Escheat Movement"]; LFS Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: University of British Columbia Press, 1979) at 113 [Upton, *Indian-White Relations*]; Margaret McCallum, "Problems in Determining the Date of Reception in Prince Edward Island" (2006) 55 UNB LJ 3 at 3 [McCallum, "Date of Reception in PEI"].

of each remained on the island.[93] As of the 1830s there were about 500 Mi'kmaq on the island.[94] An 1838 petition from Oliver Thomas LeBone, Chief of the Prince Edward Island Mi'kmaq, stated that "they were but 'a skeleton' of 'our once numerous tribe.'"[95] Prior to the British acquisition of sovereignty, however, there was a French presence on the island, with many Acadians being expelled from the island following the fall of Louisbourg.[96]

There is also unequivocal historical evidence of Wuastukwiuk occupation in the region, particularly in the Saint John River Valley. Indeed, the British referred to them as the 'St. John River Indians', and 'Wuastukwiuk' itself means 'people of the Wulastuk (Saint John) River'.[97] The Wuastukwiuk travelled the length of the river, camping along its shores in the summer and travelling into the forests in the winter to hunt.[98] As historian W.O. Raymond wrote of the Wuastukwiuk:

> The dark recesses of the forest, the sunny glades of the open woodland, the mossy dells, the sparkling streams and roaring mountain torrents, the quiet lakes, the noble [Saint John] river flowing onward to the sea with islands here and there embosomed by its tide—all were his. The smoke of his wigwam fire curled peacefully from Indian village and temporary encampment. He might wander where he pleased with none to say him nay.[99]

While such a statement lacks the specificity required to ground a claim for Aboriginal title, it nonetheless provides a clear view of the understanding of pre-sovereignty Wuastukwiuk occupation of the Saint John River region from the eyes of an historian at the turn of the 20th century.

One of the principal Wuastukwiuk sites on the river was at Medoctec, just south of present-day Woodstock.[100] Medoctic was well beyond the reach of English settlement until well after the arrival of the Loyalists in 1784–1785 and was an

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[93] McCallum, "Date of Reception in PEI", *supra* note 92 at 4.

[94] Bitterman, "Escheat Movement", *supra* note 92 at 173.

[95] *Ibid*.

[96] By 1742 there were 2,180 Acadians on Prince Edward Island (Île Royal); by 1758, only about 200: Wicken, *Mi'kmaq Treaties*, *supra* note 91 at 103; Bitterman, "Escheat Movement", *supra* note 92 at 173.

[97] Wicken, *Mi'kmaq Treaties*, *supra* note 91 at 29.

[98] Alan D McMillan, *Native Peoples and Cultures of Canada: An Anthropological Overview*, 2d ed (Vancouver: Douglas & McIntyre, 1995) at 49–55.

[99] WO Raymond, *Glimpses of the Past History of the River St John, AD 1604-1784* (St John, NB, 1905) at 5.

[100] This site is not to be confused with present-day Meductic, which is further south of the traditional site. See DG Bell, "A Commercial Harvesting Prosecution in Context: The Peter Paul Case, 1946" (2006) 55 UNB LJ 86.

important portage site linking Wuastukwiuk territory to their Abenaki neighbours.[101] There are many reports from early explorers detailing the Wuastukwiuk presence, archeological sites running the length of the Saint John River and its tributaries, and many early maps representing Wuastukwiuk villages from Fredericton to Madawaska.[102] In sum, there is little doubt that the Wuastukwiuk occupied the Saint John River Valley at the date of the assertion of sovereignty.

Occupation can also be demonstrated for the purpose of establishing title with reference to prevailing Aboriginal conceptions of territoriality, as evidenced in part by their distinct legal and political orders.[103] In this light, it is notable that Curran J stated:

> The Mi'kmaq had, as Dr. von Gernet put it, "a sense of territoriality." That was clear from everything they said to the British from 1713 to 1760 and beyond well into the 19th century. They made it clear they considered all of Nova Scotia their land, their territory. They repeatedly accused the British of taking their land without permission.[104]

It is clear that the Mi'kmaq considered themselves to have the capacity to exclude others and to do so pursuant to their own internal legal regimes.[105] As Professor

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[101] *Ibid* at 87. This system of waterways was said to have been "used by the Indians from time immemorial": George Frederick Clarke, *Six Salmon Rivers and Another* (Fredericton, NB: Brunswick Press, 1960) at 92.

[102] Tom FS McFeat, "Two Malecite Family Industries: A Case Study" (1962) 4:2 Anthropologica 233 at 236.

[103] In the trial decision in *Tsilhqot'in*, Vickers J spent considerable time recounting the *Tsilhqot'in* stories that were given as evidence at trial: *Tsilhqot'in Trial*, *supra* note 85 at paras 146–148. For an analysis of Mi'kmaw legal principles as applied to contemporary jurisprudence, see Jamie Battiste, "Understanding the Progression of Mi'kmaw Law" (2008) 31:2 Dal LJ 311 at 325 (QL):

> The creation story of the Mi'kmaw establishes the relations between the Mi'kmaq and their ecology; it also generates Mi'kmaw knowledge and legal traditions behind their aboriginal and treaty rights. Mi'kmaq knowledge is at the root of the oral tradition and ceremonies and in the teachings, stories, and performances that are passed down from generation to generation.

See also James [sákéj] Youngblood Henderson, "First Nations Legal Inheritances in Canada: The Míkmaq Model" (1995) 23 Man LJ 1 (QL) [Henderson, "Legal Inheritances"]. For Mi'kmaw stories see Rita Joe & Lesley Choyce, *The Mi'kmaq Anthology* (Lawrencetown Beach, NS: Pottersfield Press, 1997); Alden Nowlan, *Nine Micmac Legends* (Hantsport, NS: Lancelot Press, 1983); Ruth Holmes Whitehead, *The Old Man Told Us: Excerpts from Micmac History 1500-1950* (Halifax: Nimbus Publishing, 1991).

[104] *Marshall* (NSPC), *supra* note 79 at para 135. Of crucial importance, British officials at the date of sovereignty were "aware that the Mi'kmaq claimed a right to the land": Wicken, *Mi'kmaq Treaties*, *supra* note 91 at 122.

[105] The Maliseet also believed they had the right to exclude others from their territory, as evidenced by their warning to the British to leave the Saint John River Valley in 1778. The Maliseet spokesman stated:

> …the King of England with his Evil Councilors has been Trying to Take away the Lands & Liberties of our Country… Now, as the King of England has no business, nor ever had any, on this River, we Desire you to go away with your men in Peace, & Take all those Men who

William Wicken, an expert witness in the both the *Marshall* and *Bernard* cases and a number of other cases involving Aboriginal peoples in the Maritime region, stated on the stand in *Bernard*:

> [T]here was a protocol, there was a relationship, a customary relationship that evolved over time between these people and which governed their relationships. If somebody come [sic] on to your territory then in fact there was a law, if I can use that word, aboriginal law, their law, about how this infringement upon their territory would be dealt with.[106]

This legal regime pre-dated the arrival of Europeans. Professor Sákéj Henderson, commenting on the views expressed by early Europeans in the region, stated:

> Neither European adventurers nor missionary priests of the seventeenth century who encountered the sacred order of the Míkmaq (Míkmaki) perceived an unorganised society. They did not find the anarchy that their state of nature theory presumed. Instead, they reported a natural order, with a well-defined system of consensual government and both an international and domestic law.[107]

In other words, at the date of sovereignty, there was a clearly defined territory over which the Mi'kmaq exercised exclusive occupation, evidenced not only by their use of the land, but also by the existence of complex social, political, and economic structures linking communities across the region. The international elements of Mi'kmaw law were recognized both by other Indigenous nations and by the Imperial European powers, evidenced, for example, by the fact that in 1719 the British instructed the newly commissioned governor, Richard Philipps, "to deal with the Mi'kmaq according to the protocols of Algonkian diplomacy."[108] The British not only recognized that the Mi'kmaq had existing diplomatic protocols; the British instructed their early governors in Nova Scotia to engage the Mi'kmaq *according to* those protocols.[109] The existence of the Wabanaki Confederacy, which included groups inhabiting what is now the Maritime Provinces, the Gaspé Peninsula, and

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> has been fighting or Talking against Amarica [sic]. If you Dont [sic] go Directly, you must take Care of yourself, your Men, & all your English Subjects, on this River for if any or all of you are Killed it is not our faults, for we give you Warning Time Anough [sic] to Escape.

James P Baxter, ed, *Documentary History of the State of Maine* (Portland, 1910) vol 16 at 74–75, reprinted in WD Hamilton and WA Spray, eds, *Source Materials Relating to the New Brunswick Indian* (Fredericton, NB: Hamray Books, 1977) at 50–51.

[106] *Bernard* (NBCA), *supra* note 63 at para 146 (Daigle JA) [emphasis omitted].

[107] Henderson, "Legal Inheritances", *supra* note 103 at 10. See also James [sákéj] Youngblood Henderson, *The Mikmaw Concordat* (Halifax: Fernwood Publishing, 1997) at 34.

[108] Geoffrey Plank, *An Unsettled Conquest: The British Campaign Against the Peoples of Acadia* (Philadelphia: University of Pennsylvania Press, 2001) at 70.

[109] Reliance on Aboriginal protocols was commonplace in the early treaty-making period: See James [sákéj] Youngblood Henderson, "Míkmaw Tenure in Atlantic Canada" (1995) 18:2 Dal LJ 196 at 240.

parts of New England, is further evidence of the pan-national scope of Indigenous law in the region.[110]

Much more evidence could be brought to illustrate the existence of Indigenous legal orders at the time of the assertion of British sovereignty. Here I have tried only to illustrate the likelihood that occupation sufficient to ground a finding of title could be established and that, indeed, such occupation has already been established as a finding of fact by trial courts in both Nova Scotia and New Brunswick. This is not to say that occupation sufficient to ground a declaration of Aboriginal title can or will be demonstrated over the entirety of the region. As in the trial decision in *Tsilhqot'in*, evidence of presence throughout a traditional territory can be recognized while falling short of the evidentiary requirements required to establish title.[111] Nonetheless, it seems clear that title can be proven to have existed over broad territories in the region where the correct legal standard is applied.

C. Title by Treaty

The Treaties of Peace and Friendship also provide evidence of the existence of Aboriginal title.[112] The potential importance of treaties as evidence establishing title was recognized by Lamer CJC in *Delgamuukw*.[113] It is widely accepted that the

[110] *Ibid* at 239. See also Harald EL Prins, *The Mi'kmaq: Resistance, Accommodation, and Cultural Survival* (Orlando: Harcourt Brace College Publishers, 1996) at 117–119 [Prins, *Cultural Survival*].

[111] See, e.g., *Tsilhqot'in Trial*, *supra* note 85 at para 928.

[112] For a more detailed account of this argument see Hamilton, *Aboriginal Title in Canada's Maritime Provinces*, *supra* note 1 at 40–49. Here I will focus only on the treaty of 1725-26. This treaty was renewed by later treaties in 1749, 1752, and 1760-61, with the validity of the latter two upheld by the Supreme Court in *Simon* and *Marshall #1*, respectively. See *Simon v The Queen*, [1985] 2 SCR 387 at 398–401, 24 DLR (4th) 390 (CanLII) [*Simon*]; *R v Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513 (CanLII) [*Marshall #1* cited to SCR]. Though the Mi'kmaq, in particular, have most often relied on the treaties of 1752 and 1760-61 to assert their rights, all of the mid-century treaties renewed the provisions of the 1725-26 treaty. While a thorough analysis of treaty rights in the region would require an analysis of each treaty, the 1725-26 treaty contains the most explicit provisions regarding land. This treaty is sometimes referred to as the 'Treaty of 1725': *R v Sappier; R v Gray*, [2006] 2 SCR 686 at para 62, 309 NBR (2d) 199 (CanLII) [*Sappier; Gray*]. The treaty in question was negotiated in November and December of 1725 and ratified by individual communities in 1726. I have followed Professor Wicken (in *Mi'kmaq Treaties*, *supra* note 91) in referring to the treaty as the '1726 treaty', relying on the dates of ratification, though I take no issue with the use of 1725. Much of the confusion about the 1726 treaty results from a lack of clarity regarding the distinction between 'Dummer's Treaty' and 'Mascarene's Treaty'. Put simply, the treaties were negotiated at the same time, with one applying to the Abenaki of New England and the other to the Mi'kmaq, Maliseet and Passamaquoddy. For a full account of the distinction, see Andrea Bear Nicholas, "Mascarene's Treaty of 1725" (1994) 43 UNB LJ 3. The validity of the treaty and its applicability to the Maliseet was conceded by the Crown in *Sappier; Gray* and the Crown was estopped from arguing against the validity of the treaty of 1725-26 on the basis of issue estoppel in *R v Paul*, 2014 NBPC 44 at paras 15–20 (CanLII).

[113] In *Degamuukw*, the Supreme Court held that treaties may assist in determining the Aboriginal perspective in title claims. Lamer CJC stated that

> …aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation.

Treaties of Peace and Friendship did not cede Aboriginal title in the Maritime Provinces to the Crown.[114] It is often thought that this is the case because the treaties allegedly said nothing about land.[115] This is, however, an oversimplification: The 1726 treaty *did*, in fact, deal with the future settlement of land in the region.

A reading of the text of the 1726 treaty and an examination of the historical context in which it was signed demonstrate that the treaty recognizes the existence of title. Two clauses are of particular importance. First, Clause 3 of the *Articles of Peace and Agreement* contained in the 1726 treaty states that "the Indians shall not molest any of His Majesty's Subjects or their Dependants in their Settlements already made or Lawfully to be made."[116] Under this clause, the Indigenous signatories agree not to molest any British settlements that have already been made or, crucially, those that are lawfully constructed after the signing of the treaty. The treaty clearly contemplated that a lawful procedure existed which governed any British settlement subsequent to the treaty. The first important point about this is that there was virtually no British settlement at the time the 1726 treaty was signed, the only permanent occupation being the fort at Annapolis. All British settlement subsequent to 1726—that is, all settlement outside the fort at Annapolis—was bound to occur "lawfully." Unfortunately, the term 'lawfully' is not defined in the treaty itself. Nonetheless, a look at the historical context in which the treaty was signed provides insight into how the signatories would have understood the term.

In the 17th and 18th centuries, the British policy was to purchase or otherwise acquire the Aboriginal interest in land before settlement.[117] There are many reasons to believe this policy was in the contemplation of the signatories to the

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> Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.

Delgamuukw, *supra* note 11 at para 127. Though Lamer CJC's comment focuses on treaties between Aboriginal nations, there is no reason the same logic cannot apply to treaties between Aboriginal and European nations. Such treaties were likely not in Lamer CJC's contemplation because the majority of such treaties were signed after confederation and were concerned with the cession of land, neither of which is the case in the Maritime Provinces.

[114] *Simon*, *supra* note 112 at 410. At the Nova Scotia Court of Appeal, Cromwell JA noted that "the Supreme Court of Canada on two occasions has expressed the view that the 1760 - 61 treaties do not cede land": *Marshall* (NSCA), *supra* note 28 at para 98 [emphasis in original]. See also *R v Isaac* (1975), 13 NSR (2d) 460 at 479, 9 APR 460 (CA) (WLNext Can) [*Isaac* (NSCA)]. The Department of Aboriginal Affairs and Northern Development website recognizes that "[u]nlike later treaties signed in other parts of Canada, the Peace and Friendship Treaties did not involve First Nations surrendering rights to the lands and resources they had traditionally used and occupied": Department of Aboriginal Affairs and Northern Development Canada, "Peace and Friendship Treaties", online: <https://www.aadnc-aandc.gc.ca/eng/1100100028589/1100100028591#a3>.

[115] DG Bell, "Was Amerindian Dispossession Lawful? The Response of 19th-Century Maritime Intellectuals" (2000) 23:1 Dal LJ 168 at 174 (QL) [Bell, "Amerindian Dispossession].

[116] Lisa Patterson, ed, *The Mi'kmaq Treaty Handbook* (Sydney, NS: Native Communications Society of Nova Scotia, 1987) at 19–20 [Patterson, *Mi'kmaq Treaty Handbook*].

[117] Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, Mass: Harvard University Press, 2005) at 22–28; Wicken, *Mi'kmaq Treaties*, *supra* note 91 at 113, 139; Dickason, *Canada's First Nations*, *supra* note 40 at 107–108.

1726 treaty. It is important to recall that Aboriginal peoples came to the treaty table with considerable experience in treaty-making and diplomatic relations, both with other Indigenous nations and with Europeans. The early Abenaki treaties with the British, then, provide insight into how the Mi'kmaq and Wuastukwiuk would have conceived of treaties with the British. The Abenaki signed four treaties with the British between 1678 and 1713.[118] Other members of the Wabanaki Confederacy would have been aware of these treaties, the circumstances that gave rise to them, and the solutions sought through treaty negotiations. These treaties were explicitly concerned with British settlement. Clause 3 of the *Articles of Peace and Agreement* of the 1726 treaty, which prohibited unlawful future settlements, was influenced by the earlier Abenaki treaties.[119] Central to the Abenaki treaties was the agreement that any future British settlement would require Indigenous permission and that compensation would be required for any lands to be ceded for the purposes of settlement.[120] The war of 1722–1725 between the British and members of the Wabanaki Confederacy was a direct result of British incursions onto Abenaki lands; as Professor Wicken stated, "the war was about land."[121] The 1726 treaty, then, was the product of long-standing disputes over British settlement.

This returns us to the interpretation of the phrase 'lawfully to be made', which it seems should be interpreted as meaning 'having been purchased or otherwise ceded'. Though the British insisted that previous purchases be recognized and that they had jurisdiction over the entirety of the land in the colonies in question, they accepted the need to purchase lands or otherwise obtain Aboriginal consent before settling them. Thus, Massachusetts negotiators at the treaty conference in 1725 told the Abenaki: "When we come to Settle the Bounds We shall neither build or settle any where but within our own Bounds so settled, without your Consent;" they further promised that "you will certainly be paid for such Lands as you shall hereafter dispose of to the English."[122] It is evident from the foregoing that the British signatories to the 1726 treaty understood the Indigenous signatories to have some form of ownership over or right to the territory they occupied; it would be inconsistent to hold as a policy the need to purchase or obtain a surrender of land absent the belief that the other party had some form of ownership interest. Put otherwise, it amounts to a recognition that the Indigenous peoples had the "intention and capacity to control the land" required by the 'sufficiency' and 'exclusivity' elements of the *Delgamuukw* test.

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[118] John G Reid, *Essays On Northeastern North America: Seventeenth and Eighteenth Centuries* (Toronto: University of Toronto Press, 2008) at 155. Professor Wicken argues that "the experience of the Abenaki would have been central to how Mi'kmaq leaders understood British policies": Wicken, *Mi'kmaq Treaties*, *supra* note 91 at 128.

[119] Wicken, *supra* note 91 at 118-128.

[120] The war of 1722–1725 was a result of "the British intent to enclose lands and Abenaki attempts to mark the limits of English settlement": Wicken, *Mi'kmaq Treaties*, *supra* note 91 at 74.

[121] *Ibid* at 87.

[122] *Ibid* at 128.

The view that the treaties recognize and protect an Aboriginal interest in land was expressed by Turnbull J at the New Brunswick Court of Queen's Bench in the *Peter Paul* decision.[123] There, Mr. Peter Paul asserted a treaty right to harvest timber in response to a charge of illegally removing timber from Crown land. In dismissing the charges against Mr. Peter Paul, Turnbull J stated:

> I am of the opinion that the Indians of New Brunswick do have land rights and that such are treaty rights. I believe it is like a usufructuary right. It does not matter what such rights are called. It is not a right restricted to personal use, but a full blown right of beneficial ownership and possession in keeping with the concept of this is our land - that is your land.[124]

On this interpretation, the 1726 treaty clearly distinguished between Indigenous and non-Indigenous lands and was designed to protect the Indigenous interest in those lands. As Turnbull J held, "[g]overnments must accept that Dummer's Treaty was understood to protect Indian land."[125] The 1726 treaty did not, on this view, reflect "a recognition by the Indians that the Crown held a complete title to the soil, to the exclusion of aboriginal title."[126] Turnbull J held that the terms 'molested' and 'lawfully to be made', as used in the treaty, could not have had the effect of extinguishing title, holding that "there was 'sharp practice' if this is the wording whereby the Micmac and particularly the St. Johns and Passamaquoddy Indians lost their lands" and that "[t]o say the English Monarch could make fee simple Crown grants ignoring Indians' land rights on the basis of these words is wrong."[127]

The New Brunswick Court of Appeal, however, overturned Turnbull J's findings, holding that the 1726 treaty "does not create or acknowledge an aboriginal title to land. Indeed, by it, Mr. Peter Paul's ancestors acknowledge not only the Crown's jurisdiction and dominion over the lands, but also the Crown's title and rightful possession to the lands."[128] Though much more could be said about this decision, two points will serve to illustrate its dubious precedential value. First, while the Court of Appeal did explicitly overturn Turnbull J on the question of a treaty-protected right to land, the principal issues on which the decision was overturned were that Turnbull J had taken judicial notice of disputed historical facts well beyond the permissible scope of such notice, had decided a matter that had not been argued before the Court, had relied on his own external research rather than the evidence put properly before the Court, and had decided points of law on which neither party to

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[123] *R v Peter Paul* (1997), 193 NBR (2d) 321, 1997 CarswellNB 392 (QB) (WLNext Can) [*Peter Paul* (NBQB)].

[124] *Ibid* at para 69.

[125] *Ibid* at para 71.

[126] Brian Slattery, "Some Thoughts on Aboriginal Title" (1999) 48 UNB LJ 19 at 36 [Slattery, "Some Thoughts"].

[127] *Peter Paul* (NBQB), *supra* note 123 at para 46.

[128] *R v Peter Paul* (1998), 196 NBR (2d) 292, 1998 CarswellNB 117 at para 27 (CA) (WLNext Can).

the case had been given the opportunity to make representations to the Court.[129] Put simply, the trial decision was overturned primarily on procedural and technical grounds. Such issues would likely not arise in most cases.

Second, the Court of Appeal's specific findings on Aboriginal title itself are also of questionable precedential value. The Court of Appeal held that, in the treaty promises of 1726, the Indigenous signatories "acknowledge not only the Crown's jurisdiction and dominion over the lands, but also the Crown's title and rightful possession to the lands."[130] As Brian Slattery has remarked, however, "this inference seems to ignore a number of fundamental considerations."[131] Slattery has pointed out two relevant problems with the Court of Appeal's decision. First, the decision overlooks the fundamental distinction between sovereignty and property rights. In overlooking this distinction, the Court also overlooked the well established doctrine of continuity, which recognized that, where there was a change in sovereignty, "the existing property rights of the local inhabitants presumptively survive the change of sovereignty and are recognizable in the courts established by the new sovereign."[132] Second, the Court wrongly assumed that the terms 'just titles' and 'Jurisdiction and Dominion' dealt with Indigenous land rights or gave the Crown property rights unburdened by existing Aboriginal title.[133] Beyond these two problems, it is important to note that, although the Court of Appeal upbraided Turnbull J for deciding an issue that was not argued before the Court (and thus on a wanting evidentiary record), the Court of Appeal then relied on that same record to make extremely important findings regarding title in the region. Thus, while the Court of Appeal's ruling in respect of the procedural concerns surrounding Turnbull J's decision was justified, its conclusions regarding Aboriginal title, with respect, were not.

The question of a treaty-protected right to land, therefore, must be assessed on the basis of a complete and properly pleaded evidentiary record. As outlined above, there is good cause to believe that such a right may be demonstrated under those circumstances. Put otherwise, Aboriginal title may be *protected* by treaty in the region. Equally important, however, is the less ambitious claim that title is *recognized* in the 1726 treaty. The view that the 1726 treaty *recognizes* Aboriginal title stops short of arguing that the treaty *protects* title, arguing only that the parties to the treaty clearly understood the Indigenous signatories to have the intention and capacity to occupy and control their territories and that such an understanding should form an important part of an evidentiary record demonstrating the existence of title at the time of the assertion of British sovereignty.

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[129] *Ibid* at paras 13–24.

[130] *Ibid* at para 27.

[131] Slattery, "Some Thoughts", *supra* note 126 at 38.

[132] *Ibid* at 39.

[133] *Ibid*.

This interpretation is supported by the Supreme Court's holdings on treaty interpretation. In interpreting a treaty between the Crown and Indigenous peoples, courts "must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration."[134] In interpreting the historical context of the treaty and the perceptions of the signatories, courts are required to give the treaty a "just, broad and liberal construction"[135] and resolve ambiguities and uncertainties "in favour of the Indians."[136] The liberal approach to treaty interpretation is grounded in the presumption that the Crown negotiated treaties honourably, such that a flexible interpretation must be applied, including the use "of context and implied terms to make honourable sense of the treaty arrangement" and of the terms of the treaty.[137] In this context, the foregoing discussion regarding the historical background of the treaties and the Indigenous perspectives on their crucial clauses concerning settlement and land use, coupled with the Supreme Court's clear jurisprudence on treaty interpretation, strongly suggests that the treaties should be interpreted as both recognizing and protecting the Indigenous interest in land.

Having argued that Aboriginal title existed in the region, the two questions which arise are where such title existed and whether such title has been extinguished. As discussed, the first of these questions is beyond the purview of this paper to address; it will suffice for the purposes of this paper to establish that title clearly existed *somewhere*, likely to broad, contiguous tracts of land. The remainder of this paper will be concerned with providing an answer to the latter question: whether, where it can be proven to have existed, title has been extinguished.

IV. EXTINGUISHMENT OF ABORIGINAL TITLE

Prior to the constitutionalization of Aboriginal and treaty rights in 1982, Aboriginal title may have been extinguished in one of two ways: by voluntary surrender or unilaterally through legislation.[138] Title can now be extinguished only through voluntary surrender, and any infringements of title must be justified pursuant to the standards established by the Supreme Court.[139] Where Aboriginal title can be proven to have existed at the date of the assertion of sovereignty, extinguishment can be determined by ascertaining whether that title was surrendered voluntarily or, prior to 1982, by unilateral legislation. The onus is on the party seeking to prove

[134] *R v Sioui*, [1990] 1 SCR 1025 at 1035, 70 DLR (4th) 427 (CanLII).

[135] *Ibid* at 1036.

[136] *Ibid* at 1035.

[137] *Marshall #1*, *supra* note 112 at para 14.

[138] *R v Van der Peet*, [1996] 2 SCR 507 at para 110, 137 DLR (4th) 289 (CanLII) [*Van der Peet*]; *Mitchell v MNR*, 2001 SCC 33 at paras 10–11, [2001] 1 SCR 911 (CanLII).

[139] *Delgamuukw*, *supra* note 11. The standards for justification of infringements of Aboriginal rights more generally were established in *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 (CanLII) [*Sparrow* cited to SCR].

extinguishment to bring evidence that title was extinguished by one of these two means.[140]

Should pre-1982 legislation be relied on as evidence of extinguishment, the ability of that legislation to extinguish title is constrained by three requirements. First, the legislative body must have been competent to legislate in respect of both common law property rights and Aboriginal land rights—that is, the legislation must not have been *ultra vires* the legislative body which enacted it. Second, the legislation in question must not have been repugnant to higher order constitutional laws or principles by which the legislative body was bound (*e.g.*, *Royal Proclamation, 1763*,[141] treaties, etc.).[142] Third, any purported legislative extinguishment must satisfy the "clear and plain intent" standard.[143] This standard stipulates that the legislative body must have had the intention to extinguish the right in question; extinguishment could not have occurred incidentally.

A. Voluntary Surrender

The ability of Indigenous peoples to voluntarily enter into agreements with the Crown that have the effect of extinguishing title has never been questioned; rather, "[i]t has always been considered possible for a native people to cede aboriginal lands to the Crown by treaty."[144] This policy was given legal force in the *Royal Proclamation*, which "laid down a uniform legal regime governing native title, whereby native groups were recognized as holding communal rights to their unceded lands, subject only to a restriction of alienation."[145] As Professor Slattery stated, pursuant to the *Royal Proclamation*, "aboriginal peoples held continuing rights to their lands except where these rights have been extinguished by voluntary

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[140] *Calder v British Columbia (AG)*, [1973] SCR 313 at 404, 34 DLR (3d) 145 (CanLII) [*Calder*].

[141] RSC, 1985, App II, No 1 [*Royal Proclamation* or *Proclamation*].

[142] Framing this as an issue of competence and repugnancy was adopted from Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal & Kingston: McGill-Queen's University Press, 1990) at 71 [Clark, *Native Liberty*]. Clark also referred to repugnancy in terms of the doctrine of repugnancy, which stated that colonial laws could not be repugnant to the laws of England. It is commonly held that repugnancy has not been an issue since the enactment of the *Colonial Laws Validity Act*, 1865 (UK), 28 & 29 Vict, c 63, which retroactively validated legislation made void by way of repugnancy: see *Bernard* (NBCA), *supra* note 63 at para 177 (Robertson JA). It is my view that the *Colonial Laws Validity Act* did not apply as sweepingly as suggested by Robertson JA, and that the *Colonial Laws Validity Act* could not have operated to revive a law which would have been *ultra vires* a colonial legislature, as the constitutional framework establishing that jurisdiction was constituted by Imperial laws about the colony, not colonial laws. The *Royal Proclamation* was held to have survived the *Colonial Laws Validity Act* by Hall J in *Calder*, *supra* note 140 at 395.

[143] *Sparrow*, *supra* note 139 at 1097.

[144] Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32:2 Am J Comp L 361 at 387.

[145] *Ibid* at 373.

cession."[146] The *Proclamation* both established legal parameters for acquiring Indigenous lands and confirmed that Indigenous land rights were communally held, continued to exist where they had not been extinguished, and could be extinguished only by voluntary surrender to the Crown.

In *Chippewas of Sarnia*, the Ontario Court of Appeal held that the legal framework established by the *Royal Proclamation*—specifically, the prohibitions on alienation and the procedural requirements governing the acquisition of Aboriginal lands—was and is a part of the common law and exists independently of the *Proclamation*.[147] Thus, following the *Proclamation*, Aboriginal title could be extinguished by voluntary surrender, though only by surrender to the Crown. Following 1982, this is the only manner in which title may be extinguished.

B. Unilateral Legislation

Any purported legislative extinguishment of title must meet the three criteria outlined above: the legislation must have been *intra vires* the legislative body in question, the legislation must not have been repugnant to any higher order constitutional laws or principles, and the legislation must satisfy the clear and plain intent standard. In this section I outline these criteria with the aim of providing a clear articulation of what types of legislation may have extinguished title during distinct historical eras. This requires an analysis of executive and legislative authority, Imperial and colonial jurisdiction in the pre-confederation period, and federal and provincial jurisdiction in the post-confederation period.

1. Executive and Legislative Authority

In the British-Canadian system, law-making authority rests exclusively with the legislative branch of government. Executive authority is political or administrative and is derived from statute or royal prerogative.[148] The scope of authority that inheres in each branch of government is essential in determining the capacity to extinguish Aboriginal title. In the British and Canadian systems, property rights can be extinguished or infringed only under the auspices of explicit legislative authority. Property cannot be seized—that is, property rights cannot be extinguished—by the executive branch except during wartime, and even then compensation must be

[146] *Ibid* at 372.

[147] *Chippewas of Sarnia Band v Canada (AG)* (2000), 51 OR (3d) 641, 2000 CanLII 16991 at paras 195–199 (CA) [*Chippewas of Sarnia*]. Inalienability has also been recognized as a characteristic of Aboriginal title quite apart from the *Royal Proclamation*: see *Delgamuukw*, *supra* note 11 at para 113; *Tsilhqot'in Nation*, *supra* note 2 at para 74.

[148] Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Rights and Duties of the Subject* (London: Joseph Butterworth and Son, 1820) at 2 [Chitty, *Prerogatives of the Crown*]; Christopher Vincenzi, *Crown Powers, Subjects and Citizens* (London: Pinter, 1998) at 7; Sir John G Bourinot, *Canada Under British Rule 1760-1900* (London: CJ Clay & Sons, 1900) at 5 [Bourinot, *Canada Under British Rule*].

paid.[149] The 'executive taking' of property has been prohibited since at least the Magna Carta in 1215.[150] Only under the auspices of explicit legislative authority, then, can proprietary interests in land be extinguished.

Courts have established a degree of judicial oversight over this process by requiring a "clear and plain" legislative intent to legally effectuate the extinguishment of property rights.[151] Further, ambiguities will be interpreted as favouring property owners, and courts will look for compensation to be provided wherever land is taken pursuant to legislative authority—unless compensation is expressly limited by the legislation itself.[152] Courts have been consistent in stating that the executive branch cannot extinguish property rights in the absence of clear and plain legislation permitting such an action.[153] Before any of the characteristics unique to Aboriginal title are considered, this should be the basic level of protection afforded to Aboriginal title lands.[154] Any protections that Aboriginal title receives pursuant to its status as a constitutionalized Aboriginal right should be considered in addition to the protections it receives as a common law property right. Conceptual clarity in this respect is important to ensure that the *sui generis* nature of Aboriginal title not be applied in a manner that derogates from the protections afforded property rights at common law.[155]

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[149] *Attorney-General v De Keyser's Royal Hotel Ltd*, [1920] AC 508 at 542, 551, [1920] UKHL 1 (BAILII); Henry Winthrop Ballantine, *Blackstone's Commentaries* (Chicago: Blackstone Institute, 1915) at 466; *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75 at 79, [1964] UKHL 6 (BAILII) where the House of Lords stated that "[t]he prerogative right of the state to take the citizen's property is founded on necessity" and, at 83, that there is no common law case "suggesting the existence of a prerogative right to seize or destroy the subject's property without compensation."

[150] Article 39 of the Magna Carta reads in part: "No freeman shall be taken or imprisoned, or disseised… unless by the lawful judgement of his peers, or by the law of the land." See Mabel Hill & Albert Bushnell Hart, *Liberty Documents: With Contemporary Exposition and Critical Comments Drawn From Various Writers* (New York, Longmans, Green and Co, 1901), at 18 [Hill & Hart, *Liberty Documents*]. Similarly, the *Liberty of Subject Act*, 1354, 28 Edw III, c 3 reads in part: "no man of what estate or condition that he be, should be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law." Both of these provisions were included in the 1628 Petition of Right. Article IV of the Petition restated the provisions of the aforementioned Act verbatim, explicitly incorporating the Act. Article III of the same Petition incorporated the provision of the Magna Carta quoted above, stating: "And whereas also by the statute called 'The Great Charter of the Liberties of England, [the Magna Carta] it is declared and enacted, that no freeman may be taken or imprisoned or be disseized of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land." See *The Petition of Right*, 1628, 3 Car I, c 1, reprinted in Hill & Hart, *Liberty Documents*, *ibid* at 67–71.

[151] *Sparrow*, *supra* note 139 at 1099.

[152] *Newcastle Breweries Limited v The King*, [1920] 1 KB 854 at 856.

[153] *Calder*, *supra* note 140 at 404; *Delgamuukw*, *supra* note 11 at para 180.

[154] Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33:2 Ottawa L Rev 301 at 315 (QL) [McNeil, "Extinguishment of Aboriginal Title"].

[155] See John Borrows and Leonard Rotman "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alta L Rev 9 at 11–13 (QL).

Clarity in this regard is essential because of the uneven language employed by the Supreme Court. In *Sparrow*, for example, the Court referred to the will of the "Sovereign" in articulating the clear and plain intent test.[156] This language leaves open the possibility of executive extinguishment, so long as such extinguishment was clearly intended. This is a residue of the *St Catherine's Milling*[157] decision, in which Lord Watson characterized Aboriginal title as a "personal and usufructuary right, dependent upon the good will of the Sovereign."[158] This characterization has clearly been abandoned in contemporary jurisprudence. In *Calder*, for example, Hall J held that title could only be extinguished by specific legislation passed by a competent legislative authority or by surrender to the Crown.[159] In particular, the Supreme Court has emphasized that Aboriginal title is a *proprietary* right, due all the protections afforded other such rights at common law. As Lamer CJC stated in *Delgamuukw*, the *sui generis* nature of Aboriginal title does not derogate from the protections it receives as a proprietary right at common law:

> This Court has taken pains to clarify that aboriginal title is only "personal" in this sense [that it is inalienable except to the Crown], and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests.[160]

As a proprietary right, title could only have been extinguished by clear and plain legislation, and compensation would be expected unless stated otherwise in the legislation.

Given some ambiguity in the case law, however, it is important to note that, owing to the fact that rights could only be extinguished by the legislative branch, the clear and plain intent test applies to *legislation*, not to the 'Sovereign' or 'Crown'. Given this, the question is which legislative bodies had the jurisdiction to extinguish title. In the pre-confederation period, this inquiry is concerned with the division of powers between the Imperial and colonial legislatures.

2. Imperial and Colonial Jurisdiction

The jurisdiction to manage the relationship with Indigenous peoples in the pre-confederation period rested with the Imperial government. As the Ontario Court of Appeal stated in *Chippewas of Sarnia*:

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[156] As LaForest J wrote in *Sparrow*: "the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right": *Sparrow*, *supra* note 139 at 1099.

[157] *St Catherine's Milling and Lumber Company v The Queen (Ontario)* (1888), 14 App Cas 46, [1888] UKPC 70 (BAILII) [*St Catherine's Milling* cited to App Cas].

[158] *Ibid* at 54.

[159] *Calder*, *supra* note 140 at 402; McNeil, "Extinguishment of Aboriginal Title", *supra* note 154 at 312.

[160] *Delgamuukw*, *supra* note 11 at para 113; *Canadian Pacific Ltd v Paul*, [1988] 2 SCR 654 at 677, 91 NBR (2d) 43 (CanLII).

> First and foremost, dealings between the English Crown and First Nations were viewed as involving relations between sovereign nations to be governed by agreements or treaties made by the English Crown and the First Nations. Relations with the First Nations were an imperial concern to be administered primarily through the exercise of the royal prerogative.[161]

Accordingly, the authority to extinguish rights also rested at the Imperial level. As Bastarache J stated in *R v Sappier; R v Gray*, "during the colonial period, the power to extinguish aboriginal rights rested with the Imperial Crown."[162] As has been seen above, however, extinguishing rights required legislative authority. Accordingly, the legal authority to extinguish Aboriginal rights in the pre-confederation period resided with the Imperial Parliament, subject to two important exceptions: the authority to legislatively extinguish rights could be delegated to colonial authorities; and, in colonies acquired by conquest or cession, the royal prerogative included the power to legislate until such time as a governor was authorized to establish a legislative assembly.[163]

The policy of maintaining Imperial control over relations with Indigenous nations was in part shaped by a concern that colonists, those closest to Indigenous peoples and with the most interest in their lands, could not be trusted to deal with Indigenous peoples in a just manner. This concern is reflected in the *Royal Proclamation* and in the body of constitutional law that developed to govern these relations. As Bruce Clark wrote:

> Conjure up an image of the imperial government balancing the scales of power, the scales weighted on the one hand with the indigenous tribes and on the other with the colonial governments of the colonists. Although the balance could have been left to a political question, to be determined on an ad hoc basis as future events might dictate, it was not. The balance was determined instead by established rules of constitutional law, knowable a priori. The crucial principles were subordination and delegation – the colonial governments were *subordinate* to the imperial government, and could validate only such legislative acts as were within the mandate of power expressly *delegated* by the imperial to the colonial governments.[164]

Colonial legislatures could only have extinguished title if they had been delegated the authority to do so. The executive and legislative branches of colonial governments exercised delegated and subordinate powers and were bound to act within the confines, and in accordance with, the constitutional principles and laws established by the Imperial government.

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[161] *Chippewas of Sarnia*, *supra* note 147 at para 51.

[162] *Sappier; Gray*, *supra* note 112 at para 58.

[163] Sir Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Oxford: Claredon Press, 1902) at 6; *Campbell v Hall* (1774), 1 Cowp 204 at 213, 98 ER 1045 (KB) (CommonLII) [*Campbell* (1774)].

[164] Clark, *Native Liberty*, *supra* note 142 at 59 [emphasis in original].

In respect of the colonial executive, the Imperial Crown appointed colonial governors by means of a royal commission that conferred upon them powers and specific legal authority.[165] A governor's authority was "derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him."[166] Subsequent formal instructions laid out specific duties and rules of conduct.[167] A governor's authority was, therefore, delegated in nature; the executive branch of colonial governments was subordinate to the Imperial government and did not possess sovereign authority. The specific instruments by which the powers of colonial governors were delegated were important in both their form and their content. In respect of form, the commissions by which governors were appointed were granted "by letters-patent under the great seal."[168] Subsequent royal instructions "bore the signet and sign-manual of the king."[169] These formal mechanisms were the only means by which authority could be delegated.[170] It follows that other means of purported delegation could not have had the legal effect of delegating authority. In light of the extensive correspondence between colonial governors and the Colonial Office in London, it is particularly important that the form of instrument relied on as evidence of delegation be scrutinized.[171] Crucially, "it was not open for governors to assume from mere dispatches expressing opinions or sentiments a jurisdiction to make laws upon a subject."[172] Only instruments bearing the signet and sign-manual of the King or the great seal of Great Britain could legally delegate authority and transfer jurisdiction. As Hall J held in *Calder*, governors "had no powers to legislate other than those given in the commission."[173] Given this, Hall J found that because "neither the Commission nor the Instructions contain any power or authorization to extinguish the Indian title, then it follows

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[165] Charles James Tarring, *Chapters on the Law Relating to the Colonies*, 3d ed (London: Stevens and Haynes, 1882) at 33–34 [Tarring, *Law Relating to the Colonies*].

[166] *Ibid* at 33, citing *Musgrave v Pulido*, (1879) 5 App Cas 102, 49 LJPC 20. See also Clark, *Native Liberty*, *supra* note 142 at 58–59.

[167] Tarring, *Law Relating to the Colonies*, *supra* note 165 at 33–36; Clark, *Native Liberty*, *supra* note 142 at 59; Chitty, *Prerogatives of the Crown*, *supra* note 148 at 34–35.

[168] Alpheus Todd, *Parliamentary Government in the British Colonies* (Boston: Little, Brown, and Company, 1880) at 77; Clark, *Native Liberty*, *supra* note 142 at 59; Anthony Stokes, *A View of the Constitution of the British Colonies, in North America and the West Indies, at the Time the Civil War Broke Out on the Continent of America* (London: B White, 1783) at 150.

[169] Clark, *Native Liberty*, *supra* note 142 at 60, citing George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence Chiefly Concerning the Colonies, Fisheries, and Commerce of Great Britain* (New York: Burt Franklin, 1971) vol 1 at 225.

[170] This could also be done by Act of the Imperial Parliament, *e.g.*, *Quebec Act, 1774* (UK), 14 Geo III, c 83, reprinted in RSC 1985, App II, No 2, s 8 [*Quebec Act, 1774*] and *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

[171] Clark, *Native Liberty*, *supra* note 142 at 64

[172] *Ibid.*

[173] *Calder*, *supra* note 140 at 406.

logically that if any attempt was made to extinguish the title it was beyond the power of the Governor or of the Council to do so and, therefore, *ultra vires*."[174]

The elected house of the typical bicameral colonial legislature was an assembly raised by the Governor pursuant to the royal commission received for the purpose of establishing government in the colony.[175] The law-making power of the elected assembly was circumscribed by the royal commission to which it owed its existence and was limited to making laws concerning local affairs and for peace, order, and good government of the colony.[176] The representative assemblies typically had the authority to make laws concerning the "interior government" of the colony.[177] Crucially, "Indian affairs were no concern of the colonial legislatures."[178] The authority to extinguish Aboriginal title was not within the original grant of authority over local matters. Whether the authority of the colonial legislatures was, strictly speaking, delegated in nature, is a matter of some debate. Though it is beyond the scope of this paper to address that debate in detail, it will suffice here to say that the colonial legislatures were subordinate, bound to act within the scope of authority outlined in the instruments which brought them into being, and ultimately subject to the sovereignty of the Imperial Parliament. Given that the initial grant of legislative power does not seem to have included jurisdiction to legislate in respect of Indian lands, any colonial legislation relied on to prove extinguishment must have a source of authority delegated by a subsequent instrument.

The picture painted above is relatively straightforward: Jurisdiction to extinguish title rested with the Imperial Parliament unless delegated to a colonial body; any such delegation must have been effected according to the proper legal forms. Though these rules are an adequate starting point, they require further nuance. Colonization in Canada has occurred over several centuries. During this time, there have been many changes in the law and governance of the Imperial and colonial governments, as well as changes in the relationship between the two. Similarly, the relationship between Indigenous nations and the Imperial and colonial governments has undergone significant change.

Despite the fact that parliamentary supremacy extended to colonial affairs, the royal prerogative continued to play a crucial role. Pursuant to the royal prerogative, the Imperial executive held both constitutive and, at times, legislative authority. The range of prerogative powers exercisable in a colony, in particular the extent of the prerogative legislative authority, was largely determined by the manner in which the colony was acquired. According to the prevailing legal norms from the

[174] *Ibid* at 413.

[175] Charles Clark, *A Summary of Colonial Law, the Practice of the Court of Appeals from the Plantations, and of the Laws and Their Administration in All the Colonies* (London: S Sweet, A Maxwell, and Stevens & Sons, 1834) at 27–28 [Clark, *A Summary of Colonial Law*].

[176] Chitty, *Prerogatives of the Crown*, *supra* note 148 at 33.

[177] Clark, *A Summary of Colonial Law*, *supra* note 175 at 7.

[178] *Chippewas of Sarnia*, *supra* note 147 at para 51.

18th century onward, colonies could be acquired by settlement, conquest, or cession.[179] In a colony that had been acquired through conquest or cession, the English sovereign (*i.e.*, the executive) possessed a nearly unlimited legislative authority in the colony.[180] As a conquering power was presumed to hold absolute power over conquered or ceded territory and peoples, the executive assumed legislative authority in respect of those territories.[181]

The granting of representative institutions in a colony, however, extinguished the legislative power of the Imperial executive in respect of ordinary legislation.[182] In colonies acquired by settlement the situation was somewhat different. As "it was not possible to deprive an Englishman of the inestimable advantages of English law,"[183] the English law was said to follow an English citizen wherever they were not under the jurisdiction of another sovereign.[184] As a result, the prerogative legislative authority of the Sovereign was limited in settled colonies from the moment they were so acquired. Thus, the power of the executive to extinguish Aboriginal title by way of the prerogative legislative power existed only in colonies acquired by cession or conquest, and then only until that colony was granted representative institutions. Thereafter, any extinguishment could only have occurred by means of Imperial legislation or legislation from a body delegated the authority to extinguish title.

One further complication is the argument that has often been put forward that the relationship with Indigenous nations was itself a matter governed by the royal prerogative. As Sákéj Henderson has argued:

> The 1743 decision in *Mohegan Indians* clarified the status of the First Nations in the imperial law of Great Britain. It recognised treaty federalism and Aboriginal law as the twin bases controlling the common law in Canadian colonisation. Henceforth, controversies between Aboriginal nations and colonial authorities were to be exclusively under

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[179] Tarring, *Law Relating to the Colonies*, *supra* note 165 at 3. See also Arthur Mills, *Colonial Constitutions: An Outline of the Constitutional History and Existing Government of the British Dependencies* (London: John Murray, 1856) at 18 [Mills, *Colonial Constitutions*].

[180] Arthur Berriendale Keith, *Responsible Government in the Dominions*, 2d ed (Oxford: Clarendon Press, 1912) vol 1 at 3–4 [Keith, *Responsible Government*]; Chitty, *Prerogatives of the Crown*, *supra* note 148 at 29; Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London, UK: Stevens & Sons, 1966) at 150 [Roberts-Wray, *Colonial Law*]; Mills, *Colonial Constitutions*, *supra* note 179 at 21; Tarring, *Law Relating to the Colonies*, *supra* note 165 at 15–17.

[181] See *Campbell* (1774), *supra* note 163 at 211: "No question was ever started before, but that the King has a right to a legislative authority over a conquered country." See also Tarring, *Law Relating to the Colonies*, *supra* note 165 at 18; Chitty, *Prerogatives of the Crown*, *supra* note 148 at 27, 29.

[182] Tarring, *Law Relating to the Colonies*, *supra* note 165 at 15–17; Chitty, *Prerogatives of the Crown*, *supra* note 148 at 29–30; Mills, *Colonial Constitutions*, *supra* note 179 at 19. The only exception being "unless, indeed, the Crown had reserved a right of revocation in the instrument by which the constitution was granted": Keith, *Responsible Government*, *supra* note 180 at 3.

[183] Keith, *Responsible Government*, *supra* note 180 at 1.

[184] Tarring, *Law Relating to the Colonies*, *supra* note 165 at 3.

> his majesty's foreign jurisdictions, as subject to the royal prerogative, rather than the parliament of the United Kingdom or any colonial or local assembly. Treaties with Aboriginal nations or tribes created independent and separate jurisdictions in the imperial law, as distinct from colonial authority.[185]

The difficulty with this view is that once colonies became part of "Her Majesty's Dominions" they appear to no longer have fallen under the category of foreign jurisdictions as far as British law was concerned. Whether Aboriginal nations were considered "foreign jurisdictions" under British law changed over time. In the early 17th century all colonial activity fell under the purview of the Crown.[186] In rejecting parliamentary attempts to legislate in respect of the colonies, Ministers told the House of Commons that "it was not fit to make laws here for those countries which are not yet annexed."[187] Once a territory became a dominion of the Crown, however, it is unlikely that the Aboriginal peoples within that territory would have been considered part of a foreign jurisdiction. While it may be true that "[t]he provinces are constructs of the European imagination,"[188] the question of whether Aboriginal peoples in colonies that had been classified as dominions were considered foreign jurisdictions for the purposes of the prerogative is a question of British law. This view, however, has the problematic attribute of accepting without question the ability of the British Crown to assert dominion over Aboriginal nations and, by the mere assertion of sovereignty, to gain jurisdiction and radical title over their lands. Nonetheless, Henderson's argument speaks to a characterization in British law and must be assessed on that basis.

Insofar as Henderson implies that the prerogative was not subject to the will of the Imperial Parliament, he appears to have been mistaken.[189] As the Privy Council stated in *Campbell v Hall*, a conquered or ceded country "becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain."[190] When a colony was acquired, it was acquired in right of the Crown which *ipso facto* extended the jurisdiction of the Imperial Parliament over that territory as far as British law was concerned. While Henderson seems to be mistaken about the jurisdiction of 'the parliament', the broader question of whether the relationship with Indigenous nations was a prerogative matter remains somewhat clouded.

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[185] Henderson, "Legal Inheritances", *supra* note 103 at 8. See the *Foreign Jurisdiction Act*, 1890, 53 & 54 Vict, c 37.

[186] Mills, *Colonial Constitutions*, *supra* note 179 at 2.

[187] *Ibid*.

[188] Sákéj Henderson & Adrian Turner, "Aboriginal Land Claims in the Atlantic Provinces" in Ken Coates, ed, *Aboriginal Land Claims in Canada: A Regional Perspective* (Toronto: Copp Clark Pittman, 1992) at 131.

[189] As Professor Slattery has stated, "[i]n both settlements and conquests, the authority of the Imperial Parliament was held to be as extensive as in Great Britain, that is, under the standard view, without legal limits." Brian Slattery, *The Independence of Canada* (Toronto: Osgoode Hall Law School, 1982) at 11.

[190] *Campbell* (1774), *supra* note 163 at 208.

While the responsibility for managing the relationship rested with the executive branch, this is distinct from the power to extinguish title. This is evident when the powers of the executive are looked at closely. The 1784 instructions to Governor Thomas Carleton are illustrative of the range of authority governors were delegated in respect of Indigenous affairs. Carleton was directed to maintain correspondence with the Indians, inducing them to be both good neighbours and British Subjects and, further, to enter into treaties of peace and friendship with them.[191] Governors were delegated the authority to enter into treaties and were tasked with maintaining relationships with Indigenous peoples. These relationships were political in nature. The nature of the authority delegated to the colonial governors, then, reflected the authority of the Imperial Crown.[192] That authority was limited by its status as the executive branch of government. Aboriginal title could only have been extinguished by legislation and legislating was beyond the constitutional bounds of the executive branch.

From the above, it is evident that in the pre-confederation period title could only have been extinguished by Imperial legislation or colonial legislation where the authority to extinguish title had been delegated according to the proper legal forms. The exception to this rule arises in colonies acquired by cession or conquest. There, title could have been extinguished by way of prerogative legislation until such time as authority to raise a legislative assembly was granted.

3. Post-Confederation

In the post-Confederation era, jurisdiction to extinguish Aboriginal rights resided with the federal Parliament by way of section 91(24) of the *Constitution Act, 1867*. For a period, this jurisdiction was shared with the Imperial Parliament. As Professor McNeil explains, "[t]here can be little doubt that the Imperial Parliament's authority to extinguish Aboriginal title prior to Confederation would have continued thereafter, since the Parliament at Westminster retained authority to legislate for Canada when it enacted the *Constitution Act, 1867*."[193] Section 91(24) places in federal hands the authority to "make Laws for the Peace, Order, and good Government of Canada, in

[191] The instruction read:

> 63. And Whereas it is highly necessary for Our Service that you should cultivate and maintain a strict Friendship and good correspondence with the Indians, Inhabiting within Our said Province of New Brunswick, that they may be induced by degrees not only to be good Neighbours to our Subjects, but likewise themselves to become good subjects to Us, you are therefore to use all proper means to attain those Ends, to have Interviews from time to time, with the several heads of the said Indian Nations or Clans and to endeavour to enter into Treaty with them promising them Friendship and Protection on Our part.

See "Royal Instructions to Thomas Carleton", in WM Jarvis, ed, *Collections of the New Brunswick Historical Society* (Saint John, NB: 1909) vol 6 at 391, online: <archives.gnb.ca/exhibits/forthavoc/html/Royal-Instructions.aspx?culture=en-CA>.

[192] As Charles Clark stated, the "political and military administration is consequently vested in a governor": Clark, *A Summary of Colonial Law*, *supra* note 175 at 3.

[193] McNeil, "Extinguishment of Aboriginal Title", *supra* note 154 at 322.

relation to … Indians, and Lands reserved for the Indians."[194] In *Delgamuukw*, the Province of British Columbia put forward a limited reading of section 91(24), arguing "that 'Lands reserved for the Indians' are lands which have been specifically set aside or designated for Indian occupation, such as reserves."[195] Lamer CJC rejected this argument, holding that it ran counter to the Privy Council's decision in *St Catherine's Milling* where it was held that, had it been intended that section 91(24) be limited to reserve lands, such a limitation would have been made explicit.[196] Thus, Lamer CJC held that the power to extinguish title rested with the federal government, stating:

> Since 1871, the exclusive power to legislate in relation to "Indians, and Lands reserved for the Indians" has been vested with the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. That head of jurisdiction, in my opinion, encompasses within it the exclusive power to extinguish aboriginal rights, including aboriginal title.[197]

As it has been demonstrated that the extinguishment of rights is within the exclusive purview of the legislative branch, Lamer CJC's use of the term 'federal government' should be understood to refer to the federal Parliament. Put otherwise, since 1867, "the exclusive power to extinguish aboriginal rights, including aboriginal title" rested with the federal Parliament.[198] It is clear that the provinces at no point had the capacity to extinguish Aboriginal title.

4. Conclusions on Extinguishment

There are, therefore, four types of legislation that may have had the effect of extinguishing Aboriginal title: (1) Imperial legislation until 1931; (2) prerogative legislation prior to the promise of a representative assembly, or enacted under authority delegated by the Imperial Parliament; (3) colonial legislation enacted under the delegated authority discussed above; and (4) federal legislation prior to 1982. If colonial legislation is relied on, the onus is on the party seeking to demonstrate extinguishment to prove that the jurisdiction to do so was delegated by the proper legal instruments.

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[194] *Constitution Act, 1867*, *supra* note 170, s 91(24).

[195] *Delgamuukw*, *supra* note 11 at para 174: "The debate between the parties centred on whether that part of s. 91(24) confers jurisdiction to legislate with respect to aboriginal title."

[196] *Ibid*.

[197] *Ibid* at para 173.

[198] Lamer CJC refers to 1871 because that is the date when British Columbia (where the facts of the *Delgamuukw* decision took place) joined confederation. The authority to extinguish existed elsewhere as of 1867 or when the province in question joined confederation, whichever date is later.

V. EXTINGUISHMENT IN THE MARITIME PROVINCES

From the foregoing, it is clear that Aboriginal title existed in the Maritime Provinces. The questions that remain are where it existed and whether it has been extinguished. A party seeking to establish that title has been extinguished in the Maritime Provinces would have to demonstrate that title was extinguished by voluntary surrender or a unilateral legislative act which met the criteria outlined above. This section applies the extinguishment analysis to the Maritime Provinces to provide a preliminary assessment of whether, where it has been proven, title has been extinguished.

A. Voluntary Surrender

As Dickson CJC (as he then was) stated in *Simon*, "[n]one of the Maritime treaties of the eighteenth century cedes land."[199] Similarly, in *Marshall #1*, Binnie J wrote for the majority that "there is no applicable land cession treaty in Nova Scotia."[200] In the *Simon* decision the Crown relied on the fact that the treaties did not cede land to argue that they could not be categorized as treaties: Allegedly, a 'treaty' that does "not deal with the ceding of land or delineation of boundaries" should not be considered a treaty as the term is used in section 88 of the *Indian Act*.[201] It is evident that no land in the Maritime Provinces was ceded by treaty.

Voluntary surrenders could occur by means other than treaty. It appears that any such surrender would be required to meet the requirements of the *Royal Proclamation*. There is some debate surrounding the application of the *Proclamation* in the Maritime Provinces. While a detailed analysis of the *Proclamation*'s application in the region is a subject owed a paper of its own, it seems reasonably clear that future courts will consider the *Proclamation* to have applied insofar as that means that the validity of Indigenous surrenders of land will be assessed in light of their adherence to the principles articulated therein. To begin, McLachlin CJC held in *Marshall; Bernard* that "contemporaries viewed the *Royal Proclamation* as applying to Nova Scotia"[202] (which then included present-day New Brunswick and, as of the issuing of the *Proclamation* itself, Prince Edward Island and Cape Breton). McLachlin CJC thus proceeded "on the basis that [the *Proclamation*] applied to the former colony of Nova Scotia."[203] A party seeking to argue against the application of

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[199] *Simon*, *supra* note 112 at 410. At the Nova Scotia Court of Appeal, Cromwell JA noted that "the Supreme Court of Canada on two occasions has expressed the view that the 1760 - 61 treaties do not cede land": *Marshall* (NSCA), *supra* note 28 at para 98. In *Isaac* (NSCA), *supra* note 114 at 479, the Nova Scotia Court of Appeal held that "[n]o Nova Scotia treaty has been found whereby Indians ceded land to the Crown, whereby their rights on any land were specifically extinguished, or whereby they agreed to accept and retire to specified reserves."

[200] *Marshall #1*, *supra* note 112 at para 21.

[201] *Simon*, *supra* note 112 at 408; *Indian Act*, RSC 1985, c I-5.

[202] *Marshall; Bernard*, *supra* note 12 at para 87.

[203] *Ibid*.

the *Proclamation*, then, would have to argue against clear precedent. This may prove difficult in light of the interpretive principles that must be employed. As McLachlin CJC stated in *Marshall; Bernard*, "[t]he *Royal Proclamation* must be interpreted liberally, and any matters of doubt resolved in favour of aboriginal peoples."[204] In this respect, the interpretive principles applicable to the *Proclamation* align with the principles of treaty interpretation. The courts have gone somewhat further, though, holding that the *Proclamation*'s status as a "Charter," "Magna Carta," or "Indian Bill of Rights" must be considered in its interpretation.[205] Given the clear recent statement from the Supreme Court confirming the application of the *Proclamation* and the requirement that the *Proclamation* be interpreted not only liberally and with ambiguities being resolved in favour of Indigenous peoples, but in light of the importance of the document to them, it seems likely that a future court would find the *Proclamation* to have applied in the Maritime Provinces.

This conclusion aligns with much of the academic material on the issue.[206] First, the question of whether the *Proclamation* "applied" must be nuanced. As the *Proclamation* annexed Prince Edward Island and Cape Breton to Nova Scotia, it is beyond question that it applied in some respects.[207] Further, the *Proclamation* was sent to the Governor of Nova Scotia and, as the Supreme Court noted in *Marshall; Bernard*, communications between the Colonial Office and the government in Nova Scotia suggest the *Proclamation* was intended to apply there.[208] The argument that the *Proclamation* did not apply, then, seems to rest on the view that the "Indian provisions" did not apply, those being concerned only with lands west of the boundary line. On this issue, Mark Walters makes an important clarification. As Walters writes, the *Proclamation* established "rules in relation to two separate categories of Indian land."[209] The first category is the land to the west of the Atlantic watershed which was set aside as 'Indian lands'. The Maritime Provinces do not fall within this category. The second category includes "all other parts of British North America, where settlements were to be permitted."[210] In respect of this second

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[204] *Marshall; Bernard*, *supra* note 12 at para 86, citing *Nowegijick v The Queen*, [1983] 1 SCR 29 at 36, 144 DLR (3d) 193 (CanLII) [*Nowegijick*].

[205] *Marshall; Bernard*, *supra* note 12 at para 86.

[206] See Mark D Walters, "The Aboriginal Charter of Rights: The Royal Proclamation of 1763 and the Constitution of Canada" in Terry Fenge & Jim Aldridge, eds, *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2015) at 49–52 [Walters, "Aboriginal Charter"]; Slattery, "Some Thoughts", *supra* note 126 at 39; Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (PhD Thesis, Oxford University Faculty of Law, 1979) at 247–250 [Slattery, *Land Rights of Indigenous Canadian Peoples*]; WD Hamilton, "Indian Lands in New Brunswick: The Case of the Little South West Reserve" (1984) 13:2 Acadiensis 3 at 5 [WD Hamilton, "Little South West Reserve"]; Daniel N Paul, *We Were Not the Savages*, 3d ed (Halifax: Fernwood Publishing, 2006) at 176.

[207] *Marshall; Bernard*, *supra* note 12 at para 87.

[208] *Ibid*.

[209] Walters, "Aboriginal Charter", *supra* note 206 at 53.

[210] *Ibid*.

category, the *Proclamation*'s prohibitions on alienation to parties other than the Crown and the procedural requirements mandating a public and voluntary cession applied. In all parts of British North America, then, including the Maritime Provinces, this latter set of protections afforded by the *Proclamation* applied and no land could be granted for settlement until land had been ceded according to the procedures set out therein.[211] In light of the above, any purported extinguishment of Aboriginal title in the region by voluntary surrender should only be considered valid if the alleged 'surrender' was consistent with the *Proclamation* (from 1763 onward). These protections have also been held to have been incorporated into the common law and to apply regardless of the application of the *Proclamation* to the territory in question.[212]

There were certainly many small surrenders in the Maritime Provinces, each of which would have to be examined on a case-by-case basis to determine whether they conformed to the *Royal Proclamation* and the fiduciary obligation of the Crown. It is beyond the scope of this paper to determine the legality of these many surrenders, as they are entangled in a number of competing claims, leases, and sales.[213] Many sales were made to third parties by Indigenous individuals without the consent of the community and much land was settled by squatters whom the government lacked the resolve to remove. Lands surrendered in the pre-confederation period by means other than treaty must be assessed against the standards established in the *Royal Proclamation*. Even the most ambitious of these types of surrender, however, represent relatively small areas of land.

B. Unilateral Legislation

Now I will assess, in a preliminary manner, the possible extinguishment of title by legislation in the Maritime Provinces. The aim here is twofold: to determine which legislative bodies had the proper jurisdiction to extinguish title in different eras, and to determine whether there are examples of legislation that fits these criteria.[214]

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[211] There are other grounds on which the application of the *Proclamation* could be challenged. For instance, one could ask whether the Crown had the prerogative authority to legislate in respect of Nova Scotia in light of the rule in *Campbell* (1774), *supra* note 163, since Nova Scotia had, since 1749, been promised a representative assembly. Though it is not possible to address this matter in this paper, it should do little to effect the application of the *Proclamation* in the Maritime Provinces. For a discussion of these points see Walters, "Aboriginal Charter", *supra* note 206 at 53–68.

[212] *Chippewas of Sarnia*, *supra* note 147 at paras 199–202.

[213] For discussion, see Brian Cuthbertson, *Stubborn Resistance: New Brunswick Maliseet and Mi'kmaq in Defence of Their Lands* (Halifax: Nimbus Publishing, 2015) [Cuthbertson, *Stubborn Resistance*]; WD Hamilton, "Little South West Reserve", *supra* note 206; WD Hamilton, *The Julian Tribe* (Fredericton, NB: Micmac-Maliseet Institute, 1984) at 3–46.

[214] This analysis requires a level of historical research that is difficult to incorporate into a paper of this length. For a more detailed analysis see Hamilton, *Aboriginal Title in Canada's Maritime Provinces*, *supra* note 1 at 103–131.

Acadia, or the old colony of Nova Scotia, was ceded to the British by French in 1713 by way of the Treaty of Utrecht.[215] New Brunswick, over which the British gained sovereignty in 1759, remained part of the colony of Nova Scotia until 1784. Prince Edward Island and Cape Breton remained under French sovereignty until 1763 when they were ceded to Britain at the Treaty of Paris and annexed to Nova Scotia in the *Royal Proclamation*.[216] Cape Breton became an independent colony in 1784 and remained so until 1820, at which point it was re-annexed to Nova Scotia.[217] The establishment of a colonial government on Prince Edward Island in 1769 marked the Province's debut as an independent colony, and an elected assembly first met in the colony in 1773.[218] Prior to 1784, then, any purported extinguishment in peninsular Nova Scotia or New Brunswick can be assessed with reference to the actions of the colonial government of Nova Scotia or the Imperial government acting in respect of Nova Scotia. From 1763–1769, the same is true of Prince Edward Island; for Cape Breton, from 1763–1784 and from 1820 onward.

A bicameral legislature was not established in Nova Scotia until 1758.[219] Prior to the founding of Halifax in 1749, the government "was vested solely in a governor who had command of the garrison stationed at Annapolis."[220] Until that point, Nova Scotia was largely under military rule.[221] In 1749 the seat of government was moved to the newly established settlement at Halifax, with the newly appointed Governor Cornwallis instructed to select a twelve-person executive council and to call an assembly.[222] The power of the executive to legislate pursuant to the royal prerogative was therefore limited after 1749. Such a power never existed in the other colonies, which were, upon their creation, immediately annexed to a colony which had already been granted—and which had established—a legislative assembly of its own. Subsequent to 1749, then, Aboriginal title could only have been extinguished either by the Imperial Parliament or by a colonial legislature which had been

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[215] Sir John G Bourinot, *Builders of Nova Scotia* (Toronto: The Copp-Clark Co, 1900) at 9; Slattery, *Land rights of Indigenous Canadian Peoples*, *supra* note 206 at 128. The entire region was in fact granted to Sir William Alexander by means of a Charter in 1621. This has been ignored when establishing the date of sovereignty in the region, likely because Alexander never fulfilled the requirements of the Charter. For a discussion of the effect of the Charter, see Slattery, *Land Rights of Indigenous Canadian Peoples*, *supra* note 206 at 106–107 and Brian Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America" in John McLaren, AR Buck & Nancy E Wright, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: University of British Columbia Press, 2005) at 70–71.

[216] Mills, *Colonial Constitutions*, *supra* note 179 at 214.

[217] *In Re Cape Breton* (1846), 5 Moo 259 at 262–263, 13 ER 489 (PC).

[218] Keith, *Responsible Government*, *supra* note 180 at 5.

[219] *Ibid* at 4–5.

[220] Bourinot, *Canada Under British Rule*, *supra* note 148 at 52–53. See also Beamish Murdoch, "An Essay on the Origin and Sources of the Law of Nova Scotia" (1984) 8 Dal LJ 185 at 187.

[221] See also DG Bell "Maritime Legal Institutions Under the *Ancien Régime*, 1710–1850" (1995) 23 Man LJ 103 at 106–107 (QL).

[222] Bourinot, *Canada Under British Rule*, *supra* note 148 at 52.

delegated the authority to extinguish such title. In other words, after 1749 on peninsular Nova Scotia, 1759 in New Brunswick, and 1763 on Prince Edward Island and Cape Breton, any loss of Aboriginal lands could not have extinguished Aboriginal title unless supported by legislation passed by a competent legislative body. In determining the extinguishment of title in the Maritime Provinces, then, an important point is determining whether the colonial assemblies were delegated the authority to extinguish title.

1. Colonial Authority

As discussed above, the jurisdiction of colonial assemblies was delegated and subordinate in nature. To establish extinguishment, a party must thus demonstrate either that the *initial* delegation of authority to the colonial legislatures included the authority to extinguish title or that there was a *subsequent* delegation of authority to that effect.

Colonial legislatures were delegated authority to legislate in respect of the "Peace Welfare and good Government" of the colony.[223] Determining whether 'Peace Welfare and good Government' included the authority to extinguish Aboriginal title is a complicated task. As Sir Roberts-Wray has argued:

> Whether a particular enactment is calculated as matter of fact or policy to secure peace, order and good government is not a question into which the Courts will inquire. In short, it is apparent that the Courts have attached little value to the actual words but have concerned themselves with the general doctrine of legislative competence.[224]

The phrase is best understood as conferring an expansive (rather than limited) authority, seeming only to limit the jurisdiction of the colony to internal matters: Colonial legislation could not have extra-territorial application.[225]

Nonetheless, it is not clear that this power over local affairs was intended to, or did in fact, delegate the authority to extinguish Aboriginal land rights.[226] In *Sappier; Gray*, Bastarache J held that "it is not at all clear that the colonial

[223] This is the wording in the 1749 commission to Thomas Carleton. This wording, or the alternative 'peace *order* and good government', were a common feature of colonial commissions. 'Order' and 'welfare' in this context are functionally synonymous: see Roberts-Wray, *Colonial Law*, *supra* note 180 at 369.

[224] *Ibid*.

[225] JE Read, "The Early Provincial Constitutions" (1948) 26:4 Can Bar Rev 621 at 636.

[226] It should be noted here that I am attempting to identify the interpretation of the positive law which prevailed at the time. The division of powers between the colonial and Imperial governments, the authority of the Imperial Parliament to legislate in respect of the colonies, and the role of the royal prerogative in managing the relationship with Indigenous peoples were all highly contested and subject to modification over time. As Mark Walters stated, "it must be acknowledged that the Crown's prerogative power to regulate relations with Aboriginal peoples within established colonies was controversial": Walters, "Aboriginal Charter", *supra* note 206 at 56.

legislature of New Brunswick was ever granted the legal authority by the Imperial Crown to extinguish aboriginal rights,"[227] suggesting that the initial delegation of authority to legislate in respect of local matters did not include the authority to extinguish such rights. Any authority to extinguish rights, then, would have to have come from a subsequent delegation.

At least in the case of New Brunswick, the colony itself did not believe it had jurisdiction to legislate in respect of Indian lands until such delegation had been made by the Colonial Office. In seeking to pass legislation permitting the sale of Indian reserve lands (which will be discussed below), the colonial government in New Brunswick sought advice of the law officers, who opined that the colony could not sell such lands absent permission from the Colonial Office.[228] That the government sought this permission suggests the law officers were understood to be correct. This suggests strongly that the initial delegation of authority was not thought to confer an authority to legislatively extinguish Aboriginal title and that a subsequent delegation would be required.

I will now look to the specific legislation, beginning with the clear and plain intent test and then returning to the issue of legislative competence.

2. Clear and Plain Intent

Most of the extinguishment claims in the Maritime Provinces have been dismissed because the legislation relied on to demonstrate extinguishment did not satisfy the clear and plain intent test. This is important in two respects. First, as the legislation discussed here has already been brought forward by the Crown to ground a claim of extinguishment, there is good reason to believe that Crown attorneys believed this legislation to be that which had the best chance of success. Second, as will be seen, the legislation that has been subject to (and which has failed to satisfy) the clear and plain intent test is that which would have extinguished title to the greatest amount of land.

In the *Bernard* litigation, the Crown relied at the trial and appellate levels on four pre-confederation statutes to prove extinguishment.[229] The first was an 1840 Act entitled *An Act to provide for the more effectual prevention of Trespasses and protection of Timber growing on Crown lands within this Province*.[230] The 1840 Act

[227] *Sappier; Gray*, *supra* note 112 at para 58.

[228] Cuthbertson, *Stubborn Resistance*, *supra* note 213 at 43.

[229] 3 Vict, c 77. See *Bernard* (NBCA), *supra* note 63 at para 181 (Daigle JA).

[230] The remaining three were: an 1850 act entitled *An Act for the better prevention of Trespasses on Crown Lands and Private Property*, 13 Vict, c 7; a revision of that 1850 Act, entitled *Of Trespasses on Lands, Private Property, and Lumber*, RSNB 1854, c 133, in the *Revised Statutes of New Brunswick 1854*, c 133; and an 1862 amendment to chapter 133 of the *Revised Statutes*, in *An Act further to amend Chapter 133, Title xxxiv, of the Revised Statutes, "Of trespasses on lands, private property, and lumber"*, SNB 1862, 25 Vict, c 24: *Bernard* (NBCA), *supra* note 63 at paras 183–184 (Daigle JA). As can be seen, the Crown in fact relied on two pieces of legislation and an additional two legislative amendments to the

"prohibits any person from cutting, felling, removing or destroying various species of trees and lumber made from them without right derived from the Crown to do so."[231]

A later 1850 Act made it a misdemeanour offense for anyone to remove logs or timber from any "granted or ungranted" lands without legal authority.[232] As explained by Robertson JA, the Act further provided that:

> [T]he property in timber taken from Crown lands held under lease or licence is in the lessee or licensee. Section 3 authorizes the lessee or licensee to recover damages in any action for trespass or replevin. The Crown submits that in recognizing a licensee to be the owner of the timber, the legislation negates any notion of a right vested in an aboriginal community.[233]

This last piece of legislation the Crown put forward expanded the definition of 'licensee' so that the licensee could bring an action despite "any law, usage or custom to the contrary."[234] While Robertson JA recognized that this phrase may seem to include Aboriginal rights, he dismissed this possibility, holding:

> This is true until one places the phrase in its historical context. Under the common law and equity a person who might otherwise be labelled a trespasser could assert a right to enter on Crown lands for logging purposes provided that person could establish, for example, adverse possession or a profit à prendre. It seems to me that the true purpose of the 1862 amendment is to extinguish any non-consensual right to cut Crown timber that a person may have acquired through the application of common law and equitable principles. In the present case, we are dealing with a right established under a consensual agreement and, therefore, the legislation could not have the effect of implicitly extinguishing a right which arises by agreement and not by prescription. With respect to aboriginal title, it arises because of historical occupation prior to the assertion of British sovereignty, not by prescription. The Indians were first in time and cannot be compared to someone who squats on another person's lands.[235]

Importantly, Robertson JA held that the source of Aboriginal title—the pre-sovereignty occupation of the land—distinguishes title from the customary and usage-based rights contemplated by the Act.

1850 Act. The Crown also relied on the 1862 amendment in *Sappier; Gray* (where the claimants sought a declaration of Aboriginal *right*, rather than Aboriginal *title*), *supra* note 112 at para 59.

[231] *Bernard* (NBCA), *supra* note 63 at para 181 (Daigle JA).

[232] *Ibid* at para 182 (Robertson JA).

[233] *Ibid*.

[234] *Ibid* at para 184 (Robertson JA).

[235] *Ibid* at para 186 (Robertson JA).

The salient feature of the legislation relied on by the Crown to demonstrate extinguishment in *Bernard* was that it dealt with access to Crown lands. As Robertson JA noted, the Crown's argument boiled down to the claim "that by vesting licensees and lessees with ownership of timber growing on Crown lands, the legislature intended to extinguish aboriginal title and any treaty right to harvest and sell timber growing on the same lands."[236] Robertson JA disagreed, holding that the statutes controlling access or granting timber licences to Crown lands did not possess the clear and plain intent required to extinguish Aboriginal and treaty rights.[237]

This reasoning was adopted again by the New Brunswick Court of Appeal in the *Gray* decision, where Robertson JA held that his "concurring opinion and that of Justice Daigle in *Bernard* is a sufficient basis for purposes of disposing of any argument that an existing aboriginal right was extinguished by either pre- or post-Confederation provincial legislation."[238] In the *Sappier* litigation, in which Maliseet individuals from the Woodstock First Nation relied on treaty and Aboriginal rights to harvest lumber from Crown lands as a defense to a charge of unauthorized possession of lumber taken from Crown lands, the Crown did "not allege that the right was extinguished by either pre- or post-Confederation legislation" at the appellate level.[239] Despite having made this concession at the New Brunswick Court of Appeal, the Crown brought the extinguishment issue again before the Supreme Court. As discussed above, Bastarache J, writing for a near unanimous court (with Binnie J writing a concurring decision), agreed with the New Brunswick Court of Appeal's characterization of the legislation being relied on by the Crown as essentially regulatory in nature, relying on *Sparrow* to support the holding that the regulation of the exercise of a right does not extinguish the right.[240]

In Nova Scotia, the extinguishment of a treaty right to harvest timber under the 1760-61 treaties and the extinguishment of Aboriginal title were addressed by the Court of Appeal in the *Marshall* decision.[241] Here, the Crown relied on two statutes, *An Act to Prevent Waste and Destruction of Pine or other Timber Trees, on certain reserved and un-granted Lands in this Province*[242] and *An Act concerning Trespasses to Crown Property*,[243] to prove extinguishment of both the asserted treaty right and Aboriginal title. The Crown argued that because these Acts, which prohibited the removal of timber from Crown lands, did not explicitly exempt Aboriginal peoples, any rights enjoyed prior to enactment of the legislation were

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[236] *Ibid* at para 185 (Robertson JA).

[237] *Ibid* at para 187 (Robertson JA).

[238] *R v Gray*, 2004 NBCA 291 at para 25, 273 NBR (2d) 157 (CanLII), cited with approval in *Sappier; Gray*, *supra* note 112 at para 56.

[239] *R v Sappier*, 2004 NBCA 295 at para 3, 273 NBR (2d) 93 (CanLII) [*Sappier* (NBCA)].

[240] *Sappier; Gray*, *supra* note 112 at 58–60.

[241] *Marshall* (NSCA), *supra* note 28 at paras 60–68, 237–248.

[242] 3 Geo (1774), c 3.

[243] 1859, c 22.

extinguished. Cromwell JA rejected this view and, like the New Brunswick Court of Appeal in *Bernard*, *Sappier*, and *Gray*, drew on a long line of Supreme Court decisions to support the position that regulating the exercise of a right did not demonstrate extinguishment.[244]

The clear and plain intent standard will be difficult to satisfy in respect of pre-confederation legislation; with a notable exception that will be dealt with below, there is no legislation from that era that purports to extinguish the exercise of Aboriginal rights or title. Absent a judicial modification of the clear and plain intent standard to allow a greater scope for incidental extinguishment, it is very unlikely that pre-confederation legislation, with the possible exception of that analyzed below, could have extinguished title.

C. Instances of Possible Extinguishment

Though it is not possible in this space to cover all possible instances of legislative extinguishment in detail, a few words can be said in respect of those pieces of legislation, other than those already addressed by courts, which seem on their surface most likely to have extinguished title.[245]

1. Colonial Legislation

No colonial legislation dealt directly with Indigenous peoples until mid-19th century attempts to secure the title of squatters on Indigenous lands, settle Indigenous peoples in agricultural communities, and sell off reserve lands.[246] These Acts were: in New Brunswick, *An Act to regulate the management and disposal of the Indian Reserves in this Province*;[247] in Nova Scotia, *An Act to Provide for the Instruction and Permanent Settlement of the Indians*;[248] and in Prince Edward Island, *An Act relating to the Indians of Prince Edward Island*.[249] In light of the limited space available here, I will focus only on the New Brunswick 1844 Act.

As the title of the New Brunswick 1844 Act suggests, its purpose was to dispose of "unused" Indian reserve lands.[250] The immediate aim of the Act was to

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[244] *Marshall* (NSCA), *supra* note 28.

[245] For a detailed analysis see Hamilton, *Aboriginal Title in Canada's Maritime Provinces*, *supra* note 1 at 122–132.

[246] Upton, *Indian-White Relations*, *supra* note 92 at 202.

[247] 7 Vict, c 47 (1844) [New Brunswick 1844 Act]. For a detailed account of the Act see Cuthbertson, *Stubborn Resistance*, *supra* note 213.

[248] 5 Vict, c 16 (1842).

[249] 19 Vict, c 10 (1856), reprinted in *Revised Statutes of Prince Edward Island, 1856*, c 10.

[250] It is important to note that the Act applies to *reserve* lands, not title lands more broadly, though it is likely that the locations of the original reserves correspond quite closely to areas where title would be most easily proven (such as village sites): Prins, *Cultural Survival*, *supra* note 110 at 168.

open desirable lands to settlement, agricultural development, and resource exploitation. Like similar Acts passed in the other Maritime Provinces and the Canadas in this period, the Act was cast by proponents as a means of ameliorating the condition of the Indians by settling them in agricultural communities and "civilizing" them.[251] The Act granted power to the Lieutenant-Governor, on the advice of the Council, to appoint individuals to survey Indian reserve lands, to "distinguish the improved from the unimproved lands," and to determine which lands were fit for settlement.[252] The lands so identified were then to be leased or sold pursuant to the procedures established under the Act, which required lands to be publicly auctioned to the highest bidder.[253] The Act included a suspending clause requiring it to receive royal approbation before it could be enacted;[254] assent was given on 3 September 1844.[255]

The alienations that took place under the auspices of these Acts amounted to over 10,000 acres in New Brunswick alone.[256] As discussed above, it seems that these alienations must be assessed in light of the procedural requirements established in the *Royal Proclamation*. Put simply, "a surrender required a voluntary, informed, communal decision to give up the land."[257] The question of whether the decision to sell or lease lands pursuant to this legislation was voluntary, informed and communal, is a question of fact that I cannot speak to conclusively here. There is clear evidence that in many cases the Indigenous peoples resisted the sale of their reserve lands.[258] In any case, where such resistance is evident the *Proclamation* would serve to invalidate the alienation. There is also evidence that in some instances Indian Commissioners sought the approval of communities for the sale of lands.[259] Should it be demonstrated that the consent of a community, given voluntarily and on an informed basis, was conveyed to the government, the *Proclamation* would not stand in the way of an otherwise valid sale.

Even if consent for a sale were given, however, the procedural requirements of the *Proclamation* may pose further problems for land transactions conducted under these Acts. The third clause of the *Proclamation* mandates that no sales of

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[251] Cuthbertson, *Stubborn Resistance*, *supra* note 213 at 22–38.

[252] New Brunswick 1844 Act, *supra* note 247, s 1.

[253] *Ibid*, s 2.

[254] *Ibid*, s 13.

[255] *Acts of the General Assembly of her Majesty's Province of New Brunswick, passed in the year 1845* (Fredericton, NB: J Simpson, 1845) at 149. The Act further required that notice of the auction be given in the Royal Gazette sixty days prior to the auction and that handbills "be posted in three of the most public places in the county where such Reserves are situate": New Brunswick 1844 Act, *supra* note 247, s 2.

[256] Upton, *Indian-White Relations*, *supra* note 92 at 112.

[257] *Chippewas of Sarnia*, *supra* note 147 at paras 20, 199.

[258] Upton, *Indian-White Relations*, *supra* note 92 at 84, 88–89, 96, 115.

[259] *Ibid* at 102, 105.

lands reserved to the Indians may be made to private persons.[260] By the terms of the *Proclamation*, alienations could only be made to the Crown; only once the Crown purchased the land could it be granted to settlers.[261] Under the regime established by the New Brunswick and Nova Scotia legislation, purchases were made directly by third parties. Further, the proceeds of the sales did not go directly to the Indigenous peoples, but were to be held in a fund for their benefit—a fund over which they had no control.[262] It is not clear whether the fact that the government was facilitating the sale would satisfy a court that the spirit of the *Proclamation* had been followed, but given the Supreme Court's numerous holdings that the *Proclamation* "must be interpreted liberally, and any matters of doubt resolved in favour of aboriginal peoples,"[263] there is a strong argument in favour of giving a strict interpretation to the prohibitions on alienations to parties other than the Crown. Indeed, such an interpretation would align with the overarching purpose of implementing procedural safeguards through the *Proclamation*, which was to protect Indigenous lands from being fraudulently and dishonestly taken, particularly by having the Imperial government provide a measure of control against the actions of the colonists. On this interpretation, even consent of the Indigenous community could not save sales of land under the Act.

A party seeking to rely on the sales made pursuant to this legislation as evidence of extinguishment would bear the burden of demonstrating that the colonial legislatures were competent to extinguish Aboriginal title. Again, this would require demonstrating that the authority to extinguish title had been delegated according to the proper legal procedures. The authority to sell lands under the New Brunswick 1844 Act, for example, was 'delegated' by means of a dispatch from the Colonial Office. As noted above, it is not clear that delegation by dispatch could legally transfer authority.

2. Imperial Legislation

Most of the Imperial legislation directed specifically at New Brunswick and Prince Edward Island dealt with customs and duties, including regulating the importation of rum for sale in the Canadas, opening ports to trade, governing trade between the Maritime Provinces, and finalizing New Brunswick's borders.[264] The lone

[260] Patterson, *Mi'kmaq Treaty Handbook*, *supra* note 116 at 11.

[261] Walters, "Aboriginal Charter", *supra* note 206 at 53.

[262] Cuthbertson, *Stubborn Resistance*, *supra* note 213 at 42–65.

[263] See, e.g., *Marshall; Bernard*, *supra* note 12 at 86; *Nowegijick*, *supra* note 204 at 36.

[264] See, e.g., *An Act for the Settlement of the Boundaries between the Provinces of Canada and New Brunswick*, 14 & 15 Vict, c 63 (*The New Brunswick Boundary Act, 1851*). See also a follow up Act in 1857 explaining the 1851 Act: *An Act to explain an Act for the Settlement of the Boundaries between the Provinces of Canada and New Brunswick*, 20 & 21 Vict, c 34. The *Customs Act 1843*, 6 & 7 Vict, c 84, s 23, allowed for produce from the Maine portion of the Saint John River watershed to be traded in as if produced in New Brunswick. The *Importation Act 1811*, 51 Geo 3, c 48, allowed rum to be imported into the Canadas from the Maritime Provinces.

exceptions appear to be two 1834 Acts creating land acquisition companies: *An Act for granting certain Powers to the New Brunswick and Nova Scotia Land Company*[265] and *An Act for granting certain Powers to "the British American Land Company"*.[266] As the names suggest, these companies were "established for the Purpose of purchasing, holding, improving, clearing, settling, and cultivating, letting, leasing, exchanging, selling, and disposing of waste Lands, and other Lands, Tenements, and Hereditaments."[267] In short, the land companies functioned as a means of privatizing the settlement process, with companies being permitted to purchase Crown lands at discount rates on the condition that they build the infrastructure necessary to facilitate settlement.[268] The companies were then tasked with selling the lands to prospective settlers.

In assessing whether the Acts may have extinguished Aboriginal title, competence is not at issue. These Acts may, however, prove problematic where constitutional repugnancy is concerned. Should Aboriginal title be proven to lands to which the New Brunswick Company held the first Crown-derived title, a party seeking to demonstrate that this acquisition extinguished title would be required to demonstrate that the acquisition was not repugnant to prevailing constitutional laws and principles. I have found no evidence that the 589,000-acre purchase made by the Company in York County, which sits primarily in traditional Maliseet territory and extends into traditional Mi'kmaw territory as well, was preceded by an Indigenous surrender of land pursuant to the procedural terms of the *Royal Proclamation*.[269] It is important to recall that even surveying the land without Indigenous consent is a violation of the *Proclamation*. Further, the interpretation of the Peace and Friendship Treaties articulated above would require that the Indigenous interest be purchased or ceded to any areas outside those already settled by the British in 1726.

If the land in question was not purchased or ceded, the Act enabling the Company's activities must satisfy the clear and plain intent test if it is to be relied on as evidence of extinguishment. The Imperial Parliament could, if it wished, legislate contrary to the *Royal Proclamation*,[270] though extinguishment must still be assessed on the basis of the clear and plain intent standard. The *New Brunswick and Nova*

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[265] 4 & 5 Will 4, c 24 [*New Brunswick and Nova Scotia Land Company Act*].

[266] 4 & 5 Will 4, c 25.

[267] *New Brunswick and Nova Scotia Land Company Act*, *supra* note 265, s 1.

[268] The company was to "make, form, erect, and build Roads, Canals, Drains, Bridges, and other internal Communications, Houses, Schools, Chapels, Mills, Wharfs, and other Buildings and Works necessary or expedient for the Occupation, Planting, and profitable Cultivation or Improvement of any such Lands": *ibid*.

[269] For detailed information on the lands disposed of through the New Brunswick Land Company, See Professor Bruce Elliot, "Emigrant Recruitment by the New Brunswick Land Company: The Pioneer Settlers of Stanley and Harvey" published in four parts in (2004) 26:4 Generations: The Journal of the New Brunswick Genealogical Society 50; (2005) 27:1 Generations 34; (2005) 27:2 Generations 11; (2005) 27:3 Generations 7. Extensive information is available online: <http://history.earthsci.carleton.ca/company/history/elliott1.htm>.

[270] See, e.g., *Quebec Act, 1774*, *supra* note 170.

Scotia Land Company Act granted the power to purchase and re-sell or otherwise dispose of "waste Lands, and other Lands, Tenements, and Hereditaments."[271] It also granted subsurface rights in lands acquired under the Act. Though the Act stopped short of an explicit extinguishment of title, the standard the courts have applied falls somewhat short of requiring an explicit statement. In *Calder*, Hall J rejected the view that general land legislation could extinguish title, holding instead that extinguishment requires "specific legislation."[272] The first question, then, is whether the terminology in the Act ('waste Lands, and other Lands, Tenements, and Hereditaments') contemplates Indigenous lands. As seen in the analysis of the New Brunswick 1844 Act, 'waste lands' was a term that indicated that lands were unused or uncultivated and was used in the context of that Act to describe Indian reserve lands that had not been cultivated or improved. The phrase 'other Lands, Tenements, and Hereditaments' is certainly broad enough to include Indigenous land rights. The question here is whether the phrase is too broad and falls into the category of general land legislation. Lamer CJC's statement in *Gladstone* is instructive here:

> While to extinguish an aboriginal right the Crown does not, perhaps, have to use language which refers expressly to its extinguishment of aboriginal rights, it must demonstrate more than that, in the past, the exercise of an aboriginal right has been subject to a regulatory scheme.[273]

The distinction drawn here is between a general regulatory scheme on the one hand and an explicit statement of extinguishment on the other. This distinction is reflected in Daigle JA's reasoning in *Bernard* where he held that creating regulatory regimes governing the use of Crown land and licensing regimes regarding the timber on those lands was insufficient to extinguish Aboriginal rights.[274] The facts here are somewhat different. This is not a case of imposing a regulatory scheme which has the effect of limiting the full exercise of a right; rather, it is a grant of land so complete that it seems inimical to the existence of any other interest. While it is clear that as a general proposition a grant cannot extinguish rights, in this instance we are dealing not with a grant, but with a right to purchase enabled by Imperial legislation. In this light, it seems the interest of the New Brunswick Company sits between the two poles identified by Lamer CJC in *Gladstone*. While the legislation does not explicitly extinguish rights or title, nor is it merely general or regulatory in nature. Adoption of a somewhat different articulation of the clear and plain intent test may yield a clearer result in this case. In *Van der Peet*, McLachlin J (as she then was), writing in dissent, articulated a clear and plain standard that would require an "indication that the government of the day considered the aboriginal right on the one hand, and the effect of its proposed action on that right on the other."[275] McLachlin J would have required evidence that the government of the day had the Aboriginal

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[271] *New Brunswick and Nova Scotia Land Company Act*, *supra* note 265, s 1.

[272] *Calder*, *supra* note 140 at 402.

[273] *R v Gladstone*, [1996] 2 SCR 723 at para 34, 137 DLR (4th) 648 (CanLII).

[274] *Bernard* (NBCA), *supra* note 63 at paras 180–187 (Robertson JA).

[275] *Van der Peet*, *supra* note 138 at para 289.

right in question in mind and made a deliberate decision to legislate in a manner incommensurate with the existence of that right, even if extinguishment did not need to be expressly stated in the legislation. The belief among many legislators in the 19th century that Indigenous peoples in the Maritimes possessed no land rights whatsoever outside of Indian reserves (themselves considered to be on Crown land) would, on this reading, seem to preclude satisfaction of the clear and plain intent standard.[276] Further, the term 'waste lands' as used in the legislation was likely intended to refer only to Crown lands. It seems highly unlikely, for example, that the Act was intended to apply to privately owned lands that were going unused. While some early grants were allowed to escheat if they went unused, this is much different from permitting the taking of privately held lands. It seems likely, then, that the Act was only intended to apply to lands held by the Crown that were unburdened by any other interest, which would exclude Aboriginal title lands.

The legislative history of the Imperial Parliament in respect of Nova Scotia is much the same; trade dominated the agenda, with one important exception. Every year from 1748–1779, the Imperial Parliament approved money for the settlement of Nova Scotia—specifically, "for supporting, maintaining, and enlarging the Settlement of his Majesty's Colony of Nova Scotia."[277] Thus, the settlement provisions of the Governor's commission to Cornwallis, which allowed for the grating of lands for settlement, seem to have been drafted pursuant to authority granted by enabling legislation from the Imperial Parliament. This would have allowed the Governor to settle lands in Nova Scotia while the enabling legislation continued to be passed annually and would have extended to present-day New Brunswick and Prince Edward Island, after those colonies became part of Nova Scotia (Prince Edward Island until 1769; New Brunswick until 1784).

The authority to settle lands, however, should not necessarily be equated with the authority to extinguish rights. It is well established that the Crown possessed the authority to create interests in land by granting Crown land.[278] Rather than delegating authority to the Crown to settle lands, the Supply Acts simply authorized the expenditures required by the Crown to carry out its prerogative activity of granting Crown lands. How the 'Crown lands' came to be acquired is another question, but we should recall that no Crown lands legislation has yet been before the courts which has been found to satisfy the clear and plain intent test.

3. Federal Legislation

Federal legislation has yet to be relied on to demonstrate extinguishment of title. There is little federal legislation that, on its face, extinguishes or could be read as extinguishing title. The federal government clearly had the authority to extinguish

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[276] For an account of the views held by 19th century Maritime Intellectuals concerning the land rights of Aboriginal peoples, see Bell, "Amerindian Dispossession", *supra* note 115.

[277] *Supply, etc Act 1749*, 23 Geo 2, c 21, s 18.

[278] See Chitty, *Prerogatives of the Crown*, *supra* note 148 at 387.

title from 1867–1982. However, any legislation relied on to demonstrate extinguishment would be subject to the clear and plain intent test. The lone exception to this is the view that statutes of limitation that operate as federal legislation may have the effect of extinguishing title.[279]

VI. CONCLUSION

An analysis of the relevant case law, legal scholarship, and historical material demonstrates that Aboriginal title can be proven to have existed in the Maritime Provinces at the date of the assertion of British sovereignty. The clear embrace of the territorial conception of Aboriginal title in the *Tsilhqot'in* decision reinforces the view that title can likely be proven to have existed in the region on the basis of properly pleaded title litigation supported by a reasonably complete evidentiary record. In the Maritime Provinces, Aboriginal title is recognized and protected both at common law and in the Treaties of Peace and Friendship. Once title has been proven, the question becomes whether or not it has been extinguished.

It is clear that Aboriginal title was not ceded by treaty. It also appears that it was not extinguished by legislation in either the pre- or post-confederation periods. The manner in which Indigenous peoples were dispossessed of their lands—by assuming all land under British sovereignty could be leased, granted, and sold at the pleasure of the Crown—violated the common law, the *Royal Proclamation*, and the Treaties of Peace and Friendship. This process was not supported by legislation and, as such, could not have extinguished title. In point of fact, this approach was made possible only by the adoption of a *terra nullius* doctrine which denied the existence of Aboriginal rights contrary to both British law of the 18th and 19th centuries and contemporary Canadian law.

When Professor Brian Slattery spoke about Aboriginal title at the University of New Brunswick in 1999, he closed by saying: "To my mind, then, the question of aboriginal title in New Brunswick and Nova Scotia is very much alive and will continue to preoccupy the courts of those provinces for some years to come."[280] This is as true today as it was then, and the *Tsilhqot'in* decision suggests that the courts may continue to be occupied for many years yet. As has been argued in this paper, it is likely that title has yet to be extinguished in the region and remains a legal interest where it can be proven to have existed.

[279] McNeil, "Extinguishment of Aboriginal Title", *supra* note 154 at 325.

[280] Slattery, "Some Thoughts", *supra* note 126 at 40.