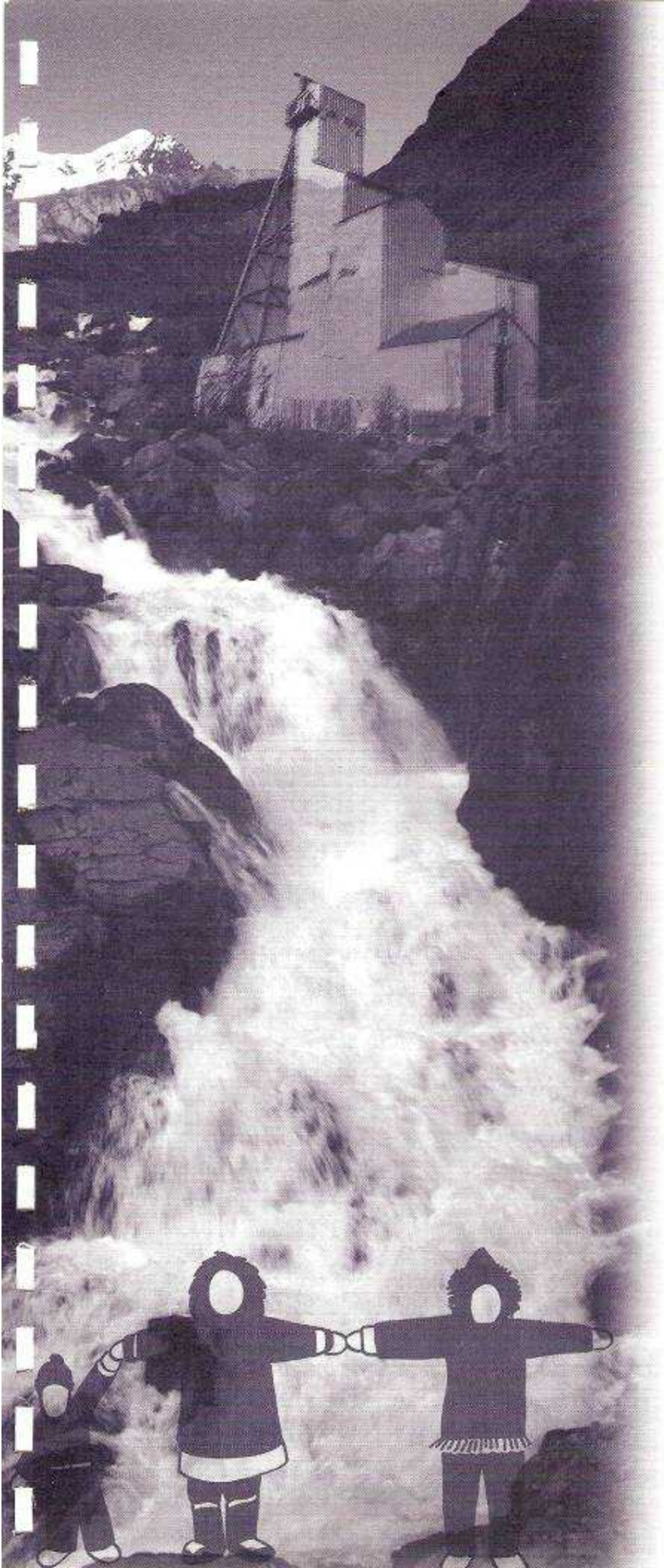

Aboriginal Title and Free Entry Mining Regimes in Northern Canada

Nigel Bankes
and
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FOREWORD

The Canadian Arctic Resources Committee (CARC) embarked upon a research and advocacy initiative in 1995 known as the Northern Minerals Program (NMP). This series of Working Papers sets out the results of the research that was undertaken as part of this program. We are grateful to the following foundations for providing financial assistance in one form or another over the duration of the NMP.

The Audrey S. Hellyer Charitable Foundation
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CARC has examined mineral development across the North for many years. Most of this work focussed on environmental and socio-economic impacts and benefits, and conformity with law and policy. The NMP envisioned a more proactive approach to linking sustainability and mining across the North. In particular, the NMP has taken aim at the manner in which current policies, regulation and monitoring practices reflect the principles of sustainability. As well, CARC examined the challenges and opportunities that 'impact and benefits agreements' bring to Aboriginal governments.

The following is a list of the NMP Working Papers (an order form for these publications is found at the end of each paper).

1. "Mine Reclamation Planning in the Canadian North" by Brian Bowman and Doug Baker.
2. "Aboriginal Title and Free Entry Mining Regimes in Northern Canada" by Nigel Bankes and Cheryl Sharvit.
3. "Reforming the Mining Law of the Northwest Territories" by Barry Barton.
4. "Thinking About Benefits Agreements: An Analytical Framework" by Janet Keeping.
5. "A Guide to Community-Based Monitoring for Northern Communities" by Brenda Parlee.
6. "The Free Entry Mineral Allocation System in Canada's North: Economics and Alternatives" by Malcolm Taggart.
7. "Aboriginal Peoples and Impact and Benefit Agreements: Report of A National Workshop" by Kevin O'Reilly and Erin Eacott.

These papers are 'works in progress'; much of the research continues. While we believe that the findings offer important opportunities for reform, the views and opinions presented are those of the authors and do not necessarily reflect those of CARC.

CARC will continue to press for changes to mining practice and policy. The findings and recommendations in these papers will be used by CARC to build an agenda for major reforms to northern mining law, better environmental management of mineral development, and fairer relationships amongst northern communities, governments and the mineral industry.

TABLE OF CONTENTS

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Kevin O'Reilly supported the project from the outset and provided useful input at several stages.

Nigel Bankes
Cheryl Sharvit
July 1998

1.0 Introduction

For the last century or more, the Government of Canada has proceeded on the assumption that mining legislation in both Yukon and the Northwest Territories allows miners to enter on to the traditional lands of aboriginal peoples, stake claims, go to lease and produce and export minerals without requiring the consent of the aboriginal peoples concerned, and without needing to pay compensation to those aboriginal people. The purpose of this working paper is to question the validity of those assumptions.

The paper deals with those parts of Yukon and the Northwest Territories which are not covered by a modern land claim agreement.

1.1 Two Hypotheses

1.1.1 The Free Entry Hypothesis

The paper examines two related hypotheses. The first, the free entry hypothesis, is that a mineral leasing regime that embodies the basic elements of what has come to be known as a free entry regime is inconsistent with an existing aboriginal title and is therefore unconstitutional unless it can be justified in accordance with tests developed by the Supreme Court of Canada. The main concern of this portion of the paper is with s.35 of the *Constitution Act, 1982*[1] and a particular type of mineral leasing regime. We will consider the jurisprudence on s.35 and apply it to two free entry mineral regimes, the *Yukon Quartz Mining Act*[2] (*YQA*) and the *Canada Mining Regulations*[3] (*CMR*s). To date, much of the s.35 jurisprudence has focused on fishing cases which have come to court as defences to prosecutions. The challenge is to apply that jurisprudence in the different context of a mineral disposition scheme. The court's

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1 Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 35 provides that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

2 R.S.C. 1985, c. Y-4. We have chosen to focus on the Yukon hard rock regime rather than the Yukon placer regime.

3 C.R.C. 1978, c. 1516.

recent decision in *Delgamuukw* v. *British Columbia*[4] provides useful guidance.

We will examine the s.35 cases in some detail in Part 3 but, briefly, these cases hold that where an aboriginal plaintiff can establish a *prima facie* interference with an existing aboriginal right, the government must justify that interference. In doing so, the government must demonstrate that the legislation accommodates the aboriginal interest in strict accordance with the honour and good faith of the Crown. This requires examination of the overall disposition system that government has put in place for the resource in question, as well as the particular licence or incident that brought the conflict to court. The examination will include recognition of an appropriate priority for the aboriginal interest; consultation to ensure that aboriginal rights are taken seriously; some consideration of whether the infringement of the aboriginal interest has been as small as possible given the legislative objective; and the availability of fair compensation.

1.1.2 The *1870 Order* Hypothesis

The second hypothesis, the *1870 Order* hypothesis, considers the validity of a more broadly based claim. The *1870 Order* hypothesis makes the claim that the terms of the 1870 Imperial Order in Council pursuant to which the United Kingdom transferred the administration and control of Rupert's Land and the North-Western Territory to Canada[5], included certain terms and conditions ("the equitable conditions"), and that these conditions preclude Canada from alienating the lands of First Nations and aboriginal people before there has been an equitable settlement of their claims. The *1870 Order* is part of the Constitution of Canada by virtue of s.146 of the *Constitution Act, 1867* and s.52 of the *Constitution Act, 1982* and it therefore operates as a limitation on the plenary power that the Parliament of Canada would otherwise have

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[4] (1997), 153 D.L.R. (4th) 193 (S.C.C.).

[5] *Rupert's Land and North-Western Territory Order*, R.S.C. 1985, App. II, No. 9 [hereafter *1870 Order*]. We will be primarily concerned with the North-Western Territory.

pursuant to s.4 of the *Constitution Act, 1871*.[6] That section accords to parliament the power to make laws for the peace order and good government of the territories. The *1870 Order* has been subject to little academic or judicial analysis[7] although the practising bar, especially in the Yukon, places heavy reliance on the scope of the conditions.

1.1.3 Other Possible Hypotheses

The federal parliament has the plenary legislative power to make laws for the territories. The administration and control of all mineral interests (apart from minerals transferred to aboriginal peoples as part of the settlement of a land claim) is vested in the Crown in right of Canada for the use and benefit of Canada. For these two reasons it is impossible to make the division of powers claim that no provincial or territorial mineral leasing statute can apply to lands that are subject to an unextinguished aboriginal title. The *Delgamuukw* decision brings that question sharply into focus in the provinces[8] but the argument is more

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[6] 34-35 Vict., c.28 (U.K.).

[7] See the case report for *Halferdahl* v. *Canada (Mining Recorder, Whitehorse Mining District),* [1992] 1 F.C. 813 (C.A.). The Kluane Tribal Council and the Council of Yukon Indians intervened and argued (at 817) that by the terms of the *1870 Order*, Parliament was "constitutionally barred from empowering any official, including the mining recorder from making any alienation of land or interest in land that may be required to enable the Government of Canada to fulfil its duty to settle Indian land claims in accordance with certain equitable principles in what is now the Yukon Territory ...". The court found it unnecessary to deal with the question. See also *Hamlet of Baker Lake* v. *Minister of Indian Affairs* (1979), 107 D.L.R. (3d) 513 (F.C.T.D.) [hereafter *Baker Lake*]; *Re Paulette*, [1973] 6 W.W.R. 97 (N.W.T.S.C.), especially at 136, rev'd on other grounds (1975) 63 D.L.R. (3d) 1 (C.A.), aff'd (1976) 72 D.L.R. (3d) 161 (S.C.C.) on the basis that it was not possible to file a caveat in the Land Titles Office against unpatented Crown lands. For judgements on preliminary motions related to the *1870 Order* see *Montana Band of Indians* v. *Canada*, [1991] 2 C.N.L.R. 88 (Fed. C.A.), leave to appeal to the Supreme Court of Canada refused (1991) 136 N.R. 421 n; *Dawson First Nation* v. *Arkona Resources Inc*, [1993] Y.J. No. 231 (QL) and [1994] Y.J. No. 39 (QL); *Calliou* v. *Canada* (1997), 140 F.T.R. 9 (F.C.T.D.). The most thorough academic commentary is K. McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982); see also R. Thompson, *Aboriginal Title and Mining Legislation in the Northwest Territories* (Saskatoon: University of Saskatchewan Native Law Centre, 1982). Thompson's main thesis is a statutory construction argument to the effect that lands subject to an aboriginal title are not subject to disposition under federal mining laws or regulations, or, that at the very least, the aboriginal owners are entitled to compensation as surface owners.

[8] *Supra* note 4 at paras. 172 - 183. For discussion see N.D. Bankes, "*Delgamuukw*, Division of Powers

complex in the Territories.

For a division of powers analysis to have any bite in the territories we need to make two points. The first is that at the time of writing, the territorial governments have no effective power to make laws in relation to minerals[9] and will not have that power unless and until the federal Crown transfers the administration and control of mines and minerals to the Commissioners. The second point is that even upon such a transfer to the Commissioners, we would need to establish that a territorial legislature will not have legislative powers that are more extensive than those of a province. This claim has some intuitive appeal and is supported by ss.18 and 17 of the *Yukon Act* (*YA*) and *Northwest Territories Act* (*NWTA*) respectively. Those provisions are identical and read as follows:

> Restriction on powers
>
> 18. Nothing in section 17 [section 16 of the *NWTA*] shall be construed as giving the Commissioner in Council greater powers with respect to any class of subjects described therein than are given to legislatures of the provinces under sections 92 and 95 of the *Constitution Act, 1867*, with respect to similar subjects therein described.

We do not have an authoritative interpretation of this section and there are two competing interpretations.

On the one hand, the section might be construed as a substantive limitation on power to ensure that a territorial legislature has no greater law-making powers than those possessed by a province. On this view, the provisions represent a conscious decision by Parliament to limit the powers in ss. 17 and 16 to the

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and Provincial Land and Resource Laws", June 1998, submitted for publication.

[9] The *Yukon Act* R.S.C. 1985, c. Y-2, and the *Northwest Territories Act*, R.S.C. 1985, c. N-27, were amended in 1993 (S.C. 1993, c.41) to allow the Yukon and Northwest Territories legislatures to make laws with respect to the management and sale of public lands transferred to the Commissioner and of the timber and wood thereon. The provisions are modelled on s.92(5) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, but are of course limited by the fact that the administration and control of mines and minerals and surface title have generally not been transferred to the Commissioners. Consequently, it is an empty power and will be until the federal government agrees to fill the box. In the case of oil and gas in the Yukon see *Canada-Yukon Oil and Gas Accord Implementation Act*, S.C. 1998, c. 5, in force May 12 1998, except ss. 11-13, 16, 18 (see ss. 28, 19(1)).

scope of similar provincial powers. Despite variations in wording, where a power listed in the *YA* and *NWTA* has a counterpart in s. 92, the scope of territorial authority can be no broader than that of a province. Thus ss.17(n.1)[10] and 16(n.1) are modelled on s. 92(5) and territorial powers to manage and sale public lands are no greater than those of the provinces. Just as a province cannot sell lands that are "reserved for Indians", even though it may own the underlying title,[11] neither could the territorial government.

On the other hand, there is some textual and judicial support for a more limited interpretation of the section. This more limited interpretation focuses on the word "construed" in the section and emphasises that the section creates a rule of interpretation and does not impose a substantive limit on power. The interpretation also emphasises that the section only applies to heads of power in the territorial list that are similar to the heads contained in the *Constitution Act, 1867* and that there is no legal reason why the parliament of Canada could not accord a territorial legislature greater powers than those accorded to a province.[12]

We do not propose to resolve that issue here since the question is somewhat premature. Instead, we will focus on the *Constitution Act, 1982* and the *1870 Order* as limitations on federal powers and leave to another day the application of a traditional division of powers analysis within the territories.

Finally, the recent decision of the British Columbia Court of Appeal in *Haida Nation* v. *British Columbia (Minister of Forests)*[13] gives credence to a series of statutory interpretation arguments that might forestall the application of mineral leasing statutes to aboriginal title lands by reason of general language contained in the leasing statutes. In *Council of Haida Nation*, the court held that aboriginal title lands were an

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[10] The paragraph reads as follows: "the management and sale of the properties referred to in subsection 47(1) [property under the Commissioner's administration and control] and of the timber and wood thereon", virtually identical to the wording of s. 92(5) of the *Constitution Act, 1867*.

[11] *Delgamuukw*, *supra* note 4 at paras.174-176.

[12] This is effectively the interpretation preferred by Borins D.J. in *R.* v. *Davies* (1986), [1990] N.W.T.R. 394 (Y.T.S.C.).

[13] (1997), 153 D.L.R. (4th) 1 (B.C.C.A.), reversing (1995), 130 D.L.R. (4th) 661 (B.C.S.C.).

"encumbering right" within the meaning of the BC *Forest Act* thereby precluding the Crown from including these lands within a forest disposition. There are analogous arguments that can be made under the *YQA* and the *CMR*s.

1.1.4 Mining legislation and land claim agreements

This paper does not consider whether free entry regimes are consistent with the modern land claim agreements in the north.[14]

1.2 Background

This introductory section contains three components. The first component describes three staking rushes in the territories each of which has caused conflicts between mineral activities and aboriginal title claims. The second component describes the basic elements of a free entry mining system and discusses some of the general public policy criticisms of such systems that have been advanced in the literature. The third component discusses the current status of claims negotiations in the two territories for the purpose of identifying which areas are still subject to an existing title claim.

1.2.1 Some Examples of Conflicts Between Free Entry Mineral Exploration and Aboriginal Peoples

Three examples will serve to illustrate the nature of disputes between free entry mining legislation and aboriginal title claims. The first example deals with the Baker Lake uranium staking rush in the 1970s, the second example discusses the Lac de Gras diamond staking rush in the 1990s and the final example is the

[14] For a discussion of possible conflict between the Inuvialuit Final Agreement and the *Canada Mining Regulations* see G. Roy, "Negotiation and Consultation with Local Communities: The Inuvialuit Experience" in M.M. Ross and J.O. Saunders, eds., *Disposition of Natural Resources: Options and Issues for Northern Lands* (Calgary: Canadian Institute of Resource Law, 1997) 270.

Finlayson Lake rush in south east Yukon which also occurred in the 1990s.

1.2.1.1 Baker Lake Uranium Exploration

This first example of a staking rush is the rush that led to the litigation in *Hamlet of Baker Lake* v. *Minister of Indian Affairs*.[15] The plaintiffs in that case asserted an unextinguished aboriginal title over a portion of the Northwest Territories and questioned the validity of the *Territorial Lands Act*,[16] the *Territorial Land Use Regulations*,[17] and the *Canada Mining Regulations*[18] as unlawful intrusions on their rights.[19] The plaintiffs sought, amongst other things, an order restraining the government from issuing prospecting permits and recording mineral claims on their lands. The government had issued prospecting permits covering extensive areas of traditional lands, and large blocks of those lands were staked. Extensive and intrusive exploratory work ensued. Justice Mahoney described some of the activities that comprise exploratory work:[20]

> The exploration work under prospecting permits is of three kinds: geological reconnaissance, geochemical sampling and geophysical survey.... The movement of personnel, equipment and supplies is by air. The aircraft used are most often helicopters. Geological reconnaissance involves small parties of geologists on the ground.... They and their camps are frequently moved by aircraft. Geochemical sampling involves an aircraft setting down on a lake, dropping a dredge and taking samples of the water and bottom sediment. Samples may be taken at half-mile intervals and are removed for analysis

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15 *Supra* note 7. We should not lose sight of the fact that the subject of the staking rush was uranium. Exploration for and production of uranium raises particular ethical questions that are not germane to other minerals. Several Inuit organizations have taken stances expressing total opposition to uranium exploration on moral grounds.

16 R.S.C. 1985, c. T-7.

17 C.R.C. 1978, c. 1524.

18 *Supra* note 3.

19 *Baker Lake*, *supra* note 7 at 514-515.

20 *Id.,* at 530-531.

> elsewhere. A geophysical survey involves an aircraft flying a grid pattern over an area. ... the grid may be flown in lines as close as an eighth of a mile apart at as little as one hundred feet. When work is done on the ground, grids are marked with stakes. Depending on the detail of the exploration, those stakes, two to three feet long, are driven into the ground at intervals of from 100 to 500 feet. To aid in spotting them, a few inches of bright, plastic ribbon is usually attached to the top of each. It flutters in any breeze. It rarely survives a winter and is known to have been eaten by caribou....
>
> ...If the results of the preliminary work warrant, claims within that area are staked and a diamond-drilling programme is undertaken. Test holes are drilled to depths of several hundred feet.

The court acknowledged that the use of low flying aircraft, both helicopters and fixed wing, associated with staking and geophysical activities did result in harassment of caribou and sometimes death.[21] Subsequent studies have confirmed that caribou are particularly vulnerable in low-energy situations and especially post-calving.[22] Justice Mahoney also noted that "notwithstanding regulations to the contrary and the efforts of the Government defendants to police them, debris is frequently left at abandoned sites. Sometimes it is washed up on lakes and river banks. Oil drums, propane tanks and, in one instance, a bulldozer were mentioned in evidence."[23] While problems of this nature are endemic in any disposition system they are much more difficult to control in a free-entry system than in a leasing system.

1.2.1.2 Lac de Gras Diamond Rush

Another example of conflict between a free entry regime and aboriginal title arose from the discovery in

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[21] *Id.*, at 532-33.

[22] See Department of Resources, Wildlife and Economic Development, Government of Northwest Territories, Discussion Paper, *Management of Caribou Calving Grounds in the Northwest Territories, Issues and Options*, September 1996, esp. at 4; *Sensitive Habitats of the Porcupine Caribou Herd*, Report Accepted by the International Porcupine Caribou Board, from the Porcupine Caribou Technical Committee, January 1993.

[23] *Baker Lake, supra* note 7 at 531.

1990 of kimberlite pipes in the Lac de Gras area of the Northwest Territories.[24] That discovery started a staking rush by over 150 companies.[25] More than 21 million hectares of land were staked in the Slave geological region alone.[26] Staking can directly disrupt community life as well; in Snare Lake, for example, prospectors actually staked portions of the community without any communication with community leaders.[27] Such consultation as occurs often occurs after the event when companies require further regulatory approvals. The comments of the Lutsel K'e First Nation to the BHP Assessment Panel are typical:

> Although prospecting and mineral exploration has been taking place on our lands at Lac de Gras for several years, we were never consulted or informed about these events on our land.
>
> It was not until BHP/Diamet had decided to build a mine that they began to consult with us.[28]

A rush of this kind can result in direct interference with the traditional uses aboriginal peoples make of their lands. For example, helicopters fly low and scare off game. Prospectors conduct aerial geophysical surveys and geochemical sampling of soil and water, they carry out surface searches to isolate minerals often

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[24] See "Presentation by Dogrib Treaty 11 Council to General Session EARP Panel Hearings" (Yellowknife, 12 February 1986).

[25] "Diamond rush is on in the Northwest Territories" *Canadian Press Newswire* (24 October 1994) [hereafter "Diamond Rush"].

[26] *Id.*

[27] John Donihee, pers. communication, May 1998. See also the transcript of Mr. Ted Blondin, Land Claims Manager, Dogrib Treaty 11 Tribal Council to The Standing Senate Committee on Aboriginal Peoples, Proceedings of the Standing Senate Committee on Aboriginal Peoples, First Session Thirty-sixth Parliament, Tuesday, May 12, 1998, Issue No. 6, Third meeting on: Bill C-6, Mackenzie Valley Resource Management Act:

> We have experienced the biggest rush of claim staking in the mining history of Canada, so much that these claim-staking activities cover 75 per cent of our traditional territory, and right into one of our communities, Snare Lake.

[28] Lutsel K'e First Nation, Submission to the NWT Diamonds Project, Federal Environmental Assessment Panel, np, nd, mimeo at 4.

found with diamonds, and they drill for core samples.[29] Drilling becomes more intensive as exploration advances. In this particular case, exploration and test mining on traditional lands[30] resulted in the location of proposed diamond mines on the Dogrib and Yellowknives First Nations' traditional hunting and trapping territories.[31] These hunting grounds are important not only for sustenance, but are also central to these nations' cultures.[32]

1.2.1.3 Finlayson-Wolverine Lake Staking Rush

Intensive exploration in the Finlayson-Wolverine Lake area in southeastern Yukon began when Cominco located its Kudz Ze Kayah (KZK) discovery in 1994.[33] In 1995, Westmin and Atna discovered the Wolverine deposit. After grid mapping, soil sampling, and some initial exploratory holes indicated the presence of minerals, the Westmin/Atna joint venture increased their claims in the area from 143 to 1,840,

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29 "Diamond rush", *supra* note 25. Sometimes small-scale mining actually takes place during exploration to determine if a mine will be economical.

30 James Sturcke, "Dene Doubting Diamonds" (1994) 20(4) Alternatives 8 at 8.

31 Susan Wismer, "The Nasty Game: How Environmental Assessment is Failing Aboriginal Communities in Canada's North" (1996) 22:4 Alternatives 10 at 10; Keith Damsell "Whose Land is it Anyway?" *Financial Post* (2 March 1996). BHP's Ekati project was approved by the federal government in the fall of 1996 with leases and licences issuing in January 1997: Indian Affairs and Northern Development, News Release, "BHP Mine going through all the regulatory steps"(7 January 1997). The proposal of Diavik Diamonds Inc to establish a second diamond mine on an island in Lac de Gras was referred for a comprehensive study under the Canadian Environmental Assessment Act in May 1998. Exploration in the region continues: "Ekati partners evaluate pipes near mine" 84(15) *Northern Miner* (8-14 June 1998) 14.

32 The Yellowknives refer to their hunting grounds as their "most spiritually important lands" in Yellowknives Dene First Nation, *Environmental Assessment Review of BHP Diamonds Project: Fact Sheet # 10: Our Position on Development*, (n.d.) at 2.

33 "Busy exploration season is forecast for the Yukon" 82(2) *Northern Miner* (11 March 11 1996) D1, D2 [hereafter "Busy exploration"]; "Atna's Yukon claims yields rich discovery" *Financial Post* (23/25 December 1995) 22 [hereafter "Atna's Yukon claims"]. Exploration has revealed the presence of copper, gold, silver and lead. Following screening under the Canadian Environmental Assessment Act in 1997, Cominco applied for a water licence for the KZK project. The water board commenced its hearing in February 1998.

and Westmin staked an additional 850 claims next to the Wolverine property.[34] By the end of 1995, the total number of quartz claims staked in the area was 14, 207.[35] Staking continued into 1997.[36]

Between August and November 1995, Atna and Westmin alone drilled twenty-four exploration holes just in the main discovery area.[37] In 1996, other companies made discoveries at Fyre Lake,[38] and Atna and Westmin drilled 18, 810 metres in 64 holes.[39] In 1997 exploratory drilling expanded to the Lynx zone, where 17,000 metres were drilled in sixty holes.[40] Atna and Westmin constructed an airstrip near the deposit to facilitate exploration activities.[41] Others have made discoveries in the area as well.[42] All of this activity occurred within the traditional territories of the Liard and Ross River First Nations neither of which has signed a final agreement with Canada.[43] In response to concerns of the Ross River Dene on the effect of exploratory activities on the Finlayson Caribou herd, industry met in the spring of 1996 to discuss

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34 Of the 1,840 claims, Cominco shares 108 as a result of a joint venture entered into to solve a staking dispute resulting from the parties overstaking the same ground on the same day: "Westmin, Atna drilling to expand Wolverine (Yukon)" 82(27) *Northern Miner* (2 September 1996) 1 [hereafter "Westmin, Atna drilling"].

35 "Busy exploration", *supra* note 33.

36 Rob Robertson, "Wolverine adds to Lynx zone" 83(17) *Northern Miner* (23 June 23 1997) 3 [hereafter "Wolverine adds"]; Rob Robertson, "Atna releases more results from Wolf" 83(34) *Northern Miner* (29 October 1997) 1.

37 "Atna's Yukon claims", *supra* note 33. The exploratory holes had "strike lengths" of 250 metres and "downdip lengths" of 400 metres. "Westmin, Atna drilling", *supra* note 34.

38 Rob Robertson, "Exploration proves up VMS potential of Finlayson Lake camp: Juniors flock to southeastern Yukon" 83(17) *Northern Miner* (23 June 1997) B1 [hereafter "Exploration proves"].

39 *Id.*

40 Rob Robertson, "Wolverine adds Lynx zone" 83(17) *Northern Miner* (23 June 1997) 3.

41 "Westmin, Atna size up Wolverine deposit (Yukon)" 82(2) *Northern Miner* (11 March 1996) 3.

42 See Rob Robertson, "Exploration proves", *supra* note 38.

43 For further discussion of the Yukon Umbrella Agreement see *infra*, text to notes 59-62.

minimizing possible impacts of extensive exploration on wildlife.[44] A study released later in the spring indicated Yukon caribou herds were secure and mining companies agreed to use the study in planning activities.[45]

1.2.2 The Elements of a Free Entry System

Three features characterize a free entry scheme for disposing of resources. First, there are few if any qualifications that a person must meet in order to be eligible to acquire rights to the resource. The resource is open to all-comers. Second, the entire resource base is presumptively open to acquisition unless expressly withdrawn. Third, rights to the resource are acquired by physical acts ("staking" or "locating") which accord priority to the person first in time and may themselves cause limited (but unnecessary) environmental damage.[46] As the description of drilling and other exploratory activities above indicates, prospecting activities which may be carried out by a claim holder can also be intrusive and damaging. Rights are maintained by continuing to perform work ("representation work") on the property and there is generally a right to go to lease and produce the leased substances. In some jurisdictions physical entry has been replaced by a system of map-staking.

There is considerable literature, especially in the United States,[47] critiquing free entry disposition systems.[48]

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44 Mario Mota, "Wildlife Discussions Scheduled" *Whitehorse Star* (12 April 1996) 4.

45 Companies suspended work in calving areas for two weeks at a time: Alan Macleod, "Yukon Caribou herds secure - biologist" *Whitehorse Star* (10 May 1996) 6.

46 See judicial comment to this effect in *R.* v. *Peter Paul*, (1996) 145 D.L.R. (4th) 472 at 491-92, noting that the Crown could hardly complain about First Nations harvesting bird's eye maple on Crown land when the Mining Act contemplated blazing or four-facing trees when staking a claim; aff'd (1997), 153 D.L.R. (4th) 131, rev'd [1998] N.B.J. 126 (C.A.) on the grounds that the plaintiff had failed to prove either an aboriginal or a treaty right. The Court of Appeal does not discuss this issue. It would be highly misleading to make the claim that staking in treed areas results in extensive damage; the point is simply that whatever destruction does occur is readily avoidable by the simple expedient of adopting a map staking system.

47 See in particular J. H. Leshy, *The Mining Law: A Study in Perpetual Motion* (Washington: Resources for the Future, 1987), and C. Wilkinson, *Crossing the Next Meridian: Land, Water and the Future of*

We cannot canvass that entire body of literature here, nor is it completely relevant for our purposes. We shall however set out some of the major criticisms if only to emphasise that the critique of free entry systems is potentially far more broadly based than is the present critique, based as it is upon an alleged inconsistency between free entry and aboriginal title.

First, free entry systems incorporate an ethic of development rather than an ethic of conservation. They begin with the presumption that all land is open for potential development. This ethic, if appropriate at the time free entry systems were created (generally the end of the nineteenth and beginning of the twentieth century), is anachronistic in the post-industrial age and is inconsistent with sustainability values and the precautionary principle. Second, free entry schemes may entail considerable transaction costs because there is great potential for disputes inherent in any system of ground staking. Third, free entry schemes by their nature, defer all possibility of government rent collection to the time of production. Fourth, because the system is driven by prospector interest on the ground and is not centrally controlled or coordinated, it is difficult if not impossible to graft benefits requirements on to the tenure scheme as is common in the oil and gas sector. For the same reason it is difficult to develop and impose site specific environmental requirements at least until the activities of the prospector engage other regulatory requirements. Fifth, since all lands are open for exploration and staking unless withdrawn from entry, this represents a default judgement that mining represents the highest and best use of the lands in question. This judgement is not intuitively obvious and, in most cases, there will have been no comprehensive planning exercise undertaken to ascertain which lands should be withdrawn for other purposes. These other purposes might include recreation, hydro generation and the protection of lands for ecological or watershed values. By failing to

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the West (Washington: Island Press, 1992) esp. chapter 2. Wilkinson coined the phrase the "lords of yesterday" to describe disposition and other policies which seemed appropriate to the conditions of a frontier world "at a moment and a place where there seemed to be no end to nature's ability to produce still more material goods with few negative consequences" (at 20). For a relatively recent review of attempts to reform the US Mining Law of 1872 see R. G. Eggert, "Reforming the Rules for Mining on Federal Lands" 117 RESOURCES 6 (1994).

[48] For the Canadian literature see especially, B. Barton, *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993); and B. Barton, "The Future of the Free Entry System for Mining in Canada's North in M. M. Ross and J. O. Saunders, eds., *supra* note 14, 81.

address these issues before parties acquire property entitlements, governments may be faced with expensive compensation claims if they subsequently decide that mining ought not to be permitted in a particular area.[49]

1.2.3 The Status of Land Claim Negotiations in Yukon and the Northwest Territories

This section provides a thumb-nail sketch of the status of land claim negotiations in the two territories in order to assist the reader in thinking about the geographical areas to which the hypotheses under consideration might apply. We look first at Treaties 8 and 11 and then review the modern land claim agreements. Finally, we provide some indication of those areas of the territories for which there is no modern land claim agreement. We have not provided an account of the transboundary claims that may be made by First Nations resident within a province. The overall goal of the section is to identify, in a preliminary way, areas within the two Territories in which there is likely an existing aboriginal title the exercise of which is not constrained by a treaty or modern land claim agreement.

1.2.3.1 Treaties 8 and 11

Treaty 8, negotiated in 1899, primarily covers lands located within Alberta, Saskatchewan and British Columbia. However, the treaty also extends to a triangle of land between the shores of Great Slave Lake and the 60th parallel (see Figure 1). Treaty 11, negotiated in 1921 covers lands in the western part of the NWT and the south eastern corner of Yukon within the Mackenzie drainage basin and other areas in the NWT lying to the west of the Coppermine River. The numbered treaties did not extend to the balance of the two Territories.

Both treaties contained a surrender clause in the following terms:

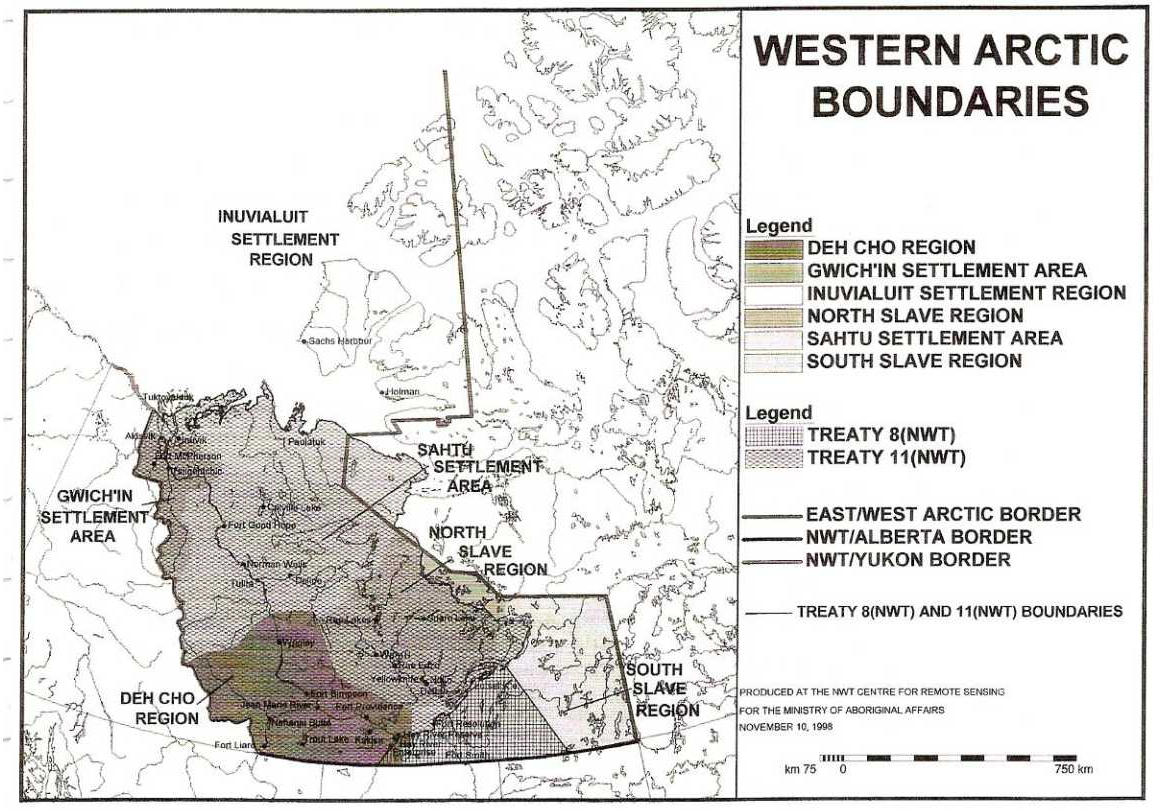
> the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their

[49] The classic case is *British Columbia* v. *Tener* (1985), 17 D.L.R. (4th) 1 (S.C.C.).

rights, titles and privileges whatsoever, to the lands included within the following limits ...

If these treaties are valid there is good reason for thinking that these clauses would be effective to extinguish the aboriginal title of signatories and their descendants, such that the title would not have been an existing aboriginal right within the meaning of s.35 of the *Constitution Act, 1982* when that

Figure 1



section came into force on April 17, 1982.[50] However, the validity of both of these treaties, at least insofar

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50 In *Ontario (Attorney General)* v. *Bear Island Foundation* (1991), 83 D.L.R. (4th) 381 at 384, the Court held that the Temagami Band surrendered their aboriginal rights upon adhering to the Robinson-Huron Treaty in exchange for annuities and a reserve. See also *Howard* v. *R.* (1994), 115 D.L.R. (4th) 312 (S.C.C.). While there may be arguments to the effect that free entry mining legislation may infringe treaty rights (depending upon the terms of the particular treaty), the discussion in this paper is limited to aboriginal title. The numbered treaties are conveniently reproduced in *Consolidated Native Law Statutes, Regulations and Treaties, 1993* (Scarborough: Carswell, 1993) and successive annual editions.

as they purport to apply in the territories, was called into question by Justice Morrow in *Re Paulette*.[51] The plaintiffs in *Paulette* (some 16 chiefs) tried to file a caveat in the land titles office claiming an interest in extensive tracts of land by virtue of an aboriginal title. The title claim was predicated on the assumption that Treaties 8 and 11 had not extinguished their titles.

On hearing the Crown's application to reject the filing of the caveat, Justice Morrow had the benefit of *viva voce* evidence of persons who were present at the signing of Treaty 11. In his view, much of the evidence tended to support the claim that the Treaty was not intended to change anything and certainly was not intended to extinguish title.[52] Furthermore there was evidence that the treaty was delivered as an ultimatum and that there was the threat of coercion if the tribes did not sign. The small areas of reserve land promised offered "one more reason to suspect the bona fides of the negotiations". Justice Morrow did not have to come to a final determination on these points but in his view there was enough evidence to maintain the caveat pending a final determination of the merits of the plaintiffs' claims. Clearly, we too cannot come to any final determination of these matters here. We simply observe that the continuing willingness of the federal Crown to enter into negotiations with the peoples concerned on the basis of a comprehensive title claim suggests that Justice Morrow's findings are not entirely without merit especially when combined with the failure of the Crown to set aside reserves in the Territories.[53]

1.2.3.2 Modern Land Claim Agreements

There are four modern land claim agreements in the Northwest Territories (see Figure 2). The eastern

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[51] *Supra* note 7.

[52] The evidence is reviewed *id.*, at 138 - 143.

[53] There are only two reserves, the Hay River Reserve and the Salt River Reserve, in the NWT. See *Hay River* v. *R.* (1979), 101 D.L.R. (3d) 184 (F.C.T.D.); *R.* v. *Drybones* (1967), 60 W.W.R. (N.W.T. Terr. Ct.) 321, aff'd (1967), 64 D.L.R. (2d) 260 (N.W.T.C.A.), aff'd (1976), 9 D.L.R. (3d) 473 (S.C.C.); and *Dene Nation* v. *Canada* [1992] 2 F.C. 681 (C.A.), which held that lands set aside under the *Territorial Lands Act* are not reserves.

Arctic is covered by the Nunavut Land Claims Agreement which represents a settlement of Inuit claims in the east.[54] The Inuvialuit Final Agreement[55] covers the aboriginal title claims of the Inuvialuit people of the Mackenzie Delta. Moving further south up the Mackenzie Valley, the Gwich'in[56] and Sahtu Dene and Métis[57] peoples have both settled their claims based upon the model of the Dene/Métis Agreement in Principle[58] which was not adopted by other First Nations in the Mackenzie Valley. Thus, while claims have been settled in the eastern half of NWT and in the northern part of the Valley, there are outstanding claims to the south, east and west of the Sahtu and Gwich'in claims.

In Yukon, the Council of Yukon Indians on behalf of 14 Yukon First Nations, Canada and Yukon signed the Umbrella Final Agreement (UFA) in May 1993.[59] The UFA establishes a blueprint or framework for the negotiation of Final Agreements between Canada and Yukon and individual First

Figure 2

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54 Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada, 1993; *Nunavut Land Claims Agreement Act*, S.C. 1993, c.20. See J. Merritt and T. Fenge, "The Nunavut Land Claims Settlement: Emerging Issues in Law and Public Administration" (1990) 15 Queen's L.J. 255.

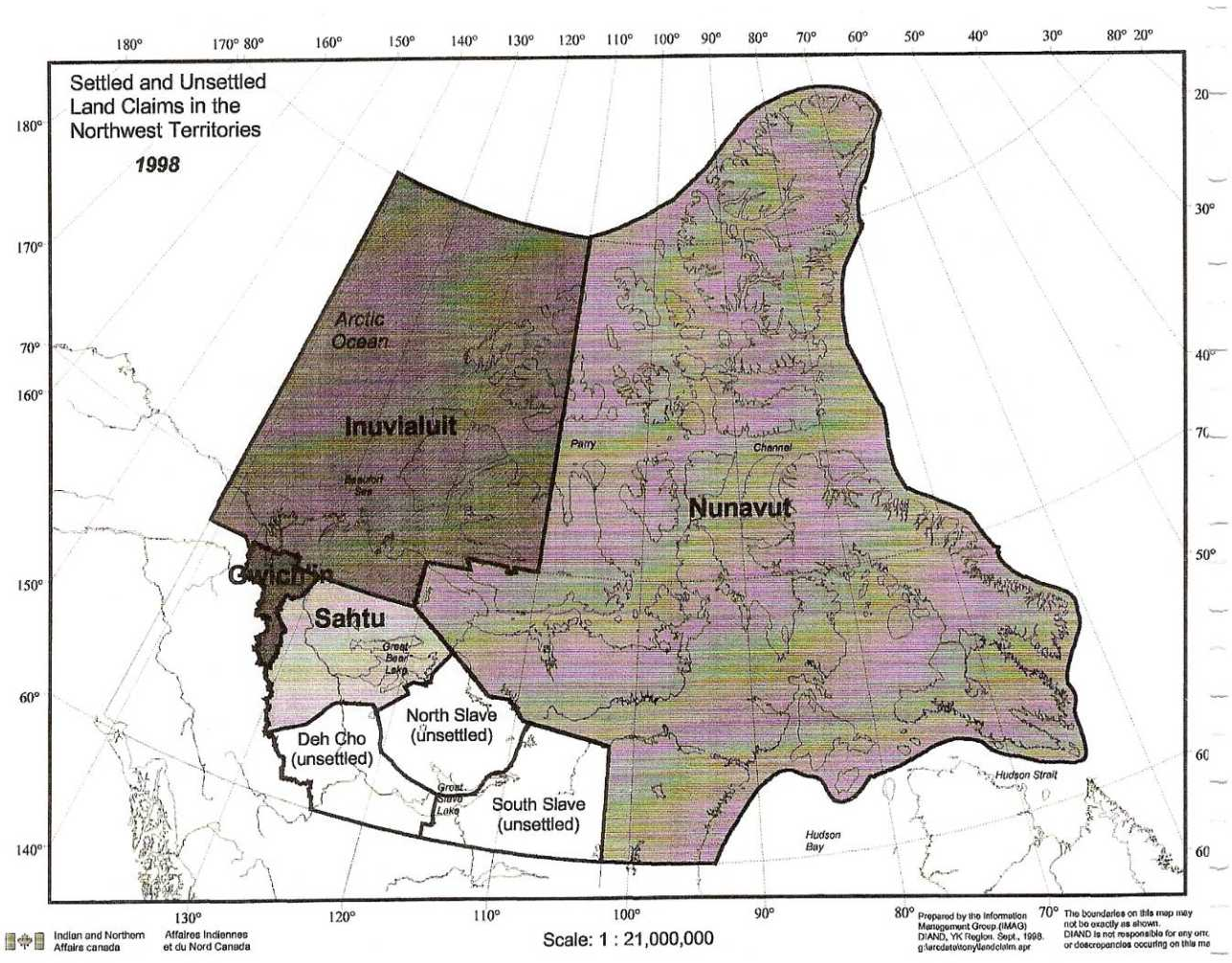
55 Western Arctic Claim: the Inuvialuit Final Agreement, 1984; *Western Arctic (Inuvialuit) Claims Settlement Act*, S.C. 1984, c.24.

56 Gwich'in Comprehensive Land Claim Agreement, 1992; *Gwich'in Land Claim Settlement Act*, S.C. 1992, c.53.

57 Sahtu Dene and Métis Comprehensive Land Claim Agreement, 1993; *Sahtu Dene and Métis Land Claim Settlement Act*, S.C. 1994, c. 27.

58 Dene/Métis Comprehensive Land Claim, Agreement in Principle, 1988.

59 Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon, 1993 [hereafter UFA]; *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c.34 and *Yukon First Nations Self-Government Act*, S.C. 1994, c.35.



Nations. Thus far, the following First Nations have reached Final Agreements: Teslin Tlingit (Teslin), Vuntut Gwich'in (Old Crow), Na-cho Ny'ak Dun (Mayo), Champagne and Aishihik (Haines Junction), Little Salmon-Carmacks, Selkirk (Pelly Crossing), Tr'on Dek Hwech'in (Dawson) and White River (Beaver Creek). The UFA[60] itself does not create or affect any legal rights[61] but ratification of the UFA signifies a mutual intention to negotiate Final Agreements "in accordance with" the UFA.[62] Only the individual Final

60 For published comment on the UFA and the self government agreements see P.W. Hogg and M. E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995), 74 Can. Bar Rev. 187.

61 UFA, *supra* note 59, s. 2.1.2.

Agreements are land claim agreements within the meaning of s.35 of the *Constitution Act, 1982*.

1.2.3.3 Areas Without Agreements[63]

The position is most complex in the NWT where there are outstanding claims from the Deh Cho, the Dogrib, the NWT Treaty 8 First Nations, the North Slave Métis and South Slave Métis Councils. Figures 1 and 2 provide an overview of the areas with and without agreements. Many of the boundaries of unsettled areas are subject to final negotiation of overlapping claims.

The Deh Cho First Nations are currently defining their negotiation position. The Deh Cho region includes the Dene First Nations of Pehdzeh Ki (Wrigley), Jean Marie River, Lidlii Kue (Fort Simpson), Sambaa K'e (Trout Lake), Nahanni Butte, Ka'a'gee Tu (Kakisa), Deh Gah Gotie Dene Council (Fort Providence), West Point (Hay River West Point), Acho Dene Koe (Fort Laird) and Hay River Dene Band (located on Hay River Reserve, these Dene signed Treaty 8 but prefer to work together with Treaty 11 Deh Cho communities as they share the same language and family ties). Deh Cho Métis are represented through Locals in Fort Simpson, Fort Laird and Fort Providence. These First Nations claim title to areas in the southwest Northwest Territories, bordered by Treaty 8 and the Sahtu settlement area in the east and north, the sixtieth parallel, and the Yukon border in the west.

The Dogrib Treaty Tribal Council is currently negotiating a comprehensive claim and arrangements for self-government at the same table. The council represents First Nations in Rae-Edzo, Wha Ti (Lac la Martre), Wekweti (Snare Lake), and Gameti (Rae Lakes).

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62 *Id.*, s. 2.1.1. Not all Yukon First Nations consider that they are bound by the UFA (e.g. the Liard First Nation).

63 This section is based in part on information provided by Kevin O'Reilly, Research Director, Canadian Arctic Resources ComLairde, Yellowknife.

The North Slave Métis Alliance is currently developing its negotiating position. The Alliance representing Métis Locals in Rae-Edzo, Yellowknife Local 66, Yellowknife Métis Local 77, and the Yellowknife Métis Council, is likely to pursue a comprehensive claim. This claim has not yet been accepted for negotiation by the federal government.

The South Slave Métis Council is currently negotiating a comprehensive claim. The Council represents Métis Locals in Fort Smith, Fort Resolution and Hay River.

The Akaitcho Treaty 8 Tribal Council (successor to NWT Treaty 8 Tribal Council with the exception of the Salt River First Nation) is currently negotiating a treaty based upon principles of entitlement/co-existence on behalf of the Yellowknives Dene First Nation, Lutsel K'e Dene First Nation, and Deninu K'ue (Fort Resolution) First Nation. Finally, the Salt River First Nation (located in Fort Smith) is currently negotiating a specific claim/Treaty entitlement.

In Yukon, the following First Nations have yet to conclude Final Agreements: Kluane (Burwash Landing), Laird (Watson Lake), Ross River, Ta'an Kwach'an (Whitehorse and Lake Laberge), Kwanlin Dun (Whitehorse) and Carcross-Tagish.

2.0 The Constitutional and Statutory Framework for Mineral Dispositions in Yukon and Northwest Territories

2.1 The Constitutional Position

As discussed in the introduction, the administration and control of Crown owned minerals remains vested in the Crown in right of Canada and has yet to be transferred to the Commissioners acting on the advice of territorial ministers. The same is also true of the surface of the lands, with the exception of settlement lands and Commissioner's lands. Oil and gas will be transferred to Yukon in the immediate future upon the entry

into force of the *Canada-Yukon Oil and Gas Accord Implementation Act*.[64] Thus, although each territorial legislature has the power to make laws in relation to public resources which is commensurate with the extensive powers held by provinces prior to 1982[65] under s.92(5) of the *Constitution Act, 1867*, in fact, the Commissioner has no mineral resources upon which these law making powers can operate. Consequently, in each jurisdiction, the prevailing disposition legislation is federal.

2.2 The Mineral Legislation

In the case of Yukon, the relevant legislation is the *Yukon Quartz Mining Act (YQA)*.[66] This legislation, first passed in 1924, is based upon a set of regulations dating back to 1898.[67] It remained largely unaltered until 1996 when additional sections dealing with environmental protection were added.[68] In the NWT, the

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64 *Supra* note 9; part of the legislation is now in force, the balance will enter into force upon the actual transfer of administration and control of the oil and gas resources.

65 See *YA, supra* note 9, s.17(n.1) and *NWTA, supra* note 9, s. 16(n.1). The provinces gained additional powers in 1982 through s.92A. For comment on that section see R. D. Cairns, M. A. Chandler, and W. D. Moull, "The Resource Amendment (section 92A) and the Political Economy of Canadian Federalism" (1986) 23 Osgoode Hall L.J. 253; R. D. Cairns, M. A. Chandler and W. D. Moull, "Constitutional Change and the Private Sector: the Case of the Resource Amendment" (1986) 24 Osgoode Hall L.J. 299-313; J. P. Meekison, R. J. Romanow and W. D. Moull, *Origins and meaning of section 92A: the 1982 Constitutional Amendment on Resources (*Montreal : Institute for Research on Public Policy, 1985); *Ontario Hydro* v. *Ontario (Labour Relations Board)* (1993), 107 D.L.R. (4th) 457 (S.C.C.) at 487 - 489 and 499 and 509 - 513; *Westcoast Energy Inc.* v. *Canada (National Energy Board)* (1998), 156 D.L.R. (4th) 456 (S.C.C.) at paras. 80 - 84 and 118 - 121. As part of devolution the territories will doubtless be accorded these additional powers. See *Report to the Honourable Ronald Irwin re the Devolution of Provincial-like Powers to The Yukon and Northwest Territories (the Wright Report)*, April 20, 1995 (mimeo) and Indian and Northern Affairs Canada, *Transferring Full Authority over Natural Resources to Yukoners: A Formal Proposal from the Government of Canada to devolve Northern Affairs Programs in the Yukon to the Yukon Government*, 1997. In the case of oil and gas see *Canada-Yukon Oil and Gas Accord Implementation Act, supra* note 9.

66 *Supra* note 2.

67 *CPAWS* v. *Canada*, [1996] 1 F.C. 832 (T.D.) at para. 843 [hereafter *CPAWS*]. The original regulations were the *Quartz Mining Regulations* (1898), 31 Canada Gazette 2225.

68 S.C. 1996, c.27, in force, April 1, 1997. Note though that the regulations required to make this legislation effective have yet to be promulgated (May 1998). Hence, at the time of writing the legal position is very much as stated in *CPAWS, id.*

relevant mining rules are contained in the *Canada Mining Regulations* (*CMR*s).[69] Like the *YQA*, the *CMR*s are derived from the *Quartz Mining Regulations* of 1898.[70] Authority for the regulations used to be provided by both the *TLA* and the *Public Lands Grants Act*[71] (*PLGA*). Since 1988 the *PLGA* has not been a source of statutory authority for the regulations.[72] In addition to the mineral legislation we need to consider the relevant provisions of the *Territorial Lands Act*[73] (*TLA*), because a withdrawal under the *TLA* removes lands from disposition under the *CMR*s, and it is apparent that, historically, a withdrawal of lands under the *TLA* effected a withdrawal for the purposes of the *YQA* as well.[74] This follows from the ruling in the *Halferdahl* case[75] considered below.

This section is divided into four parts. The first part explains the basic regime and indicates how persons can acquire mineral interests. The second part deals with the qualification or entry requirements for a person wishing to acquire mineral interests while the third part deals with lands open for acquisition and the discretionary withdrawal powers under each of the two regimes. The final part of this section focuses on the surface rights provisions of the two regimes and considers whether aboriginal title holders may avail themselves of these provisions.

2.2.1 Acquisition of rights

The *YQA* and *CMR*s create two forms of property rights to minerals, mineral claims held by entry, and

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69 *Supra* note 3.

70 *Supra* note 67; see Barton, *Canadian Law of Mining, supra* note 48 at 84 - 85.

71 R.S.C. 1985, c. P- 30, now replaced by the *Federal Real Property Act*, S.C. 1991, c. 50.

72 SOR\88-9.

73 *Supra* note 16.

74 *Halferdahl*, *supra* note 7.

75 *Id.*

leases of mineral claims. In Yukon, both the claim and the lease convey the same range of rights. Section 76 of the *YQA* describes the rights as follows:

> 76. (1) The holder of a mineral claim, by entry or by lease, located on vacant territorial lands is entitled to
>
> (a) all minerals found in veins or lodes, whether the minerals are found separate or in combination with each other in, on or under the lands included in the entry or lease, together with the right to enter on and use and occupy the surface of the claim, or such portion thereof and to such extent as the Minister may consider necessary, for the efficient and miner-like operation of the mines and minerals contained in the claim, but for no other purpose; and
>
> (b) the right to cut free of dues such of the timber on the claim or such portion thereof as may be necessary for the working of the claim, but not for sale or traffic, except where the timber has been granted or disposed of prior to the date of entry.

A claim is valid from year to year[76] provided that the holder does and records $100 per year of representation work,[77] or alternatively, pays a fee of $100.[78] Although s.50 of the *YQA* describes the status of the claim as a "chattel interest", a fairly demeaning term, this disguises the reality that the interest is a proprietary interest and can be held in perpetuity provided that the holder complies with the terms and conditions of the *YQA*.

A claim is acquired by properly locating the claim pursuant to ss. 21-33 of the *YQA* and subsequently recording that claim within the prescribed time (s.39).[79] Proper location requires, *inter alia*, the placement of two posts and the marking of a location line between the two posts. A claim holder must perform

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[76] But apparently, perpetually renewable: *YQA*, *supra* note 2, s. 54(1).

[77] *Id.*, s. 54.

[78] *Id.*, s. 57.

[79] *Id.*, s. 39. Those readers not familiar with the *YQA* will be either amused or appalled to find that the time allowed to record varies with the distance of the claim from the recorder's office and the Act still assumes that the miner is travelling by donkey or shank's pony. For claims located more than ten miles from the recorder's office, the Act allows an additional day for every 10 miles.

representation work or pay a fee in lieu to maintain her interest[80] while a lease holder's obligation is transmuted into an obligation to pay rent.[81]

A lease has a term of 21 years renewable for further terms of 21 years in perpetuity provided that the lessee "has complied in every respect with the conditions of the lease and with the provisions of the law and regulations ...".[82] A claim holder under the *YQA* who has acquired a certificate of improvements and has paid the prescribed fees has the right to a lease of the claim.[83] A claim holder is entitled to a certificate of improvements on application where certain requirements have been met including improvements to the value of $500 and the discovery of "a vein or lode".[84] A certificate of improvements provides the lease holder with security of title by shielding him or her from attack on grounds such as misstaking.[85]

In the NWT, the *CMR*s give a claim holder the exclusive right to prospect for minerals and develop mines, including incidental surface rights. A claim holder in the NWT has only limited rights of production and can only remove up to $100,000 worth of minerals without obtaining a lease.[86] A claim is acquired by locating the claim in accordance with the requirements of ss.13-19 and recording it within 60 days of location.[87] Each of the four corners of the claim, which must be as nearly rectangular as possible, must be marked with

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80 *Id.*, ss. 54(1)(a) and 57(1).

81 *Id.*, s.103.

82 *Id.*, s.101.

83 *Id.*, s. 72.

84 *Id.*, s. 68(1).

85 A certificate of improvements may only be impeached on the ground of fraud. The security which a certificate brings its holder requires that an application for a certificate of improvements be advertised (s. 68(1)(e)). Boundaries are fixed by survey (s. 68(1)(c)). A lease is a more secure form of title than a mere claim: (1) in the NWT a claim lapses after 10 years, (2) the Crown can only terminate a lease for failure to comply with conditions, while a claim can be cancelled automatically for failure to record work (e.g., *YQA*, s. 59(2)). See B. Barton, *Canadian Law of Mining*, *supra* note 48 at 320-23 and 340-42.

86 *CMR*s, *supra* note 3, s. 27(2).

87 *Id.*, s. 24(1).

either a post, a tree found in position, or a cone shaped mound of earth.[88] Under both the *CMR*s and the *YQA*, boundary lines must be clearly marked throughout their entire length.[89] In treed areas this is done by blazing trees and cutting underbrush.[90]

The holder of a recorded claim under the *CMR*s may hold it for ten years if the holder carries out $4 per acre per year of work for the first two years and $2 per acre each year thereafter.[91] A claim holder who has either recorded $10 per acre of representation work on a claim or has undertaken to commence work on the claim is entitled to a 21 year renewable lease.[92] There is no discovery requirement under the *CMR*s.[93] The holder of a recorded claim must obtain a lease within 30 days after the tenth anniversary of recording the claim.[94]

Unlike the *YQA*, the *CMR*s do not accord extensive surface rights or rights to cut timber to a claim holder and thus, a claim holder is bound by the general provisions of the *TLA* such as s. 17 which forbids the cutting of timber on territorial lands without a permit. Furthermore, a claim holder must obtain a surface lease or grant in order to "erect any building to be used as a dwelling or any mill, concentrator or other mine building or create any tailings or waste disposal area in connection with the commencement of production from a mine".[95]

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88 *Id.*, ss. 13-14.

89 *CMR*s, *id*., s. 16; *YQA*, *supra* note 2, s. 29.

90 *CMR*s, *id*., s. 16; *YQA*, *id.*, s. 29; See *Peter Paul, supra* note 46.

91 *CMR*s, *id*., s. 38(2).

92 *Id.*, ss. 58-59. The lease is only renewable if the lessee has complied with the terms and conditions of the lease.

93 *Id.*

94 *Id.*, s. 58(1)(a).

95 *Id.*, s. 27.

A lease under the *CMR*s constitutes "a lease of a claim".[96] The lease therefore grants the holder all the rights that a claim holder has plus the right of production.[97] As under the *YQA*, lessees must pay rent.[98]

In addition to the claim and lease, the *CMR*s also establish a transitional tenure in the form of a prospecting permit. The prospecting permit, which is available in many parts of the NWT, is issued on application[99] and gives the holder the exclusive right to locate and stake mineral claims on large areas of Crown land.[100] A prospecting permit is valid for three years for lands south of the 68th parallel and for five years north of the 68th parallel.[101] Permit holders must undertake exploratory work before locating claims within a permit area.[102] The amounts to be spent per year per acre on exploratory work depend on whether the claim is north or south of the 68th parallel and increases over the course of the permit term.[103] The granting of a permit is subject to any rights previously acquired or applied for by any person in the permit area.[104]

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96 *Id.*, s. 58(2).

97 The standard form lease accords the lessee the "exclusive licence to search for, win and take all minerals ....".

98 *CMR*s, *supra* note 3, section 60(1) and Schedule I.

99 *Id.*, s. 29. The power to issue a prospecting permit is discretionary according to s. 29(10): Subject to subsection (11), where exploratory work of value will be undertaken in a prospecting permit area and the granting of a permit will not hinder other mining interests, the Chief may issue a permit, in Form 6 of Schedule III, to an applicant for the exclusive right to prospect for minerals within that area.

100 *CMR*s, *supra* note 3, ss. 29(10), 33(2).

101 *Id.*, s. 29(14).

102 *Id.*, ss. 30 and 33.

103 *Id.*, s. 31(1).

104 *Id.*, s. 29(11). This general language is interesting light of the *Haida Nation* case, *supra* note 13.

Both regimes require the payment of a royalty on production.[105] Neither regime provides for revenue sharing with aboriginal title holders.[106]

In sum, third parties are able to acquire extensive rights to minerals within the traditional territories of aboriginal peoples through the expedient of staking and recording claims. Provided that certain minimum requirements are met, there is a right to convert from a claim to lease and these interests may endure for decades or longer. Neither regime provides for aboriginal involvement in the disposition process. There is no requirement of consultation with First Nations in whose traditional territory the claim is located. There is no opportunity for a First Nation to object to the staking of claims and neither is there any provision for aboriginal involvement at the leasing stage. Finally, even government intervention is kept to a minimum and discretion (or power) strictly confined. Thus the recorder is obliged to record claims and the Minister is obliged to issue a lease provided that in both cases certain minimum and purely formal conditions have been satisfied. Not only do the regimes allow interests to be disposed of on title lands, they actually require such dispositions where demanded by a staker, and there is no discretion to consider aboriginal interests.

In addition to mineral rights, the claim holder also obtains some surface rights although it is apparent that these rights are more extensive under the Yukon regime than under the *CMR*s. This point bears emphasising because it raises for us the question of whether or not a plaintiff would need to establish that its aboriginal title includes a title to minerals in order to prove the free entry hypothesis. This may not be that serious an obstacle in light of Chief Justice Lamer's comments in *Delgamuukw*[107] as to the content of an aboriginal title, but we think that it may not be necessary to go this far since a free entry system that allows a person to acquire anything more than insignificant surface entitlements will itself lead to an inconsistency

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105 *CMR*s, *id.*, s. 65; *YQA*, *supra* note 2, s. 100.

106 Revenue sharing is of course provided for under modern land claim agreements. See for example, the UFA, *supra* note 59, chapter 23 and the Nunavut Agreement, *supra* note 54, Article 25.

107 *Supra* note 4 at para. 122 and see discussion *infra* note 216.

between an aboriginal title and the surface claims of the Crown tenure holder.[108]

2.2.2 Required Qualifications to Locate a Claim

Consistent with the "free" entry ethos, neither regime imposes significant restrictions or required qualifications on those wishing to take advantage of the regime. Section 12 of the *YQA* simply provides that "any individual eighteen years of age or over may enter, locate, prospect and mine for minerals ...".

The *CMR*s are slightly more restrictive. One must first obtain a licence to prospect in order to stake claims on Crown land.[109] As in the Yukon, only persons 18 years of age or older may locate a claim.[110] Only companies registered with the Registrar of companies under the Companies Ordinance of the Territories may apply for a licence, and no individual or company "who held a licence that was revoked...within the previous 30 days, may apply for a licence."[111] The applicant must pay a nominal fee ($5/person or $50/company), but the Mining Recorder has no discretion to refuse to issue a licence upon receipt of an application accompanied by the appropriate fee.[112]

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[108] Although there is a common law rule that the subsurface title dominates the surface title, and that the mineral owner has an implied right to use so much of the surface as is reasonably necessary to exploit the mineral estate (*Borys* v. *Canadian Pacific Railway Company*, [1953] A.C. 217 (P.C.)), it seems clear that we cannot simply import such common law rules when determining the *sui generis* content of an aboriginal title: see *Delgamuukw id.*, and *St. Mary's Indian Band* v. *Cranbrook (City)* (1997), 147 D.L.R. (4th) 385 (S.C.C.) .

[109] *CMR*s, *supra* note 3, s. 11(1).

[110] *Id.*, s. 8(7).

[111] *Id.*, s. 7.

[112] *Id.*, s. 8(2). The absence of discretion under both regimes is important. We will rely upon it to show that the regimes fail to accommodate aboriginal interests. The federal government has relied upon the same absence of discretion to justify its failure to consult aboriginal peoples prior to recording claims. In our view this entirely misses the point. See Northern Affairs Program Guidelines for Addressing Crown Fiduciary Obligations Toward Aboriginal People, September 1, 1995 (mimeo) as supplemented by a document entitled "Delgamuukw and Northern Resource Management", February 23, 1998. Both documents are remarkable for their reversal of the normative authority of statutes, regulations and the constitution. For example, the 1998 document describes the duty to record claims and the duty to

2.2.3 Lands Open for Acquisition

The *CMR*s and the *YQA* both exhibit the second characteristic feature of free entry schemes namely that all lands are open for staking and acquisition by third parties unless and until expressly withdrawn. Each regime contains a discretionary withdrawal power supplemented in each case by a further withdrawal power contained in the *TLA*.

This section begins with a brief exploration of the principle that all lands are open and continues with a more detailed examination of the withdrawal power. Our interest in the withdrawal power is two-fold. First, as with other statutory discretionary powers, it may be possible to argue that the Crown must exercise this power in a manner consistent with the Crown's fiduciary obligations to aboriginal peoples.[113] Thus, under some circumstances, failure to exercise the power to withdraw lands from the application of the *CMR*s or the *YQA* may be a breach of a fiduciary duty.[114] Second, and more germane for present purposes, the

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convert claims to leases as "constraints" that apparently preclude a requirement of consultation that might otherwise arise. In fact the legislation must conform to the constitutional limitations placed on it by ss. 35 and 52(1) of the *Constitution Act, 1982*.

113 See by way of analogy *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)* (1995), 130 D.L.R. (4th) 193 (S.C.C.) (hereafter *Apsassin*), where the Court held, at paras. 21 - 24 *per* Gonthier J., and paras. 112-115 *per* McLachlin J., that the Crown breached its fiduciary duty by failing to correct its error of disposing of minerals interests when it became aware of the erroneous transfer. It had the ability under s. 64 of the *Indian Act*, R.S.C. 1927, c. 98, to revoke the transfer of mineral interests.

114 We do not explore this argument further here. The chief obstacle that the argument must overcome is that both *Apsassin, id.,* and *Guerin* v. *R* (1984), 13 D.L.R. (4th) 321 (S.C.C.), the two leading cases on fiduciary duties, deal with reserve lands for which there has been a surrender. However, the reasoning behind the conclusion may not be so confined. See the following statement from McLachlin J. in *Apsassin, id.,* at para 115: "Where a party is granted [or exercises] power over another's interests, and where the other is correspondingly deprived of power over them, or is "vulnerable", then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other..."

actual exercise of the withdrawal power by the Crown will be a key defence to any claim that the legislation infringes a constitutionally protected title. To put the most extreme case: even if an aboriginal plaintiff establishes a *prima facie* and technical breach of title, the Crown would be able to justify that breach if it could establish that it has withdrawn all lands that the relevant First Nation asked it to.

2.2.3.1 All Lands are Open for Staking

Section 12 of the *YQA* establishes the basic rule for Yukon. This section authorizes entry onto any vacant territorial lands and any other lands in respect of which the Crown has reserved the right to enter, prospect and mine for minerals. The term "vacant land" is not defined in the *YQA* and neither is the term "territorial lands". The latter term however is defined in the *TLA* and in the *CPAWS* case Justice Reed seemed to assume that the statutes were in *pari materia* and therefore that the definition from the *TLA* should apply.[115] The question therefore arises whether or not lands that are the subject of an unextinguished aboriginal title are "vacant territorial lands", but we shall not pursue that discussion here.[116]

The *CMR*s create a similar regime. Sections 3 and 11(1) provide that all lands in the NWT which are vested in the federal Crown or of which Canada has power to dispose are open for staking by licensees.[117]

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115 *CPAWS, supra* note 67 at 849. In *Halferdahl, supra* note 7 at 822, the appellant Crown expressly argued that the *TLA*, the *YQA* and the *Yukon Placer Mining Act* should be read *in pari materia*; the court found it unnecessary to deal with the argument.

116 The question is particularly interesting in light of the recent decision of the British Columbia Court of Appeal in *Haida Nation, supra* note 13. In that case a unanimous Court of Appeal (at least on the conclusion) held that an aboriginal title was an encumbrance for the purposes of s.28 of the BC *Forests Act* which contemplated the issuance of timber tenures in the form of Tree Farm Licences for areas of Crown land "the timber on which is not otherwise encumbered." The court held that the plain meaning of these words embraced an aboriginal title. Is there an analogous argument to be made in the context of the term "vacant territorial lands"? There is some indication in the statute that the term "vacant lands" is intended to have a narrower technical meaning confined to lands that are not staked or leased. This seems to be the way that the term is used in both the text and heading of s.14(2) of the *YQA*.

117 There must be a further implied limitation on the application of the *CMR*s. Section 3(1) of the *TLA*

Both regimes thus reflect the presumption that all land is open for staking.

2.2.3.2 The Exceptions and the Withdrawal Power

Although the above sections establish the basic rule that all lands where mineral rights are vested in the Crown are open for exploration and staking, we must now consider the exceptions. The exceptions under the *YQA* are listed in s.14:

> 14. (1) There shall be excepted from the provisions of section 12 any land occupied by any building, any land falling within the curtilage of any dwelling-house and any land valuable for water-power purposes, or for the time being actually under cultivation, unless with the written consent of the owner, lessee or locatee or of the person in whom the legal estate therein is vested, any land on which any church or cemetery is situated, any land lawfully occupied for mining purposes *and Indian reserves*, national parks and defence, quarantine or *other like reservations* made by the Government of Canada, except as provided by section 15.[118]

The second group of italicized words in s.14 fell to be interpreted in *Halferdahl*.[119] By two orders in council adopted in 1986 and expressed to be made pursuant to s.19(a) of the *TLA*,[120] the Crown withdrew certain

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provides that subject to an exception that is not relevant here "... this Act applies only in respect of territorial lands under the administration of the Minister". The term "Minister" is defined as the Minister for Indian Affairs and Northern Development (IAND). If the Minister for IAND no longer has control of the lands and the minerals, the lands and minerals are not subject to the *TLA* and the *CMR*s. Note as well that the *CMR*s are no longer issued under the authority of the *Public Lands Grants Act* as well as the *TLA*, see *supra* note 72.

[118] Emphasis supplied.

[119] *Supra* note 7.

[120] Section 19 of the *TLA* at the time provided as follows:

> The Governor-in-Council may
> (a) upon setting forth the reasons for withdrawal in the order, order the withdrawal of any tract or tracts of territorial lands from disposal under this Act;
>
> (d) set apart and appropriate such lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to

"territorial lands" including all mines and minerals from disposition under the *TLA*, without prejudice to, *inter alia*, recorded mineral claims in good standing under the *YQA*. The withdrawal was expressed to be "for the reason that the tracts ... are required to facilitate the settlement of native claims". The plaintiff sought an order requiring the recorder to record 80 quartz mineral claims within the withdrawn area.

The trial judge granted *certiorari* with *mandamus* in aid reasoning that the withdrawal was limited to the purposes of the *TLA*. The Federal Court of Appeal reversed, holding that what is now s.14(1) of the *YQA* operated to incorporate the withdrawal under the *TLA* (i.e. the withdrawal was one of the "other like reservations made by the Government of Canada" and described in s.14).[121] The reservation was "a like reservation" because "although the reservation is not as an 'Indian reserve', the stated purpose is similar in that the lands reserved will be for Indians in the event they should become part of a final settlement of existing land claims."[122] In sum, a withdrawal under the *TLA* also works a withdrawal under the *YQA*.

The *YQA's* own withdrawal power is found in s.14.1(2). This section was added in 1991,[123] presumably to respond to the uncertainties created by the *Halferdahl* litigation.

> 14.1 (1) Section 12 does not apply to lands entry on which for the purpose of locating a claim or prospecting or mining for minerals is prohibited by an order under subsection (2),

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> make free grants or leases for such purposes, and for any other purpose that he may consider to be conducive to the welfare of the Indians.
>
> The Court of Appeal in *Halferdahl, id.*, at 820, distinguished between these two paragraphs. The court stated that the power under paragraph (d) is broader than the power under paragraph (a) and although the *TLA* "does not expressly authorize the Governor in Council to prevent the recording of mineral claims under the *YQA*, it seems to me that a withdrawal of lands from disposal pursuant to paragraph 19(a) has the effect of frustrating the mining recorder's authority under the latter statute to record mineral claims and thereby prevents him from doing so." See also *CPAWS, supra* note 67 at 845.

121 *Halferdahl, id.*, at 823; the trial decision is reported at (1990), 31 F.T.R. 303.

122 *Id.*, at 824. Claims recorded notwithstanding the existence of a withdrawal order are void *ab initio*: *Canada (Attorney General)* v. *Halferdahl No. 2* (1996), 115 F.T.R. 158 (T.D.).

123 S.C. 1991, c.2, s.3 deemed in force February 13, 1990; s.5 of the same Act was designed to validate, if necessary, earlier orders giving them an effective date of February 13, 1990.

except on the terms and conditions, if any, set out in the order.

Order prohibiting entry

(2) Where, in the opinion of the Governor in Council, any land in the Territory may be required for a harbour, airfield, road, bridge or other public work or for a national park, historic site or town site, *the settlement of aboriginal land claims* or any other public purpose, the Governor in Council may, by order, prohibit entry on that land for the purpose of locating a claim or prospecting or mining for minerals except on such terms and conditions as the Governor in Council may prescribe.[124]

In the NWT, the restrictions on entry are established by s. 11(1) of the *CMR*s:

11. (1) Subject to any regulations made under the *Territorial Lands Act*, a licensee may enter, prospect for minerals and locate claims on lands other than lands
(a) to which the National Parks Act applies;
(b) used as a cemetery or burial ground;
(c) in respect of which a claim has been recorded and has not lapsed;
(d) the minerals in which have been granted or leased by Her Majesty;
(e) set apart and appropriated by the Governor in Council for any purpose described in section 19 [now s. 23] of the *Territorial Lands Act*;
(f) the entry on which for the purpose of prospecting for minerals and locating a claim thereon is prohibited by order of the Governor in Council, subject to the terms and conditions contained in the order;
(g) under the administration and control of the Minister of National Defence, the Minister of Energy, Mines and Resources or the Minister of Transport, unless the consent of that Minister has been obtained in writing;
(h) the surface of which has been granted or leased by Her Majesty, unless the grantee or lessee consents thereto or an order authorizing entry thereon has been made pursuant to subsection 72(3).

Lands not open for staking are primarily those which have already been designated for another use or are the subject of a prior disposition. Section 11(1) contains both its own withdrawal power, and incorporates that in the *TLA* as well. In contrast to the *YQA*, neither the *CMR*s nor the *TLA* mention withdrawing lands

[124] Emphasis supplied.

for the specific purpose of settling land claims, though they clearly allow such withdrawals under more general withdrawal provisions.[125]

The withdrawal provisions in both territories and the practice pursuant to them clearly indicates that the Crown does use these executive powers to ensure that *some* land is available for the settlement of aboriginal claims.[126] Does this mean that any attempt to attack the constitutionality of the *YQA* and/or *CMR* is

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[125] See discussion of *Halferdahl*, *supra* note 7, at text to notes 119 *et seq.* In the N.W.T., for example, withdrawals to facilitate land claims settlements occur under the authority of s. 23(a) of the *TLA*, *supra* note 16, as am. by S.C. 1994, c. 26, s. 68, which allows the Governor in Council, "on setting out the reasons for withdrawal in the order, order the withdrawal of any tract or tracts of territorial lands from disposal under this Act". Paragraph (d) of the same section allows the government to

> set apart and appropriate such areas or lands as may be necessary
> (i) to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for that purpose, or
> (ii) for any other purpose that the Governor in Council may consider to be conducive to the welfare of the Indians.

Government does not rely on this provision to withdraw title lands in order to negotiate settlements, though any lands set apart and appropriated under s. 23(d) would be excluded from the land base open to staking and prospecting activities as a result of s. 11(e) of the CMRs. Section s. 11(h) of the CMRs, prohibits a licensee from entering, prospecting or locating on lands "the surface of which has been granted or leased by Her Majesty" without consent or an order of a panel of arbitration authorizing entry. Such lands include lands granted to aboriginal organizations under land claim agreements: form letter from the Mining Recorder's Office, To All Purchasers of Maps, April 30, 1996.

[126] There are withdrawals that occur at other stages of land claim negotiations as well. For example, once agreements are signed, lands are withdrawn in anticipation of the enactment of legislation by Parliament giving First Nations ownership of land: see Prohibition of Entry on Certain Lands Order, 1992, No. 1, SOR/92-221, P.C. 1992-709, 9 April, 1992. Once a final land claim agreement has been negotiated , orders are made extending the terms of interim withdrawals and prohibitions on entry. In May 1998, several withdrawals occurred in the Yukon pursuant the UFA, because several First Nations have negotiated final agreements. The orders protect "Site Specific Settlement Land Selections" and "will end on the earlier of February 1, 2003, or upon registration of the survey plan of the Site Specific Settlement Land parcels with the Registrar of Land Titles..." See Order Prohibiting Entry on Certain Lands in the Yukon Territory (1998-No. 3, Little Salmon/Carmacks First Nation, Y.T.), SOR/98-289, P.C. 1998-857, 14 May, 1998; and Order Prohibiting Entry on Certain Lands in the Yukon Territory (1998-No. 5, First Nation of Nacho Nyak Dun, Y.T.), SOR/98-310, P.C. 1998-930, 28 May, 1998 for the Regulatory Impact Statements. The purpose of these orders is to comply with s. 5.14.4 of the UFA and individual agreements, which requires that interim orders withdrawing Proposed Site Specific Lands must be continued and made applicable to the Site Specific Lands selected from the proposed lands, until s. 2.5.0 applies to such lands. That provision provides for the surrender of rights, title and interest to mines and minerals in settlement lands, and rights to Category A and B lands that are inconsistent with the provisions of the agreements. Section 5.4.0 gives First Nations rights in and management powers over settlement lands. In Category A lands, the First Nation will have fee simple title excepting mines and minerals and the right to work such mines and minerals; and under Category B lands, fee simple

doomed to failure at the outset? We do not think that either the presence or exercise of a withdrawal power in itself disposes of the s. 35 hypothesis at the outset, as we will demonstrate in detail in section 3.4 below. In summary we have three reasons for this conclusion: first, the policy has only a limited ambit; second, the policy is simply that, merely policy; and third, in practice the policy operates in such a way as to accord priority to mineral interests through extensive grandparenting of existing interests.

2.2.4 Competing Surface Rights

Both the *CMR*s and the *YQA* include provisions to deal with a surface owner or occupier whose lands are damaged or compromised as a result of mineral activities. The sections are premised on the assumption that the surface owner has no right to withhold consent to the use of the surface of his or her land and that he or she is merely entitled to compensation for damages suffered and, perhaps for loss of use. This assumption is significant in that even if aboriginal title holders are able to get compensation for interference with their surface rights, the mineral regimes accord priority to mineral interests granted under the legislation.

2.2.4.1 The *YQA*

In addition to s.14 of the *YQA* which grants the owner a veto over entry within the curtilage of a dwelling, ss.15 and 15.1 of the *YQA* provide as follows:

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title reserving mineral interests and rights to work minerals to the Crown (s. 5. 10). A third category of lands is Fee Simple Settlement Lands. Permanent withdrawals of areas which formed part of interim withdrawal lands occur after the settlement of claims. See Prohibition of Entry on Certain Lands Order, 1993, No. 16, SOR/93-529, P.C. 1993-1941, 2 December, 1993: land withdrawn indefinitely for a Special Management Area in accordance with the Final Agreement for the Vuntut Gwich'in First Nation. Other withdrawals are aimed at fulfilling more specific provisions of Final Agreements, such as setting aside lands for wildlife habitat areas, wetland habitat areas, and historic sites: Order Prohibiting Entry on Certain Lands in the Yukon Territory (1997- No. 5, Ddhaw Ghro Habitat Protection Area, Y.T.), SOR/97-417, P.C. 1997-1154, 28 August, 1997; Order Prohibiting Entry on Certain Lands in the Yukon Territory (1997- No.6, Lhutsaw Wetland Habitat Protection Area, Y.T.), SOR/97-418, P.C. 1997-1155, 28 August, 1997); Order Prohibiting Entry on Certain Lands in the Yukon Territory (1997- No.7, Nordenskiold Wetland Habitat Protection Area, Y.T.), SOR/97-444, P.C. 1997-1304, 17 September, 1997; Order Prohibiting Entry on Certain Lands in the Yukon Territory (1997- No. 8, Fort Selkirk Historic Site, Y.T.), SOR/97-459, P.C. 1997-1424, 2 October, 1997.

> 15. (1) No person shall enter on for mining purposes or shall mine on lands owned or lawfully occupied by another person until adequate security has been given, to the satisfaction of a mining recorder, for any loss or damage that may be thereby caused.
>
> (2) Any dispute respecting a decision of the mining recorder under subsection (1) as to the security to be given shall be heard and determined by the Yukon Surface Rights Board in accordance with the *Yukon Surface Rights Board Act* on application by the person who is to give the security or the owner or lawful occupant of the lands.
>
> 15.1 Persons locating, prospecting, entering on for mining purposes or mining on lands owned or lawfully occupied by another person shall make full compensation to the owner or occupant of the lands for any loss or damage so caused, which compensation, in case of dispute, shall be determined by the Yukon Surface Rights Board in accordance with the *Yukon Surface Rights Board Act*.

These provisions offer limited protection to owners and lawful occupiers of lands. Such persons are entitled to insist that security be posted prior to entry for mining purposes and are also entitled to full compensation for any loss or damage. Disputes as to the amount of compensation or as to the amount of security shall be determined (subject to the comments below) by the Surface Rights Board.

It is entirely possible that these provisions permit an aboriginal title holder to seek compensation, not for a taking, but for damages actually suffered. Certainly there can be little doubt following the Supreme Court's decision in *Delgamuukw* that an aboriginal title holder is a "lawful occupier".[127]

The *Yukon Surface Rights Board Act* (*YSRBA*)[128] is primarily concerned with access to settlement lands (i.e. lands owned by a First Nation under the terms of a Final Agreement) and thus although the *YQA* expressly incorporates this *Act*, in fact the *YSRBA* sheds little light on this point. Arguably, the Board has no jurisdiction to deal with a compensation application because there are no provisions of the *YSRBA* that

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127 *Supra* note 4.

128 S.C. 1994, c. 65.

indicate how the Board is to deal with such an application. In other words, while the *YQA* contemplates using the *YSRBA* procedures, there are no reciprocal provisions in the *YSRBA* to accommodate this use at least for non-settlement lands.

Indeed, the only substantive provisions of the *YSRBA* dealing with *non-settlement lands* are ss. 65-66, which provide as follows:

> Order respecting interpretation
>
> 65. On application by
>
> (a) a person, other than Government, who has an interest or right in the surface of non-settlement land, or
>
> (b) a person, other than Government, who has a mineral right with a right of access under ... section 12, as restricted by section 14, of the *Yukon Quartz Mining Act* on that non-settlement land,
>
> the Board shall, in relation to a dispute between a person referred to in paragraph (a) and a person referred to in paragraph (b), make an order interpreting a provision referred to in paragraph (b) in relation to the right of access.
>
> Nature of order
>
> 66. For greater certainty, the Board may not, in making an order under section 65 respecting a right of access provided for by a provision referred to in paragraph 65(b), create any right or make that right subject to a term or condition or otherwise restrict that right in a manner not provided for in that provision.

What do these sections actually provide for? To reiterate previous discussion, s.12 of the *YQA* spells out the general principle that lands are open for staking by any person and s.14 lists the exceptions. It seems clear from these quoted clauses from the *YSRBA* that the Board's role is confined to *interpreting* the provisions of s.12 and s.14 of the *YQA in relation to the right of access*.

However, if we are wrong on this point[129] and the Board does have jurisdiction over compensation matters as well, as seems to be contemplated by the *YQA*, then it is hard to resist the conclusion that a First Nation that has yet to settle its claim must be a person (other than Government) who has "an interest or right in the surface of non-settlement land".[130]

In sum, the surface rights regime of the *YQA* may offer some protection to an aboriginal title holder although so far as we know the provisions have never been used for this purpose. The protection is limited to security and actual damage suffered. The scheme does not offer compensation for the forced nature of the taking.

2.2.4.2 The *CMR*s

The surface rights provisions of the *CMR*s[131] create a complex procedure to settle disputes between a locator or prospector and a "surface holder" who has been granted or leased the land. The relevant sections allow terms and conditions to be set for access and provide for compensation and the involvement of the mining recorder and ultimately arbitration if the parties cannot agree. The compensation payable is not expressly limited to the damage caused. Under the regulations however, the only persons defined as "surface holders" are lessees or registered holders of surface interests.[132]

It is therefore hard to imagine bringing an aboriginal title within the phrase lands that are "granted or leased to a surface holder" but, that cannot be the end of the matter since there is a strong argument that the

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129 *YSRBA*, *id.*, s.6 states that for greater certainty, Parts I (creation of the Board) and IV (general powers) apply where the Board exercises a power, duty or function conferred by another Act of Parliament. The difficulty is that these Parts do not embrace the compensation provisions of the *Act*.

130 For a discussion of the *Delgamuukw* decision, *supra* note 4, on the nature of the aboriginal title, see section 3.3 below.

131 S*upra* note 3, ss. 70 - 71.

132 *Id.*, s. 2.

Regulations are not consistent with s.12 of the *TLA*[133] which provides that:

> The Governor in Council may make regulations for the leasing of mining rights in, under or on territorial lands and the payment of royalties therefor, *but such regulations shall provide for the protection of and compensation to the holders of surface rights.*

In *Baker Lake*, the defendant mining companies argued successfully that the Inuit were not "holders of surface rights" within the meaning of what is now s. 12 of the *TLA*, as aboriginal title is not a proprietary right.[134] This conclusion no longer seems sound in light of *Delgamuukw* and other authorities.[135]

In sum, the *CMR* surface rights regime is clearly designed for the benefit of Crown grantees and is not designed to benefit and provide compensation for aboriginal title holders. These limitations render the scheme vulnerable since it is not as broad as the scheme contemplated by the *TLA*. That said, the scheme arguably offers the potential for a broader range of matters to be considered (both for compensation and the relevant terms and conditions) than does the companion scheme in the *YQA*. Under neither regime, however, can entry be precluded or refused by an occupier, unless the government withdraws the land from disposal.

2.3 Regulatory Rules Affecting Land and Water Use by Mineral Claim Holders

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133 *Supra* note 16. The arguments are explored in greater detail in Thompson, *supra* note 7 at 19 - 24.

134 *Baker Lake*, *supra* note 7 at 558.T he court also held that even if title is a proprietary right, it was extinguished by the Royal Charter of 1670 which granted ownership of the colony to the Hudson's Bay Co. If aboriginal title holders are "holders of surface rights" under s. 12 however, arguably the *CMR*s are not in compliance, both insofar as aboriginal title holders are not "surface holders" and thereby eligible for compensation, and also insofar as there is no *protection* accorded to their surface rights. Moreover, the *Baker Lake* decision was decided before s. 35, and therefore the conclusion at 557 that legislation prevails over aboriginal title no longer stands, so that the *TLA* itself, if it does not adequately protect aboriginal interests along with other "surface rights", may be open to constitutional challenge.

135 *Supra* note 4. See also *Paul* v. *Canadian Pacific Ltd* (1988), 53 D.L.R. (4th) 487 at 504 (S.C.C.) confirming that the aboriginal interest is a proprietary interest and is personal only in the sense that it is alienable only to the Crown.

In addition to the proprietary framework established by the *YQA* and the *CMR*s, there is of course a plethora of environmental and regulatory standards with which the proponent of a mineral project must comply. We cannot hope to do much more than scratch the surface of those requirements in this paper, nor do we believe it is important for us to do so. It is our contention that while consideration of these regulatory requirements may affect the answers to our questions at the margins, it will not alter the primary assessment based upon our consideration of the proprietary aspects of the regime. For example, the regulatory requirements for water quality may assist a justification argument, but they are not likely to be relevant to the question of *prima facie* infringement. Even at the stage of justification, it is hard to see how water quality standards can be used to justify the Crown in disposing of the title lands of the aboriginal plaintiffs. We think that there will usually be an insufficient nexus between the proprietary infringement and the subsequent regulatory control to allow evidence of that regulatory control of activities to be adduced to justify the infringement.[136]

The *Territorial Land Use Regulations* (*TLUR*s) passed pursuant to the *TLA* and the water legislation for each territory are the main regulatory tools (other than labour and health and safety rules) affecting mining operations in the territories.[137] In addition, operators in the Mackenzie Valley will have to familiarize themselves with the new *Mackenzie Valley Resource Management Act*[138] when it enters into force along

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[136] Regulatory requirements may be more effective in justifying infringements of rights such as harvesting rights. The Crown is aware of the difficulty. The *Program Guidelines* for addressing fiduciary responsibilities, *supra* note 112, contains the following acknowledgement:

> In some circumstances, existing legislation requires the issuance of rights (e.g. issuance of rights to staked mineral claims) and provides no opportunities for consultation or for the assessment of assertions of potential interference with the activities and/or rights of Aboriginal peoples. In such cases, it is important that you use opportunities available to meet requirements for consultation when additional authorizations are subsequently requested (e.g. a water licence in the example of Yukon mining).

[137] We should also note s.73(1) of the *CMR*s, *supra* note 3, which *inter alia* (1) gives the Minister the *discretionary* power to order a person to limit discharges of substances and (2) requires all persons doing prospecting and representation work to do so in accordance with the *TLA* and regulations and any other applicable Act of Parliament.

[138] S.C. 1998, c. 25, not yet in force (Royal Assent 18 June 1998).

with its accompanying regulations. The new Act will establish a new planning structure and a system of land and water boards for the Mackenzie Valley area.

In Yukon, operators will also have to comply with the new assessment legislation emerging from the Yukon Final Agreement as well as the recent amendments to the *YQA* and the *YPA* designed to a large extent to overcome the provision in s.3(3) of the *TLA* to the effect that nothing in the *TLA* (and therefore regulations passed pursuant to the *TLA*) shall limit the operation of the *YQA* or the *YPA*. To give a complete picture, we would also have to give some account of federal environmental assessment legislation.[139]

2.3.1 The Territorial Land Use Regulations

The *TLUR*s govern land use on Crown lands in both territories. The *TLUR*s prescribe activities which may only be undertaken with the appropriate permit.[140] Certain activities are exempt from the requirement to obtain a permit either because of specific provisions contained within the *TLUR*s in the case of *CMR*s or because of the dramatic grandparenting effect of s.3(3) of the *TLA* in the case of the *YQA*.[141]

We can demonstrate this grandparenting effect by reference to *Canadian Parks and Wilderness Society* v. *Canada*.[142] Westmin, the registered owner of certain quartz claims, applied for a land use permit to "walk" a bulldozer (eventually two) some 200 kms over bush trails and unbroken land to its claims

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139 *Canadian Environmental Assessment Act (CEAA)*, S.C. 1992, c.37. The development assessment legislation called for by the UFA in Yukon, *supra* note 59, has yet to be introduced.

140 *Supra* note 17, ss. 8-9. For comments on the enforcement of the *TLUR*s see *R.* v. *Furniss*, [1991] Y.J. 10 (Y.T.S.C.) (Q.L.).

141 Section 3(3) of the *TLA*, *supra* note 16, provides as follows:

> Nothing in this Act shall be construed as limiting the operation of the *Yukon Quartz Mining Act*, the *Yukon Placer Mining Act*, the *Dominion Water Powers Act* or the *National Parks Act*.

142 *Supra* note 67.

straddling the Bonnet Plume River. The Bonnet Plume River and Basin had been accepted for nomination as a Canadian Heritage River. The permit was granted over the objections of an affected First Nation, the Na-cho Ny' ak Dun First Nation. Once there, Westmin proposed to carry out certain exploratory work on its claims. The applicants argued that Westmin required a land use permit under the *TLUR*s for the operations that it proposed to carry out on the claims and also sought an order quashing the permit that was granted to Westmin for the "cat operation." The court had little hesitation in rejecting both claims, the first largely on the basis of s.3(3) of the *TLA*.

The court held that any attempt to apply the *TLUR*s to operations on a claim block would conflict with the rights accorded to a claim holder by s.76(1)[143] of the *YQA*:

> A restriction on the right to use the surface of the claim site, other than one imposed by the Minister of Indian Affairs and Northern Development pursuant to subsection 76(1) would limit the operation of the *Yukon Quartz Mining Act*. The *Territorial Land Use Regulations*, which it is argued should apply, do not relate to the efficient miner-like operation of the mining activities, nor are they imposed by the Minister of Indian Affairs and Northern Development. They are general land use regulations promulgated by the Governor in Council. In my view the explicit wording of subsection 76(1) precludes the operation of the *Territorial Land Use Regulations* to the mining activity in question.[144]

However, the court did confirm (inferentially) that Westmin would require a permit to cross adjacent lands (i.e. for the bulldozer walking operation) notwithstanding the broad language of s.3(3) of the *TLA*.[145]

In the same case, Justice Reed suggested that the *TLUR* permit requirements would apply to mineral activities under the *CMR*s since "in the Northwest Territories there is no exempting provision comparable to subsection 76(1) of the *Yukon Quartz Mining Act*".[146] This is clearly true. The *CMR*s are merely

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143 The section is quoted in section 2.2.1 above.

144 *CPAWS, supra* note 67 at 844.

145 *Id.*, at 848.

146 *Id.*, at 846.

regulations of the *TLA*, and s. 3(3) of the *TLA* does not except the *CMR* from the *TLA* regime. Furthermore, in direct contrast to s.76(1) of the *YQA* which insulates the claim holder, s.11(1) of the *CMR*s subjects a licensee's right to prospect for minerals to any regulations (including therefore the *TLUR*s) made under the *TLA*. Thus, if mineral operations in the NWT are to be exempted from the general regime of the *TLUR*s this will only come about as a result of a specific provision in the *TLUR*s. Section 6(b) of the *TLUR*s fits the bill. It reads in part as follows:

> 6. These Regulations do not apply to
> (b) anything done in the course of prospecting, staking or locating a mineral claim unless it requires a use of equipment or material that normally requires a permit;

Although this is not an easy provision to interpret, it is generally understood simply to mean that acts of prospecting, staking, or locating claims do not themselves trigger a requirement for a permit; as soon as those activities involve the use of equipment or material that would otherwise require a permit then the regulations apply and a permit will be required.

Thus, unlike the situation in Yukon, the fact that activities are carried out on a claim block does not itself confer an exemption from the *TLUR*s. An exemption from the regulations and the permit requirement only arises if no other section of the regulations is triggered; activities on claim blocks are only exempt in the NWT if they fall under one of the other general exemptions contained in the regulations. Read this way, the mining clause in the *TLUR*s is really no more than a "for greater certainty" clause.

The activities that are exempted from the *TLUR*s are those activities that require neither a Class A nor a Class B permit and which are not otherwise prohibited by the regulations. They include:

a. activities requiring less than 50 kg of explosives in a 30 day period;
b. use of a vehicle weighing less than 5t;
c. use of a campsite for less than 100 person days;
d. power driven equipment weighing less than 500 kg (not including ancillary equipment);
e. a fuel storage facility for less than 4,000 litres of fuel;

f. a cut line not exceeding 4 ha in area.

These exemptions are significant in the present context insofar as it is clear that a person may cause significant disruption of traditional activities and sacred areas and perhaps serious damage without the need for a prior approval in the form of a permit. The regulations cover other activities including drilling, moving earth, and the creation of trails and rights of way. Some activities are prohibited, including land use operations within 30 metres of a known monument or a known or suspected burial ground and certain activities that have detrimental effects on streams.[147] The regulations require permitees to clean and restore water crossings,[148] and restore the permit area.[149] One of the astonishing features of the regulations is that these basic prohibitions only apply to permittees. This follows from the specific language of the prohibitions ("No permittee shall ..."), but also from the fact that the s.6 "Exemption from regulations" section quoted above provides an exemption from the regulations and not simply from specific sections of the regulations.

The regional land use engineer designated by the Minister of Indian Affairs and Northern Development has a wide discretion to issue or refuse a land use permit, and to include terms and conditions respecting a wide range of matters, including: the methods and techniques used in carrying out a land use operation, matters relating to chemical and toxic substances, protection of wildlife and fisheries habitat, and objects and places of recreational, scenic and ecological value.[150] The engineer may impose other terms and conditions that he or she "thinks necessary for the protection of the biological or physical characteristics of the land management zone" so long as the matters dealt with are not inconsistent with the *TLUR*s.[151] Protection of aboriginal interests is not mentioned, and there is no specific provision in the *TLUR*s for consultation with

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147 *TLUR*s, *supra* note 17, s. 10.

148 *Id.*, s. 13.

149 *Id.*, s. 18. The permit area is to be restored "as nearly as possible to the same condition as it was prior to the commencement of the land use operation".

150 *Id.*, ss. 25, 27, 31.

151 *Id.*, s. 31(1)(m).

aboriginal communities. However, as a matter of policy, the Department routinely consults, in at least a *pro forma* way, with affected communities prior to the issuance of a permit.[152] In addition, issuance of a permit will trigger the screening provisions of the *Canadian Environmental Assessment Act.*[153]

2.3.2 Water Legislation

The *Yukon Waters Act*[154] and the *Northwest Territories Waters Act*[155] regulate the use of, and the deposit of waste into, territorial waters. Regulations made pursuant to these Acts establish water management areas.[156] With the exception of domestic and instream users, use of waters must be in accordance with a licence or the regulations.[157] While it is impossible to imagine a producing mine[158] that would not require a water licence under the provisions, many exploratory drilling operations will not be caught by the regulations, which allow significant use without a licence.[159] While in the Yukon the licence requirement is triggered by use of 300 m^3 or more per day of water, in the NWT use of 100 m^3 per day will

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152 Depending on the size and location of a land use operation, the Engineer may seek advice of community and special interest groups. Indian and Northern Affairs Canada, *A Guide to the Territorial Land Use Regulations* (December, 1994) at 4. The *Guide* makes absolutely no reference to aboriginal peoples or aboriginal rights. The *Guide* has apparently been supplemented by the policy documents referred to in note 112 *supra*. These documents envisage substantially more intensive consultation than is required by the *Guide*.

153 *Supra* note 114, and the *Law List Regulations*, SOR/94-636.

154 S.C. 1992, c.40, hereafter *YWA*.

155 S.C. 1992, c. 39, hereafter *NWTWA*.

156 The *Northwest Territories Waters Regulations* [hereafter *NWTWR*], and the *Yukon Territory Waters Regulations* [hereafter, *YTWR*] SOR/93-303, s. 3, Schedule I.

157 *YWA, supra* note 154, and *NWTWA, supra* note 155, s.8.

158 See the comments of Justice Reed in *CPAWS, supra* note 67 at para. 19.

159 Conditions of land use permits therefore contain some clauses relating to water use and deposits into water.

trigger a licence requirement.[160]

The deposit of waste into water within a water management area, or anywhere under conditions in which the waste or another waste resulting from the deposit may enter waters in a water management area, is prohibited unless authorized by regulations or a licence.[161]

The two *Acts* accord the Yukon Territory Water Board and the Northwest Territories Water Board discretionary powers to issue licences for terms up to twenty-five years to use waters or to deposit waste into waters in accordance with the regulations.[162] Schedule VII of the *Yukon Waters Regulations* and Schedule V of the *NWT Water Regulations* set out the uses and deposits which do not require a licence, as well as those which require either a type A or B licence.[163] The Board must hold a public hearing for the issuance or renewal of a type A licence while a hearing is optional for a type B licence.[164] Type A licences require the Minister's approval.[165] The Minister's approval is only necessary for a type B licence if the Board holds a hearing.[166]

The Board may include any conditions it considers appropriate in a licence.[167] The Board must exercise its

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160 *YTWR*, *supra* note 156, Sch. VII; *NWTWR*, *supra* note 156, Sch. V. In contrast, all direct or indirect deposits of waste to surface water, and all deposits of waste from milling, require a licence.

161 *Id.,* s.9.

162 *YWA*, *supra* note 154, and *NWTWA*, *supra* note 155, s. 14(1) .

163 While all mining undertakings in the NWT are subject to the same criteria, in the Yukon, there are different criteria for placer and quartz mining. As we only discuss the Yukon quartz legislation, we limit our discussion of the water regulations to their implications for quartz mining.

164 *YWA*, *supra* note 154, and *NWTWA*, *supra* note 155, s. 21.

165 *Id.,* s. 14(6)(a).

166 *Id.,* s. 14(6)(b)(ii). The Board chair must approve of all type B licences.

167 *Id.,* 15(1). Janet Keeping, "Local Benefits and Mineral Rights: Disposition in the Northwest Territories: Law and Policy", in M.M. Ross and J.O. Saunders, eds., *supra* note 48, 181 at 201-202, argues, however, that s. 15(1) can be read more restrictively, so that it is understood to contemplate only conditions

discretion in accordance with criteria imposed by s. 14(4):

> Where an application for a licence is made, the Board shall not issue a licence unless the applicant satisfies the Board that
>
> (a) either
>
> (i) the use of waters or the deposit of waste proposed by the applicant would not adversely affect, in a significant way, the use of waters, whether in or outside the water management area to which the application relates,
>
> (A) by any existing licensee, or
>
> (B) by any other applicant whose proposed use of waters would take precedence over the applicant's proposed use by virtue of section 29 [the licencee who applied first has precedence], or
>
> (ii) every licensee and applicant to whom subparagraph (i) applies has entered into a compensation agreement with the applicant;
>
> (b) compensation that the Board considers appropriate has been or will be paid by the applicant to any other applicant described in clause (a)(i)(B) but to whom paragraph (a) does not apply, and to
>
> (i) licensees to whom paragraph (a) does not apply,
>
> (ii) domestic users,
>
> (iii) instream users,
>
> (iv) authorized users,
>
> (v) authorized waste depositors,
>
> (vi) owners of property,
>
> (vii) occupiers of property, and
>
> (viii) holders of outfitting concessions, registered trapline holders, and
>
> holders of other rights of a similar nature

The *Acts* set up a right to compensation for adverse effects where person is unable to obtain adequate compensation under s. 14 :

> 30. (1) Except as otherwise provided by a compensation agreement referred to in subparagraph 14(4)(a)(ii), a person who is adversely affected as a result of
>
> (a) the issuance of a licence, or
>
> (b) a use of water or deposit of waste authorized by regulations made under paragraph 33(1)(m) or (n)
>
> is entitled to be compensated by the licensee, authorized user or authorized waste depositor

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relating to the actual use of water, and not, for example, conditions requiring benefits to be given to aboriginal communities. See also *Fisheries Assn. of Newfoundland and Labrador Ltd.* v. *Newfoundland (Minister of Fisheries, Food and Agriculture)* (1996), 142 D.L.R. (4th) 732 (Newf. CA).

> in respect of that adverse effect, and may sue for and recover any such compensation in any court of competent jurisdiction.

Although the opportunities to claim compensation appear broad, and although they conceivably include traditional aboriginal users of the land, in practice, aboriginal peoples and First Nations have found it difficult to avail themselves of these provisions.[168] Also significant in the context of a s. 35 analysis is the absence of any mention of aboriginal peoples or interests in the compensation provisions. Domestic and instream users are defined as persons[169]

> using waters, otherwise than [diverting or obstructing waters, altering the flow of waters or altering the bed or banks of a body of water], to earn income or for subsistence purposes.

Aboriginal uses generally fall under instream uses, and while s. 14(4)(b)(iii) requires a board to be satisfied that appropriate compensation is paid to instream users, in practice, aboriginal claimants have difficulty getting compensation for a number of reasons including the fact that instream users cannot obtain a

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168 See, for example, Northwest Territories Water Board Reasons for Decision respecting an application for renewal of a licence made by Northwest Territories Power Corporation, Licence Number: NIL4-0154, January 31, 1994, where rather than order compensation, the Board incorporated a condition into the renewed licence requiring the licencee to negotiate with the aboriginal claimants "for the purpose of arriving at mutually satisfactory compensation agreements." In a decision respecting the Taltson Licence, May 21, 1996 (Licence N1L4-0158), the Board determined that there was insufficient evidence to substantiate a claim for compensation. It had requested additional information from the aboriginal claimants and they did not provide it. In both these decisions the Board noted that it can only award compensation for loss, damage or other adverse effects occurring during the term of the licence in question, and has no jurisdiction to award compensation for damages which arose during previous terms. In its Reasons for Decisions respecting BHP Diamond Inc.'s application for a licence (No. N7L2-1616) February 5, 1997, the board made several decisions regarding requests for compensation. The Dogrib Treaty 11 Council sought compensation-in-kind, and the Board found that its jurisdiction was limited to awarding monetary payment of compensation. As the Dogrib Treaty 11 Council did not seek monetary compensation, the Board did not require the applicant to pay any compensation to this group. The Kitikmeot Inuit Association requested the Board to order BHP to negotiate a compensation process with them. The Board found that this would amount to a sub-delegation that was not within the Board's jurisdiction. The Lutsel k'e Dene First Nation was not awarded compensation because they did not notify the Board of their intention to make representations prior to the hearing. Finally, the Board found that the Yellowknives Dene First Nation failed to provide sufficient evidence of who used the land and water, when, the frequency of use, the nature of the instream use, the anticipated adverse effect, and the value of the use that may be lost due to the adverse effect.

169 *YWA*, *supra* note 154, and *NWTWA*, *supra* note 155, s.2.

licence.[170]

Each *Act* allows the Governor in Council to remove lands from disposition,[171] *inter alia*, to protect waters and also allows the Governor in Council to order the Board not to issue licences within specified waters for a specified time or otherwise "to enable comprehensive evaluation and planning to be carried out with respect to those waters".[172] So far as we are aware, these powers have not been exercised.

In sum, advanced exploration projects and proposals to go into production will trigger the full regulatory regime administered by the water boards. Many of the uses of water associated with preliminary exploration will not engage the regime either because they are so minor or because they are approved through the regulations and do not require an application. The legislation does provide for compensation for instream users including aboriginal users although aboriginal claimants have found it hard to take advantage of these provisions, and the legislation is not drafted to accommodate, nor does it even mention, aboriginal title or rights.

2.3.3 The 1996 Amendments to the *YQA*[173]

The 1996 amendments to the *YQA* add a new Part II to the *Act* dealing with Land Use and Reclamation. The old *Act* (now Part I) is made subject to Part II (new subs.2(4)). The focus of the new sections is environmental protection and not fulfilment of constitutional responsibilities to aboriginal peoples. This much is clear from the new s.134 which states the purposes of the new part:[174]

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170 *Id.,* s. 14(2). Domestic users also cannot be issued licences.

171 *Id.,* s. 34. Neither Act refers to the protection of aboriginal rights or title in this context.

172 *Id.,* s. 34(2).

173 *Supra* note 68.

174 This has to be one of the most developmentally oriented statements of the principle of sustainable development that we have ever seen.

> The purpose of this Part is to ensure the development and viability of a sustainable, competitive and healthy quartz mining industry that operates in a manner that upholds the essential socio-economic and environmental values of the Territory.

These amendments entered into force on April 1, 1997 but they will not become operational until the extensive regulations called for by the amendments are themselves proclaimed. This much is clear from s.133(2) which provides that this new Part of the *Act* and any provision of the regulations will only apply to lands and categories of lands to the extent that the regulations so provide. The new Part establishes four categories of exploration programs (Classes I-IV)[175] but the criteria for the categories are to be prescribed by regulation.[176] In general the scheme established by the new Part provides for prescriptive operating conditions for the different classes of exploration program, and depending upon the level of exploration, notification to the Chief of Mining Land Use and in some cases the public. Furthermore, as one moves up the scale of Classes of program there is an increasing need for various levels of approval of both the operating plan as well as of the completion of the operations. Security may be demanded for Class II, Class III and Class IV exploration programs where there is a "risk of significant adverse effects" from the program.[177]

Draft regulations have been circulated for discussion, but at the time of writing, have not been finalized.[178] The actual staking process and some preliminary exploration will escape regulation under this scheme since these activities fall below the threshold for a Class I exploration program. The different categories of exploration program are far too complex and detailed to summarize here. Suffice it to say that the Classes are based upon a number of criteria similar to those in the *TLUR*s, including: campsite (numbers of persons

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175 *Supra* note 68, s. 135.

176 *Id.*, s. 153.

177 *Id.*, s. 143.

178 *Yukon Quartz Mining Land Use Regulations* (proposals, mimeo, n.p., n.d.).

and person days), fuel storage facilities, trenching, line cutting, removal of trees and bushes and stripping of vegetative mat, use of off road vehicles, underground works, adits etc. Obviously, as work levels increase in intensity, one moves up the scale of exploration programs.

2.3.4 *The Mackenzie Valley Resource Management Act (MVRMA)*[179]

The *MVRMA* is intended to establish an "integrated system of land and water management in the Mackenzie Valley",[180] and to implement certain provisions of the Gwich'in and Sahtu Dene and Métis Comprehensive Land Claim Agreements.[181] It establishes several boards and processes to carry out these purposes. In general, it is fair to say that these Boards will assume many of the responsibilities currently assumed by government for water use, land use and environmental assessment. In addition, the *Act* will provide the legislative framework for a land use planning process. Given our interest in the portion of the Territories in which there are unsettled claims, it is important to emphasise that the legislation establishes a framework or template for the entire Mackenzie Valley[182] although the regional boards that are contemplated will only be established for those parts of the Valley for which there is already a land claim agreement in existence. Further regional boards will be established as subsequent claims are settled in the Valley.

2.3.4.1 Land Use Planning

The *MVRMA* will establish the Gwich'in Land Use Planning Board[183] and the Sahtu Land Use Planning

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179 *Supra* note 138.

180 *Id.,* long title.

181 *Id.,* preamble, s. 15(1), and Parts 2 and 3.

182 In fact the Bill also applies to areas that fall outside the Mackenzie drainage: *MVRMA*, *id.,* s. 2, definition of Mackenzie Valley.

183 *Id.,* s. 36.

Board,[184] which will each consist of five members, including two nominated by the First Nation concerned.[185] The planning boards will prepare land use plans concerning land, water and other resources in the settlement areas identified in the Gwich'in and Sahtu Agreements,[186] and submit the plans to the First Nation and the territorial and federal Ministers for approval.[187] Any body issuing licences, permits or other authorizations respecting the use of land or waters or the deposit of waste in a settlement area will be bound by the land use plan.[188] Before any such authorization is issued, a First Nation, the federal or territorial government, or the body with authority to issue the licence, permit or other authorization, may request the planning board to decide whether the proposed activity is in accordance with the applicable land use plan.[189] Any person "directly affected" by the proposed activity may also apply for such a determination.[190] There is no land use planning process for the Mackenzie Valley as a whole, nor for any non-settlement lands.

2.3.4.2 Land and Water Boards

The *MVRMA* will replace the jurisdiction of the *Northwest Territories Waters Act* in the Mackenzie Valley.[191] The Act establishes the Mackenzie Valley Land and Water Board (MVLWB), with jurisdiction over the Mackenzie Valley generally,[192] and the Gwich'in and Sahtu Land and Water Boards, who will have

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184 *Id.,* s. 38.

185 *Id.*, ss. 36(2) and 38(2).

186 *Id.,* s. 41, except areas that are in national park lands, lands acquired under the *Historic Sites and Monuments Act*, or "lands situated within the boundaries of a local government (*Id.,* s. 34)."

187 *Id.,* s. 43.

188 *Id.*, s. 46(1).

189 *Id.*, s. 47.

190 *Id.,* ss. 46(1) and 47(1),(2).

191 *Id.,* ss. 60(4), 60(5), and 99(1).

192 *Id.*, ss. 99(1), 102(1) and 105.

jurisdiction in their respective settlement areas.[193]

The MVLWB will have jurisdiction over land and water use and waste deposits in the Mackenzie Valley generally, and over applications for land or water use, or depositing waste, that affect more than one settlement area or areas outside settlement areas.[194] Regional panels will have jurisdiction over activities likely to have impacts within the settlement area only.[195]

A board issuing a licence under the *MVRMA* must do so in accordance with the applicable land use plan.[196] While the Gwich'in and Sahtu First Nations will have representatives on the MVLWB and their respective regional boards, the *MVRMA* does not seek to ensure representation of peoples with unsettled claims in land and water use regulation.[197] The *MVRMA* also accords the Gwich'in and Sahtu First Nations riparian-like rights which may affect mineral rights holders, but does not mention rights of aboriginal peoples with unsettled claims.[198]

2.3.4.3 Environmental Assessment

Section 112(1) of the Act establishes the Mackenzie Valley Environmental Impact Review Board (Review Board) and gives it jurisdiction over undertakings on land or water wholly within the Mackenzie Valley. It

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193 *Id.,* ss. 54, 56 and 58-60.

194 *Id.,* s. 103.

195 *Id.,* s. 102. Regional boards retain jurisdiction over compensation matters where a proposed use or deposit "would be likely to substantially alter the quality, quantity, or rate of flow of waters" on, through, or adjacent to First Nation lands. *Id.,* ss. 78-80.

196 *Id.,* s. 61.

197 Regional boards will each consist of five members, including two appointed on the nomination of the First Nation concerned, *id.,* ss. 54(2), 54(3), 55(2) and (3).

198 *Id.,* s. 75. Boards may issue licences and authorizations interfering with rights under the agreements so long as certain requirements, including compensation to First Nations, are met. *Id.,* ss. 76-77.

will replace the jurisdiction of the *Canadian Environmental Assessment Act* over such proposals.[199] The environmental assessment provisions will apply to the issuance of licences, permits and authorizations required for carrying out developments under any federal or territorial law.[200] The scheme of the Act is modelled on *CEAA*[201] and the regulations will provide the equivalent of the *CEAA* law list to trigger a screening.[202] The regulatory authority responsible for the proposed development must carry out the screening.[203] A more rigorous assessment is required where the screening leads the body conducting it to conclude that the development may have a significant adverse impact on the environment, or might be a cause of public concern.[204] The assessment scheme does not address title interests either.[205]

2.3.4.4 Land Use Regulations

Proposed land use regulations under the *MVRMA* were gazetted in January 1998.[206] The regulations are very much based upon the current *Territorial Land Use Regulations*. Thus the regulations will only apply to prospecting, staking or locating mineral claims in those circumstances in which a Type A or Type B

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199 *Id.*, s. 116. The Review Board will consist of at least seven members, at least half of which, excluding the chairperson, are to be appointed on the nomination of first nations; "first nations" is defined in s. 2: 'the Gwich'in First Nation, the Sahtu First Nation, or bodies representing other Dene or Metis of the North Slave, South Slave or Deh Cho region of the Mackenzie Valley .

200 *Id.,* ss. 62 and 118(1).

201 Section 117, for example, is modelled on *CEAA*'s s. 16.

202 *MVRMA, supra* note 138, s. 143(1)(b).

203 *Id.,* s. 124(1).

204 *Id.,* s. 125(1).

205 Arguably, aboriginal peoples with unextinguished title are worse off under the *MVRMA*, which does not incorporate the definition of environment effect from *CEAA*, though it does include effects on the social and cultural environment and on heritage resources within the definition of "impact on the environment." *Id.*, s. 117.

206 *Canada Gazette*, Part I, January 3 1998, p. 29.

permit is required.[207] The net result is much the same under both the *MVRMA* and the *TLUR*s.

Once the Act is proclaimed and the regulations passed, the *MVRMA* will establish a comprehensive and integrated water and land use management scheme for the Valley. The scheme will supersede the existing regulatory framework established by the *TLUR*s and will supplement the existing jurisdiction of the water board. The importance of these changes should not be underestimated but they will be of little significance form the perspective of this paper for two reasons. First, the basic disposition structure of the *CMR*s will remain intact. If the *CMR*s infringe upon aboriginal title interests before the passage of the *MVRMA* they will equally continue to do so afterwards. Second, although the name will change along with the authorizing statute, the *MVRMA* land use regulations will look very much like the old *TLUR*s. While the *MVRMA* protects rights under land claim agreements, it does not contemplate protection of aboriginal title interests or compensation for interference with title, nor does it provide aboriginal peoples with a role in land and resource decisions.

2.4 Conclusions

In this part of the paper we have provided an account of the statutory framework for mineral dispositions in Yukon and the Northwest Territories. We have also provided some account of the regulatory context for mining activities. We are now in a position to consider this legislation in light of the two hypotheses poses at the outset of the paper. The next part of the paper considers this legislation in light of s.35 of the *Constitution Act, 1982* and the final part deals with the *1870 Order*.

3.0 Is a Free Entry Scheme Inconsistent with an Aboriginal Title?

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[207] *Id.,* subs. 2(2)(c). Unfortunately, there continues to be a problem with the ambit of some of the basic prohibitions contained in the regulations and noted above in the context of the *TLUR*s. For example, s.12 dealing with burial grounds and s.6 dealing with operations close to burial grounds or watercourses only apply to permittees or operations requiring permits. Arguably, these provisions are so basic that they should apply regardless of whether the operation crosses the threshold and requires a permit.

3.1 Introduction: The Existing Jurisprudence on Section 35

With the exception of *Delgamuukw*, the jurisprudence to date of the Supreme Court of Canada on s.35 of the *Constitution Act, 1982* has been essentially reactive;[208] that is, it has been concerned with situations in which aboriginal rights have been used as a defence (as a shield and not as a sword) to specific criminal charges to regulatory offences proscribing "discrete types of activity".[209] In that context the courts have developed a four-step test for s.35 claims.

Chief Justice Lamer summarized the four steps in *Gladstone* as follows:[210]

> [F]irst, the court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right; second a court must determine whether that right was extinguished prior to the enactment of s.35(1) of the *Constitution Act, 1982*; third, a court must determine whether that right has been infringed; finally a court must determine whether that infringement was justified.

In *Delgamuukw* the court reminded us that these tests require modification to meet different facts and circumstances, and, in particular, will require modification when dealing with claims to aboriginal title rather than claims of an aboriginal right.[211] The tests may require further modification when the validity of a general legislative scheme for the disposition of public resources is at issue.[212]

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208 *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.); *R.* v. *Nikal* (1996), 133 D.L.R. (4th) 659 (S.C.C.); *R.* v. *Van der Peet* (1996), 137 D.L.R. (4th) 289 (S.C.C.); *R* v. *N.T.C. Smokehouse Ltd.* (1996) 137 D.L.R (4th) 528 (S.C.C.); *R.* v. *Gladstone* (1996), 137 D.L.R. (4th) 648 (S.C.C.); *R.* v. *Jones and Pamajewon* (1996), 138 D.L.R. (4th) 204 (S.C.C.); *R. v. Adams* (1996), 137 D.L.R. (4th) 648 (S.C.C.); *R.* v. *Côté* (1996), 137 D.L.R. (4th) 385 (S.C.C.).

209 *Delgamuukw*, *supra* note 4 at 141.

210 *Supra* note 208, at para. 20

211 *Supra* note 4 at paras 162-168.

212 As in *Gladstone* itself, *supra* note 208.

This part of the paper deals with the following points: (1) the distinction between an aboriginal title and an aboriginal right, (2) the nature and content of and limitations upon an aboriginal title, (3) the infringement test, and (4) the justification test. We shall not deal specifically with proof of title and instead we shall proceed on the assumption that the aboriginal peoples who have not executed a modern land claim agreement can establish an existing title claim. We appreciate that this is no small assumption to make but we are not in a position to make an independent assessment of the title claims of different First Nations and other aboriginal peoples.[213]

3.2 Aboriginal Right or Aboriginal Title

An Aboriginal plaintiff may seek to question the validity of a mineral disposition system on the basis that the system conflicts either with an aboriginal right or an aboriginal title. For example, a plaintiff might argue that a free entry disposition system interferes with an aboriginal right to harvest caribou for subsistence and cultural purposes. Such a case may present difficult problems of causation and proof of interference with the right.[214] Alternatively, a plaintiff may proceed on the basis of an interference with title. A claim based upon title poses fewer difficulties primarily because an aboriginal title represents an *exclusive* claim.[215] The exclusivity of title will make it easier to show that a scheme that allows others to gain competing proprietary interests within the title area represents an interference with the aboriginal title.

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213 It is also beyond the scope of the present paper to address the issue of aboriginal title held by Métis peoples. See Bell, "Metis Constitutional Rights in Section 35(1)" (1997) 36 Alta. L. Rev. 180, and *Van der Peet, supra* note 208, esp. at para. 169 *per* L'Heureux-Dubé J., and at para. 67 *per* Lamer C.J.C., where he stated that "the manner in which the aboriginal rights of other aboriginal peoples are defined are not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined."

214 See for example *Baker Lake, supra* note 7. The difficulties are not insurmountable: see *Mason* v. *Clarke*, [1955] AC 778; *Peech* v. *Best* [1931] 1 KB 1 (Eng. C.A.); and *Willingale* v. *Maitland* (1866-67), 3 LR Eq. 103. One approach is to establish interference with the exercise of trapping or hunting rights on traditional lands, for example when helicopters scare away animals.

215 *Delgamuukw, supra* note 4 at para 117.

We think that this will be the case whether or not the plaintiff can show that its aboriginal title includes minerals. Although *Delgamuukw* offers considerable support for the argument that an aboriginal title will always include minerals,[216] we do not believe that proof of a mineral content to an aboriginal title is a necessary condition for a successful attack on a free entry mineral regime. We say that largely on the basis that, as shown above, a free entry system may engender significant interference with surface interests.

The courts have developed different tests for proof of an aboriginal title and proof of an aboriginal right. Where a case is based upon an aboriginal right, the plaintiff must establish that the particular activity is:

> an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.[217]

The practice custom or tradition must have been central to the society as it existed prior to contact with

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[216] *Id.*, at paras. 122 - 123. These paragraphs are primarily concerned with oil and gas; there is a reference to minerals in paras. 122 and 128 and para. 169 includes a reference to forestry and mining. The reasoning on content of title at this point is, with respect, extraordinarily weak. It goes something like this: (1) *Guerin* v. *The Queen, supra* note 114, held that the same legal principles governed the same legal interest in reserve lands and land held pursuant to aboriginal title (para. 120); (2) the *Indian Oil and Gas Act* (R.S.C. 1985, c. I-5) demonstrates that reserves include oil and gas (para. 122); (3) *therefore* aboriginal title lands include oil and gas (para. 122). Here are the weaknesses: (1) *Guerin* was a reserve case, although widely cited as an authority on title, and the comments of Dickson J are, with respect, largely obiter. The reserve in question was created by executive act of the BC Government. (2) The *Indian Oil and Gas Act* is an empowering statute designed to prescribe the terms and condition on which oil and gas may be leased *if such rights are included within the title of the reserve.* It does not declare that all reserves include oil and gas and it certainly does not say that all lands that are "lands reserved" have an oil and gas title. Consequently, (3) the conclusion cannot follow from the premises. Of course, we are not making the claim that the conclusion could not have been supported on other grounds and Justice Lamer does refer (at para. 123) to some of the supporting literature: see especially K. McNeil, "The Meaning of Aboriginal Title" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, (Vancouver: University of British Columbia, 1997), 135 - 154, esp. at 143 -144 and 147 (title by prescription or possession is not limited in content by the specific acts of possession). Less persuasive is McNeil's discussion of the *Indian Act* and the *Indian Oil and Gas Act*. The surprising thing about all of this is the tender way in which Justice La Forest treats this unconvincing reasoning. He contents himself with the mild observation (at para. 192) that: "I am unable to assume that specific "reserve" provisions of the *Indian Act* ... and the *Indian Oil and Gas Act* ... apply to huge tracts of land which are subject to an aboriginal right of occupancy."

[217] *Van der Peet, supra* note 208 at para. 46.

Europeans,[218] and the plaintiff must demonstrate the continuity of that practice, custom or tradition.[219]

Where a claim is based upon an aboriginal title, the courts will make several adjustments. First, the requirement of distinctiveness to the culture will be subsumed by the requirement of occupancy.[220] Proof of occupation will itself ordinarily constitute proof of central significance.[221] Occupation may be proven not only through physical occupation but also through the tenure and property rules of the aboriginal society.[222]

The time for establishing aboriginal title is the time at which the Crown asserted sovereignty rather than the time of first contact.[223] The interest claimed must be exclusive[224] either to the particular group or shared

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218 *Id.*, at paras. 44 and 61.

219 *Id.*, at para. 63.

220 *Delgamuukw, supra* note 4 at para. 142 *per* Lamer C.J. and para. 199 *per* La Forest J..

221 *Id.*, at para. 151; distinctiveness is still crucial but "given the occupancy requirement in the test for aboriginal title, I cannot imagine a situation where this requirement would actually serve to limit or preclude a title claim.... in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of claimants "

222 *Id.*, at paras. 148 and 149.

223 *Id.*, at paras. 142 and 145. Justice Lamer is not completely consistent on this point. In the text he refers to *assertion* of sovereignty yet in the example he gives (at para. 145), the Treaty of Oregon, he refers to 1846 as the date on which British sovereignty *was conclusively established*. See also *Lax Kw'Alaams Band of Indians* v. *Governor and Co. of Adventurers of England Trading, into Hudson's Bay (c.o.b.) Hudson's Bay Co.*, [1998] B.C.J. No. 1181 (QL), Prince Rupert Registry No. SC1359 (B.C.S.C.) at para. 24: "The earliest date ... at which the Crown claimed sovereignty and ownership of the radical title to British Columbia was 1846." The Court relies on Justice Judson's statement in *Calder* v. *Attorney-General of B.C.* [1973] S.C.R. 313 at 325 that the area did not *come under* British sovereignty until American claims were ceded to Great Britain via the Treaty of Oregon. Presumably, the assertion of sovereignty dated back to at least the 1770s and the voyages of Meares, Cook and Vancouver and the overland exploration of Mackenzie and, in the south, Thompson. For Yukon see *Smith* v. *AG Canada,* [1978] 2 F.C. 115 at 118 (T.D.).

224 *Delgamuukw, id.*, at para. 155 et seq. The court suggests that the notion of exclusivity is based on the concept of the fee simple (at para. 156); a more accurate claim is that the idea of exclusivity inheres in the idea of a property claim whether that be a fee simple claim or some other property claim known to law. In any event exclusivity of title is contingent on the particular legal system for property is itself a creature of law. Bentham put the point this way: "Property and law are born together, and die together. Before laws were made there was no property; take away laws and property ceases." Extract from

jointly with another group.[225] Ordinarily one could expect that assertion of sovereignty (and certainly the final determination of sovereignty) will occur after the date of first contact. To the extent that this is the case, the test for title will therefore be easier for the aboriginal plaintiff to meet than the comparable test for an aboriginal right.

Perhaps the most important distinction between aboriginal rights and aboriginal title is that while each activity claimed as an aboriginal right must undergo the same rigorous testing to determine if it qualifies as an *aboriginal* right,[226] the same is not true of all activities carried out by aboriginal people on aboriginal title lands.[227] This difference flows from the exclusivity of a title claim and the fact that "what aboriginal title confers is the right to the land itself."[228]

3.3 Nature and Content of an Aboriginal Title and Limitations on that Title

3.3.1 Nature and Content

An aboriginal title is a *sui generis* interest in land[229] held communally.[230] Title embraces the *exclusive* right to use of the territory in question. The implications of this are crucial. It confirms that aboriginal property owners can avail themselves of the full panoply of protections available to any owner including trespass and nuisance. Thus the rights and activities protected by a title are extensive. As stated by the court in

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Bentham, Principles of the Civil Code reproduced in C.B. Macpherson, ed., *Property: Mainstream and Critical Positions* (Toronto: University of Toronto, 1978) at 52.

225 *Delgamuukw, id.*, at para 158.

226 *Van der Peet, supra* note 208 at para 46.

227 *Delgamuukw, supra* note 4 at para. 140.

228 *Id.*, at paras. 138 and 140.

229 *Id.*, at paras. 111 and 112.

230 *Id.*, at para 115.

Delgamuukw, "aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures".[231] Along with exclusive occupation comes the right to make land use choices concerning title lands.[232] The element of choice is significant because it suggests that any use of unextinguished title lands without the consent of aboriginal title holders is a *prima facie* infringement of the exclusive rights of the aboriginal owners.

Other passages in *Delgamuukw* suggest that the *content* of an aboriginal title potentially includes a broad range of resources, including oil and gas and mining resources within the traditional territory.[233]

3.3.2 Limitations on Title

Delgamuukw suggests that there are two limitations on the exercise of an aboriginal title. The first is the long-standing[234] restriction that an aboriginal title is inalienable except to the Crown.[235] The second type of

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231 *Id.*, at para. 117.

232 *Id.*, at para. 168. See the comment in note 15 *supra* in the context of *Baker Lake* and uranium mining.

233 *Id.*, at paras. 122 - 123, and see note 216 *supra*.

234 At least from the time of the Royal Proclamation, 1763, (17 October, 1763), reprinted in R.S.C. 1985, Appendices, Appendix II, No. 1. See *Easterbrook* v. *R.*, [1931] S.C.R. 210; and *Lady McMaster* v. *R.*, [1926] Ex. CR 68. *Indian Act* case law on prohibited dealing with reserve lands makes it clear that alienation in this context includes leasing even to corporate entities created by the First Nation: *Reference re Stony Plain Indian Reserve* (1981), 130 D.L.R. (3d) 636 (Alta. CA). Should the same case law apply to the development of aboriginal title lands by the title holder? If so, this may impose, by the back door, serious limitations on the modern use of aboriginal lands. This seems inconsistent with the general thrust of Lamer J.'s judgment in *Delgamuukw*, *supra* note 4 (see especially para. 132) but, on the other hand it would create definite incentives to negotiate (at para. 131).

235 Although this is a long-standing proposition, reiterated in all the modern cases, Justice Lamer did put a fresh spin on the point with some interesting observations (*Delgamuukw*, *supra* note 4 at para. 129) as to the inherent value of aboriginal lands:

> What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component The land

restriction is new. Justice Lamer suggests that the exercise of the title "must not be irreconcilable with the nature of the group's attachment to the land" [236] or as he put it later in his judgement, the use "must not be inconsistent with continued use by future generations of aboriginals"[237] and "cannot destroy the ability of the land to sustain future generations of aboriginal peoples".[238]

In addition to these broad normative observations on the limits inherent in an aboriginal title, Justice Lamer provided two specific examples of uses that would not ordinarily fall within the scope of an aboriginal title. He also provided an analogous legal characterization for these non-included uses. The two examples of non-included uses are as follows:

> For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g. by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g. by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).[239]

> has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value.

As with the observations on the interests of subsequent generations of aboriginal people, these remarks have a strong ethical component that finds echoes in the writings of authors who have explored the ethical dimensions of property rights especially from an ecological perspective. See in particular C. Rose, "Given-ness and Gift: Property and the Quest for Environmental Ethics" (1994) 24 Environmental Law 1; C. Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press, 1994) and Freyfogle, "Ownership and Ecology" (1993) 43 Case W. Res. L. Rev. 1269.

236 *Delgamuukw, supra* note 4 at para. 117.

237 *Id.*, at para 154.

238 *Id.*, at para 166. This last formulation of course resonates with the Brundtland principles of sustainable development. It is remarkable because, from at least some mainstream ethical perspectives (including long-run utilitarians), this is an obligation and limit that applies to all of us in our use of the world's limited resources yet it is only in the context of aboriginal title that the court has allowed that ethical perspective to influence the content of property rules in such an obvious way.

239 *Id.*, at para 128. These are the only examples that the court gives but in some respects they are inconsistent with the notion of a title-based rather than a rights-based claim. Why does Justice Lamer consider it necessary to identify the purpose for which the First Nation values the land? Do we ask

These two examples are useful but they are open to at least a couple of criticisms. The first is that the Court presumes[240] the existence of ethical rules of aboriginal peoples that will limit their use of the lands. The court then elevates those rules to a constitutional status and imposes a set of inherent limits on the uses to which aboriginal property can be put. There are no similar constitutional limitations (as opposed to ethical limitations) on the uses to which the dominant society puts its lands.[241] This is discriminatory. Second, and more specifically, both examples turn on specific uses (i.e. activities that may be characterized as rights) rather than *title* and therefore the examples lose some of their analytical bite.

The legal analogy presented by Justice Lamer as part of his explanation of the limitations inherent in an aboriginal title may prove to be more useful. Despite recognizing the *sui generis* nature of aboriginal title, Justice Lamer suggests that the doctrine of equitable waste may help describe the nature of the limits inherent in an aboriginal title. As is well known, a life tenant cannot commit waste,[242] but there are of course four types of waste, voluntary,[243] permissive,[244] ameliorative[245] and equitable.[246] Justice Lamer's choice of

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why someone values land before deciding whether there is a trespass? Obviously not; but we do recognize that the encumbering property rights of others may limit the uses to which we put even fee simple lands. See also the cases referred to in note 214 *supra*.

240 At least there is no specific reliance on the evidence at this point.

241 See though attempts by Rose and especially Freyfogle to develop limits that inhere in our concepts of property, *supra* note 235 and see also N. Lyon, "Canadian Law Meets the Seventh Generation" (1993 - 1994) 19 Queen's L.J. 350.

242 Once again there are strong ethical resonances here to the principle of intergenerational equity. See E. Weiss, "The Planetary Trust: Conservation and Intergenerational Equity" (1984) 11 Ecol. L.Q. 495. For standard treatments of waste see R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, 5th ed. (London: Stevens & Sons, 1984) at 95-100; and E.H. Burn, *Cheshire and Burn's Modern Law of Real Property*, 14th ed. (London: Butterworths, 1988) at 261 - 265.

243 Voluntary waste is doing that which ought not to be done, that which impairs the value of the reversion. Examples include cutting mature timber and opening a new mine (but not operating an existing mine), *id*.

244 Permissive waste is the failure to do that which ought to be done, the classical example being the failure to repair buildings, *id*.

equitable waste is significant because, by implication, he is of course suggesting that the other three types of waste are included within the comprehension of an aboriginal title (i.e. these activities cannot be enjoined). It is also significant because equitable waste is the only type of waste that is restrainable by one co-owner against another where land is held in tenancy in common or a joint tenancy. In other words, subject only to a duty to account for more than a just share of receipts, a co-owner is entitled to cut timber,[247] open underground mines[248] and extract the oil and gas from the lands.[249] If Justice Lamer intended to embrace these activities within the comprehension of an aboriginal title without the need to prove that these activities were aboriginal in nature, then it is clear that the scope of the interests included within a title is not far removed from the content of the settler's fee simple.[250]

3.4 Infringement

Sparrow established that in addition to proving the existence of an aboriginal right or title, the plaintiff must also show a *prima facie* interference with that right or title. The onus is on the individual or group challenging the legislation,[251] but the threshold is not high.[252]

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245 Ameliorative waste consists of those changes that actually improve the value of the property such as the conversion of buildings. Opinions may differ as to what constitutes an "improvement" (e.g. drainage of wetlands), *id.*

246 Equitable waste connotes acts of wanton destruction. It would include pulling down a house or destroying an ornamental planting of timber. It is the worst form of waste imaginable, *id.*

247 *Hersey* v. *Murphy* (1920), 48 N.B.R. 65.

248 *Job* v. *Potton* (1875), 20 L.R. (Eq) 84.

249 N. D. Bankes, "Pooling Agreements in Canadian Oil and Gas Law" (1995) 33 Alta. L. Rev. 493.

250 A point long-since anticipated in the Privy Council's decision in *Amodu Tijani* v. *Secretary, Southern Nigeria* [1921] 2 AC 399 at 409 - 410 "That title [the native title], is *prima facie* based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference."

251 *Sparrow, supra* note 208 at 411.

In *Sparrow*, the accused mounted an attack on a specific regulatory restriction of his harvesting practices, in that case a net length restriction. *Gladstone* is a more useful case for our purposes. In that case, the accused sought to challenge the broader fisheries management scheme of which the specific licensing requirement under which the accused were charged was simply a part. As Justice Lamer observed in *Gladstone*:[253]

> The appellants' arguments on the points of infringement and justification effectively impugn the entire approach taken by the Crown to the management of the herring spawn on kelp fishery.

The next paragraph of the judgement is worth quoting in its entirety.

> The fact that the appellants' challenge to the legislation is broader than that of the appellants' in *Sparrow* arises from the difference in the nature of the regulation being challenged. Regulations on net length have an impact on an individual's ability to exercise his or her aboriginal rights, and raise conservation issues, which can be subject to constitutional scrutiny independent of the broader regulatory scheme of which they are a part. The Category J licence requirement, on the other hand, cannot be scrutinized for the purpose of either infringement or justification without considering the entire regulatory scheme of which it is a part. The requirement that those engaged in the commercial fishery have licences is .... simply a constituent part of a larger regulatory scheme [discussed below].... All aspects of this regulatory scheme potentially infringe the rights of the appellants in this case; to consider s.20(3) apart from the regulatory scheme for the herring industry would distort the Court's inquiry.[254]

That led the court in *Gladstone* to analyse the overall structure of the regulatory scheme. The court found that the government's regulation of the spawn on kelp fishery proceeded in four stages.[255] The first stage

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252 See *R.* v. *Sampson* (1995), 131 D.L.R. (4th) 192 (B.C.C.A.) at paras. 40 and 43; the Court notes that the onus on the Crown in the justification stage is more onerous.

253 *Gladstone, supra* note 208, at para. 40.

254 *Id.*, at para. 41.

255 *Id.*, summarized at para. 51.

was government determination of the total allowable herring take. The second step was to allocate the harvest to the different herring fisheries (herring roe, herring spawn on kelp, and other herring fisheries). At the third stage, government allocates the spawn on kelp fishery to various user groups (commercial users and Indian food fishery) and finally allocates the commercial herring spawn on kelp licences.

The court emphasised that while each stage of the regulatory scheme must be examined separately at the *justification* stage, at the *infringement* stage of the analysis,

> the government scheme can be considered as a whole. The reason for this is that at the infringement stage it is the cumulative effect on the appellants' rights from the operation of the regulatory scheme that the court is concerned with. .... Thus in order to demonstrate that there has been a *prima facie* infringement of their rights, the appellants must simply demonstrate that limiting the amount of herring spawn on kelp that they can harvest for commercial purposes constitutes, on the basis of the test laid out in *Sparrow*, a *prima facie* interference with their aboriginal rights.[256]

The circularity of the reasoning here should not obscure the point that the threshold is low. The Court has held that any "adverse restriction" on the exercise of a right [257] or any "meaningful diminution"[258] of rights constitutes a *prima facie* infringement.

In *Sparrow* the court offered some additional questions to consider as part of determining whether there is an infringement. These questions were as follows:

> First, is the limitation unreasonable? Secondly, does the regulation impose undue hardship? Thirdly, does the regulation deny to the holders of the right their preferred means of exercising that right?[259]

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256 *Id.*, at para. 52.

257 *Sparrow, supra* note 208 at 1112.

258 *Gladstone, supra* note 208 at 757.

259 *Sparrow, supra* note 208, at 411.

The court explained this passage further in *Gladstone* stating that these questions do not define the concept of *prima facie* infringement; they only point to factors which will indicate whether an infringement has occurred. Furthermore, they do not all need to be answered positively.[260] In *Gladstone*, the court concluded that the herring regulations did limit the aboriginal right since prior to regulation the Heiltsuk people's harvest was unlimited; subsequent to regulation they could harvest spawn on kelp for commercial purposes only to the limited extent permitted by government.[261] Unfortunately for our purposes, the court offered little further guidance on the question of infringement in *Delgamuukw* and simply contented itself with the observation that an aboriginal title is not absolute and can be infringed by both orders of government.[262] The inquiry indicated by the passage from *Gladstone* is aimed at determining simply whether there has been any limit on the exercise of a s. 35 right. Arguably in most cases the analysis should be simple: any limit on the group's ability to exclusively occupy title lands or choose the use to which such lands are put would be a *prima facie* infringement because it limits the exercise of their right to title over the lands in question. Similarly, as title is a proprietary right, whenever legislation purports to permit an activity or use of land that would constitute a common law cause of action such as trespass or nuisance, that legislation should be viewed as a *prima facie* infringement.

More useful for our purposes are Justice Dorgan's comments on infringement in the *Halfway River First Nation* case.[263] In that case, the Ministry of Forests argued that any infringement of the Nation's treaty rights through the issuance of a cutting permit in a specific part of the traditional territory was a reasonable limit given other opportunities that the Nation had within the balance of its traditional area to continue its

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260 *Gladstone, supra* note 208 at para. 43.

261 *Id.*, at para. 53.

262 *Delgamuukw, supra* note 4 at para. 160.

263 *Halfway River First Nation* v. *British Columbia (Ministry of Forests),* [1997] 4 C.N.L.R. 45 (B.C.S.C.).

activities.[264] The Nation had argued that its interests were not site specific and had adopted a more holistic view of its territory: "logging in any part of the [area] has widespread effects on aboriginal Rights throughout the area, for example, by providing better access to non-native hunters, by disturbing trails, horse corrals and meat drying camps and by affecting wildlife."[265] Justice Dorgan preferred the views of the First Nation on the grounds that they were more consistent with the requirement that the courts be sensitive to the aboriginal perspective in an assessment of both the rights and infringement.[266]

> To Halfway the Tusdzuh is one of the last unspoiled areas of wilderness in which they can exercise their traditional way of life. Logging even of a limited area of the Tusdzuh would irrevocably change its character.

Justice Dorgan's approach is similar to Justice Lamer's in *Gladstone* in that they both recognize the relevance of cumulative effects and of the perspective of aboriginal peoples concerning their ability to continue to exercise their rights. Justice Dorgan further suggested that whether a *prima facie* interference is established will often be a matter of common sense.[267]

Finally, in thinking about infringement, it is useful to keep in mind the Supreme Court of Canada's decisions

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264 *Id.*, at para. 105.

265 *Id.*, at para. 88. But see *Siska Indian Band* v. *British Columbia (Minister of Forests*), [1998] B.C.J. No. 1661 (QL), Vancouver Registry A98167 (B.C.S.C.), refusal of an interlocutory injunction application on the grounds that the balance of convenience favoured the forest licensee who wished to build a road in traditional territory.

266 *Halfway, id.*, at para. 106; *Sparrow*, *supra* note 208 at 411.

267 *Halfway, id.*, at para. 103, where Justice Dorgan found as follows in the context of *prima facie* interference:

> Canfor's logging plans show that several roads will be constructed to enable logging of CP 212. Common sense may suggest that this will improve access to the area, thereby increasing non-native pressure and reducing the game available to Halfway.

See also *R.* v. *Bombay*, [1993] 1 C.N.L.R. 92 (Ont. C.A.) at 94: the establishment of an interference with the exercise of a right is sufficient to establish a *prima facie* infringement for the purpose of s. 35.

in *Adams* and *Côté* where the Court held that where an aboriginal right is "exercisable only at the discretion of the Minister"[268] there is a *prima facie* infringement. The relevant passage from Justice Lamer's reasons is as follows:

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament [or a province] may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, *the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights*. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.[269]

In other words, in determining whether a legislative scheme *prima facie* infringes a s. 35 right, the Courts will look to whether that legislation seeks to accommodate the rights in question. Legislation whose operation potentially interferes with the exercise of aboriginal rights and which is not structured to facilitate or ensure accommodation those rights itself constitutes a *prima facie* interference. As we demonstrate below, this may be the easiest way to establish that the *CMR*s and *YQA* represent a *prima facie* infringement of the unextinguished aboriginal title of peoples in the territories.

We have three main reasons for thinking that a free entry disposition system represents a *prima facie* interference with an existing aboriginal title. First, free entry legislation purports to treat all aboriginal lands as if they were open for staking. This is inconsistent with the exclusive nature of an aboriginal title. It is inconsistent even if the aboriginal title is confined to surface title because open access regimes purport to allow others to do things on the surface that only an owner can authorize. If aboriginal title is a right to exclusive occupation good against the entire world, as the *Delgamuukw* decision suggests, then legislation that grants others rights to occupy the surface of title lands arguably constitutes a *prima facie* infringement.

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[268] *Adams, supra* note 208 at para. 51.

[269] *Id.,* at para. 54 (emphasis added); see also *Coté, supra* note 208, at para. 76.

Both the *CMR*s and the *YQA* require locatees to conduct representation work on the surface of claims. That work may include stripping, drilling, trenching, sinking shafts and driving adits or drifts and geological, geochemical and geophysical investigations.[270] Although at common law there is a rule that the sub-surface estate dominates the surface estate[271], there is no reason for thinking that that rule should automatically apply to the interface between aboriginal law property rules and common law property rules.[272] At its most basic, a free entry system allows another party to acquire rights in First Nation lands without consent or consultation. As noted above, aboriginal title includes the right to make land use decisions. It is hard to escape the conclusion that in authorizing staking and exploratory activities on, or disposing of interests in title lands without the consent of, or even consultation with, the aboriginal title holder, the Crown commits a *prima facie* infringement of a s.35 right.

Second, a free entry regime is premised on the proposition that mining is the highest and best use of the lands in question. This ignores entirely the aboriginal perspective and removes from the aboriginal owner the right to make land use decisions: such a right is meaningless if it does not include a right to decide on the best use of title lands.

In *Delgamuukw,* Lamer J. held that while aboriginal people could not put title lands to a use which is "irreconcilable with the nature of the group's attachment to the land"[273] or "inconsistent with continued use by future generations of aboriginals,"[274] they could surrender the land for that purpose. The obverse of this

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270 See, e.g., *CMR*s, *supra* note 3, s. 38(1). Given that title accords the right to exclusive possession, mere entry and placing of stakes upon title lands, as well as noisy and intense overhead flights, are akin to common law trespass and nuisance, and therefore should be recognized as *prima facie* infringements.

271 *Borys* v. *CPR, supra* note 108.

272 See *Delgamuukw, supra* note 4 and also *St Mary's Indian Band* v. *Cranbrook (City) supra* note 108 at para. 16 and *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development), supra* note 113.

273 *Delgamuukw, id.,* at para. 117.

274 *Id.,* at para 154.

reasoning must be that any similar such use of the land for these purposes by the Crown or a licensee of the Crown prior to a surrender by the aboriginal people concerned must also be a *prima facie* infringement for it must be irreconcilable with the aboriginal interest in the land.

Third, as noted above, the Court in *Côté* and *Adams* held that legislation which effectively gives a Minister the discretion to decide whether aboriginal rights may be exercised constitutes a *prima facie* infringement unless there is legislation or regulations in place to ensure that the discretion is exercised in a manner which accommodates the rights in question. There is no precise analogy between the type of discretionary power discussed in those cases and the free entry regimes discussed here since both regimes deny the Mining Recorder any discretionary power in recording claims. Instead, each regime *requires* the issuance of a disposition once certain formalities, none of which serve to ensure that aboriginal title or rights are protected, are met. We think that if it is not open to Parliament to adopt an unstructured discretionary regime which risks infringing aboriginal rights, then, by the same token, it clearly cannot adopt a regime which gives no discretion in disposing of resources where that regime risks infringing aboriginal rights or title in a substantial number of applications. The key to the passage quoted from *Adams* is not that a discretionary power must be structured to accommodate rights, but that any exercise of government powers or authority, whether the power is discretionary or not, must be structured to accommodate title if title is potentially affected.

Neither the *YQA* nor the *CMR*s regime seeks to accommodate aboriginal rights or title. Instead, each regime encourages third parties to enter onto aboriginal title lands and requires that the Mining Recorder record those claims *before* ascertaining whether those lands are the exclusive title lands of an aboriginal people or First Nation. The legislation directly authorizes entry on title lands for the purpose of locating and staking claims. Under the *CMR*s, a prospecting licence must be issued upon payment of a nominal fee. Even in the context of the discretionary prospecting permits under the *CMR*s, the legislation contains no mention of aboriginal interests.[275] The Crown cannot make the case that it has structured this discretionary

[275] Barton, *Canadian Law of Mining, supra* note 48 at 157, notes that the purpose of this discretion is to ensure that staking activity is not stifled. Indeed, the discretion in s. 29(10) of the *CMR*s is not completely unfettered, but is rather structured to ensure that "the granting of permit will not hinder

power to ensure that the aboriginal title is given priority. In sum, neither legislative regime seeks to accommodate or even recognize the existence of title. We think this constitutes a *prima facie* infringement.

Does the presence of the withdrawal power, or its exercise, avoid the conclusion that the mineral disposition regimes in the territories do not on their face infringe aboriginal title? We think not for two reasons. The first is that the policy has a limited ambit. This is well described in the Regulatory Impact Analysis Statement accompanying withdrawals under s.14.1 of the *YQA* to the effect that:

> The federal negotiating mandate for Yukon Aboriginal land claims provides for the identification of parcels of land from which final land selections can be made. The government has agreed that in the interim, *between land identification and final selection*, it will take steps to ensure that no new third-party interests are created on the identified lands for each First Nation.[276]

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other mining interests".

[276] Order Prohibiting Entry on Certain Lands in the Yukon Territory (1997-No.3, Dawson First Nation, Y.T.), SOR/97-380, 25 July 1997, italics supplied. For similar orders see Order Prohibiting Entry on Certain Lands in the Yukon Territory (1997-No. 1, Selkirk First Nation, Y.T.), SOR 97-207, 15 April 1997. Earlier Orders state in the Regulatory Impact Analysis Statements that the lands withdrawn have been selected by First Nations for "interim protection" as "proposed settlement lands". See, for example: Prohibition of Entry on Certain Lands Order, 1991, No. 2, SOR/91-679, 21 November 1991; Prohibition of Entry on Certain Lands Order, 1992, No. 2, SOR/92-241, 30 April, 1992; Prohibition of Entry on Certain Lands Order, 1992, No. 4, SOR/92-519, 27 August 1992; Prohibition of Entry on Certain Lands Order, 1993, No. 1, SOR/93-78, 11 February 1993; Prohibition of Entry on Certain Lands Order, 1993, No. 2, SOR/93-79, 11 February 1993.

For a recent example of a withdrawal under s. 23(a) of the *TLA* see Withdrawal from Disposal Order (North Slave Region, N.W.T.), SI/97-42, 30 April 1997. While there are no regulatory impact analysis statements in statutory instruments, paragraph 3 of this order reflects the same limitations as the withdrawal process under the *YQA*, which would be expected given that both processes occur under the same policy:

> 3. Subject to section 4 [which protects existing prospecting permits, located or recorded mineral claims, and mineral leases acquired under the *CMR*], the lands described...are withdrawn from disposal for the period beginning on the date of registration of this Order and ending on the earlier of September 30, 2001 or on the date of registration of the Order in Council to withdraw land following the completion of land selection pursuant to negotiation of the comprehensive land claim agreement...

As under the *YQA*, negotiations have already commenced when a withdrawal takes place, and the withdrawal has no effect on acquired rights. It is worth noting that even existing prospecting permits

The italicized language indicates the limits to this policy. In practice there are no withdrawals until negotiations reach a fairly advanced stage. Until then, third parties are able to acquire rights and it is federal policy to grandparent those rights through the terms of land claim agreements.[277] Therefore the primary

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are protected as pre-existing rights. For a discussion of the withdrawal orders in the area of the BHP Diamond Mine see Report of the Environmental Assessment Panel, *NWT Diamonds Project*, 1996, at 12 - 13. More recent Orders temporarily withdrawing lands for the settling of claims contain a purpose clause, which states: "The purpose of this Order is to withdraw certain lands from disposal to facilitate the settlement of aboriginal land claims." See for example, Withdrawal from Disposal Order (North Slave Region, N.W.T.), SI/97-42, 15 April 1997;. Earlier SI's include a statement that the lands withdrawn are "required to facilitate the settlement" of land claims. See Withdrawal of Certain Lands (Fry Inlet on Contwoyto Lake, N.W.T.) from Disposal Order, SI/91-111, 11 June, 1992; Withdrawal of Certain Lands (North and South Baffin, Kitikmeot East and West and Keewatin, N.W.T.) from Disposal Order, SI/92-139, 16 July, 1992 (amended by SI/92-213, 26 November, 1992 and SI/93-43, 16 March, 1993); Withdrawal from Disposal Order (Contwoyto Lake, N.W.T.), SI/93-150, 6 July, 1993. No explanation of government policy is included however.

David Jennings Assistant Land Claim Negotiator, DIAND in a telephone discussion July 17, 1998 confirms that in the Yukon there have been two phases to the withdrawal policy. First, during the mid-1980s withdrawals were made upon request of individual First Nations. Second, following the UFA further withdrawals have been made when there is a negotiated agreement as to the identification of specific sites. Withdrawals are limted to 100% of the quantum for each First Nation as fixed in the UFA (9.3.3 and Schedule). There was an exception in the case of Dawson where the First Nation was initially allowed to select up to 120% of quantum partly because of significant placer and quartz interest in the area. As negotiations progressed, this was reduced to 100% of quantum. Withdrawals do not occur on a site-by-site basis but are batched together in a single Order in Council for reasons of administrative convenience.

277 The fact patterns of several cases show some of the problems: *First Nation of Nacho Nyak Dun* v. *Furniss* (1997), 10 C.P.C. (4th) 45 (Y.T.S.C.) and *Arctic Outpost Camps Ltd.* v. *Canada (Minister of Indian and Northern Affairs*, [1996] N.W.T.J. 62 and 70 (N.W.T.S.C.) (Q.L.). Even a withdrawal order is no guarantee that third parties will not be able to perfect or acquire rights: *R.* v. *Secerbegovik*, [1995] Y.J. 75 (Y.T.S.C.) (Q.L.) (squatter in the territory of the Liard First Nation). For examples of withdrawal orders see the Order Prohibiting Entry for the Dawson First Nation, *id.;* paragraph 3 states that the prohibition on locating, prospecting and mining under the *YQA* "does not apply in respect of an owner or holder of a recorded ... mineral claim in good standing acquired under the ... Yukon Quartz Mining Act." The Regulatory Impact Analysis Statement makes it clear that the intent is only to prevent new third party interests.
Although the Crown does allow aboriginal peoples to select or retain lands that are encumbered by third party interests the selection is subject to those third party rights. Existing interests are grandparented. See for example Council for Yukon Indians, Umbrella Final Agreement, *supra* note 59, paras. 5.4.2 and 18.3; the Nunavut Agreement, *supra* note 54, article 21.7; Gwich'in Comprehensive Land Claim Agreement, *supra* note 56, para. 20.2.3 (b); Sahtu Dene and Metis Comprehensive Land Claim Agreement, *supra* note 57, para. 21.2.3(b); the Inuvialuit Final Agreement, *supra* note 55, s. 7(18). In effect the First Nation takes an assignment of the federal interest. In addition, the Crown will not allow an aboriginal party to select a producing mine or a property that is in a very advanced stage of

objection to free entry systems remains. While selected lands are eventually removed from the application of the free entry regimes, they are arguably removed too late in the process to adequately protect title interests. In effect, the exercise of the withdrawal power is best characterized as facilitating claims negotiations and not accommodating the existence of an existing title.

The second reason is that the policy is simply that, a statement of policy. Neither the legislation nor the regulations lay out how these discretionary withdrawal powers will be exercised. According to the Supreme Court decision in *Adams,* Where the "exercise of [an] aboriginal [or treaty] right ... is exercisable only at the discretion of the Minister" the government has *prima facie* infringed the rights and must justify that infringement to avoid a finding that the legislative provision is of no force or effect to the extent of its inconsistency with s 35(1) rights.[278] We think that the Court's analysis is not limited to discretionary disposition powers, but may also be applied to withdrawals: in both cases rights related to title are exercisable only where the Crown chooses to allow their continued exercise by protecting the lands concerned. For withdrawal powers to prevent claims of *prima facie* infringements, the legislation or regulations would need to impose mandatory exercise of the power where title lands are at issue, or set out criteria for withdrawing lands which direct the governor in council to identify and protect aboriginal interests

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exploration.

The current statement of federal land claims policy (*Federal Policy for the Settlement of Native Claims*, Indian and Northern Affairs Canada, March 1993) is silent on the subject of protecting third party rights but earlier documents reveal a clearer statement of federal policy and, as a matter of practice at the level of land selections, this policy still obtains. See for example, *In All Fairness: A Native Claims Policy*, 1981 at 23:

> Lands selected by Natives for their continuing use should be traditional land that they currently use and occupy; but persons of non-Native origin who have acquired for various purposes, rights in the land in the area claimed, are equally deserving of consideration. Their rights and interests must be dealt with equitably.
>
> Other basic access rights must also be taken into consideration: rights of access such as transportation routes within and through a settlement area; rights of way for necessary government purposes; rights of access to holders of subsurface rights for exploration, development and production of resources, subject to fair compensation as mutually agree either through negotiation or arbitration.

278 *Adams*, *supra* note 208 at paras. 51 and 54; *Côté*, *supra* note 208 at para. 76.

in their title lands.

Finally, *Gladstone* emphasises that one must look at the larger regulatory scheme when considering both infringement and justification. This larger context would no doubt include, for present purposes, land use, environmental assessment and water legislation, any or all of which might limit the actual exercise of rights acquired under the *YQA* and *CMR*s. However, given the low threshold for *prima facie* infringement it seems more likely that a court will take these considerations into account as part of a consideration of justification.[279]

In sum, and as noted above, until claims negotiations reach a fairly advanced stage and withdrawal powers are exercised, the status quo is continued staking over title lands. Any delays by government in settling claims result in more land and mineral dispositions.[280] The withdrawal power is not meant to protect title or

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[279] The land and water management legislation discussed above is not concerned to protect aboriginal title.

[280] An example of a First Nation making new land selections is the following withdrawal on behalf of the Dawson First Nation: Prohibition of Entry on Certain Lands Order, 1995, No. 6, SOR/95-227, 2 May, 1995, where the Regulatory Impact Analysis Statement states that "it is desirable to protect these new land selections as soon as possible as this area is sensitive in respect of ongoing subsurface activities." See *supra*, note 276, notes of interview with David Jenkins. This example illustrates the danger of allowing continued staking to remove lands from potential land claim settlements. By not acting, government harms aboriginal interests and benefits the mining industry; the status quo is not neutral but rather a default judgment in favour of mining. Paul McKay reported with respect to the proposed moratorium on staking in Yukon's Tombstone area:

> "The Tombstone boundary issue is still under discussion in the Tr'on Dek Hwech'in First Nation's land claims forum," Mr. Irwin [then federal Indian Affairs Minister] wrote. "Until the parties have some resolution on a park proposal, or can provide more clarity on the land under consideration, removal of more land from staking is not warranted.
>
> "I understand that the Government of Yukon is considering an expansion of the existing boundaries, and I am currently awaiting development in this regard. As a proposal is received, I will give priority attention to the request."
>
> Mr. Irwin's delays may have allowed the exploration company to resolve the Tombstone park boundary for him.

Paul McKay, "In the search for buried treasure: Land protectionists claim the 'frontier attitude' of Yukon mining laws threaten park land" Ottawa Citizen, September 29, 1997, Final Edition, p. A3. One writer has noted that most of the central Arctic has been staked in the last five years, and that two thirds of the land is proposed for major mining development: Leslie Gillet, "Arctic under attack: WWF trying to raise awareness" The Province (Vancouver), July 22, 1996, Final Edition, p. B8.

to ensure that its constitutional position is reflected in mineral dispositions, nor does it reflect a presumption that mineral exploration is not the best use of title lands. The rights of title holders to exclusively occupy their title lands and decide what uses those lands should be put to, are still interfered with. We think it is fair to conclude that the *YQA* and *CMR*s both dispose of interests in land which may be title land, and that neither regime seeks to accommodate aboriginal interests or acknowledges that unextinguished title may exist in territorial lands.

3.5 Justification

As noted above, the onus is on government to justify any infringement once an infringement has been established. There are two steps to this process. First, government must establish that it was acting pursuant to a legislative objective that is compelling and substantial. The second part of the test requires government to demonstrate that the infringement is consistent with the nature of the special fiduciary relationship between the Crown and aboriginal peoples.

3.5.1 Legitimate Legislative Objective

The first test has evolved considerably since the *Sparrow* decision to the point that it is difficult to conceive of the test as imposing a serious limitation on the scope of federal, territorial and provincial legislative powers. In *Sparrow*, the court took the view that a "public interest" justification was too vague to provide meaningful constitutional guidance as a limitation on power.[281] However, by the time of *Gladstone* we find

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> The delays may be entirely artificial and simply be the result of an arbitrary government policy. For example, for a long period the federal government limited the number of claims under active negotiation to six: see *Report of the Task Force to Review Comprehensive Claims, Living Treaties: Lasting Agreements*, 1985 at 13. The Task Force recommended (at 46) attaching a priority to "those aboriginal societies that still engage in traditional activities over most of their traditional lands and that may be threatened by major development or third party alienations."

281 *Sparrow, supra* note 208 at 412.

the court modifying the apparent stringency of *Sparrow* and contemplating that an objective would be compelling "if it is consistent with the reconciliation of aboriginal societies with the larger Canadian society of which they are a part."[282] In *Gladstone* that translated into the following statement:[283]

> ... I would suggest that with regard to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.

By the time of *Delgamuukw* the list of legitimate objectives has expanded even further:[284]

> In my opinion the development of agriculture, forestry mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support these aims, are the kinds of objective that are consistent with this purpose and, in principle, can justify the infringement of an aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case-basis.

The further limitation in *Delgamuukw* is important for several reasons not the least of which is that in *Gladstone* the retreat from *Sparrow* was qualified by the italicized and underlined language. Justice Lamer does not include these qualifications in his *Delgamuukw* judgement. While the *Gladstone* judgement suggested that these kinds of objectives would only be in the interests of all Canadians or necessary for reconciliation "in the right circumstances", in *Delgamuukw* the Chief Justice seems to accept that the above-mentioned objectives will always be compelling and substantial. While the public interest as such will not qualify as a valid legislative objective in the context of infringing aboriginal title, the Court will apparently accept particular public interest objectives as valid for the purpose of the justification analysis without further

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282 *Supra* note 208 at para. 74.

283 *Id.,* at para. 75 (emphasis in the original).

284 *Delgamuukw, supra* note 4 *per* Lamer C.J. at para. 165 and *per* La Forest J. at para. 202.

scrutiny or analysis. Even if we are unduly pessimistic on this point it seems clear that the court will focus most of its attention on the second branch of the justification analysis.

3.5.2 Upholding the Honour of the Crown

In *Sparrow* the court emphasised the central importance of priority for the aboriginal harvest as part of this second stage.[285] The court did however mention other factors that might be relevant depending upon the circumstances.[286]

> These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available, and whether the group in question has been consulted with respect to the conservation measures being implemented.[287]

Once again, in applying the law in the present context, we gain the most insight from *Gladstone* and *Delgamuukw*; the former because the Crown needed to justify the different elements of the entire regulatory scheme of which the particular offence was a part, while the latter, *Delgamuukw*, is useful because of its adaptation of the justification tests to the situation of aboriginal title.

3.5.2.1 Priority of the Aboriginal Resource Users

The earlier fishery cases emphasised that the fiduciary aspects of justification required the Crown to accord priority to aboriginal harvesters. In *Gladstone* the court explained that where the right had no internal limitations, priority did not mean exclusivity:[288]

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285 *Sparrow, supra* note 208 at 413.

286 In *Gladstone, supra* note 208 at para. 64, Lamer C.J.C., for the majority, suggested that these factors serve to indicate whether government has granted priority to aboriginal rights holders.

287 *Sparrow, supra* note 208 at 416 - 417.

288 *Gladstone, supra* note 208 at para. 61.

> Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. The right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.[289]

In *Delgamuukw* the court emphasised that the exclusive nature of the aboriginal title mandated the application of the modified priority rule of *Gladstone*:[290]

> ... this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers[291] to aboriginal uses of their lands (e.g. licensing fees) be somewhat reduced.

There is little evidence that either the *CMR* or the *YQA* have been modified to accommodate an aboriginal priority. The respective regimes are silent on the question of aboriginal participation. There are no provisions requiring benefits agreements to be negotiated with aboriginal people. There are no opportunities for equity participation on a carried or working basis for aboriginal people. There are no legislated programs to reduce economic barriers for aboriginal people in the mining sector[292] and there is certainly

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289 *Id.*, at para. 62.

290 *Delgamuukw*, *supra* note 208 at para. 167.

291 This seems very naive; the limited literature suggests that the real issue is access to capital not barriers in the form of fees. For an historical account of access in the BC fishery see Diane Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto, 1993) and for aboriginal involvement in the resource economy of northern Manitoba see Frank Tough's brilliant assessment in *As Their Resources Fail: Native Peoples and the Economic History of Manitoba 1870 - 1930* (Vancouver: University of British Columbia, 1996).

292 See in the case of the *Territorial Coal Regulations*, C.R.C. 1978, c.1522, s.34:

nothing in the two regimes that reflects the prior occupation of title lands.

Can the Crown justify an infringement on the basis that the aboriginal people in question may obtain economic benefits from a so-called benefits agreement?[293] We do not think so. First, neither the *YQA* or *CMR* impose an obligation to negotiate a benefits agreement and in fact neither even mentions benefits agreements or even authorizes government to order the negotiation of such an agreement. The government cannot offer benefits agreements as evidence that they have accorded priority to title where there is no guarantee of benefits. Without a legislative requirement or protection of benefits agreements, aboriginal peoples cannot be certain they will be honoured. In the absence of such legislation, the federal government in the context of BHP Diamonds Inc.'s proposed diamond mine at Lac de Gras, required the company to achieve significant progress or conclude benefits agreements as a condition of obtaining a water licence under the *NWTWA*.[294] The legality of this kind of requirement may be open to question, as the Minister arguably exceeded the discretion granted under the *NWTWA*.[295] In our view, even if the content of such agreements is sufficient to justify an infringement in a particular case, the fact that they are not required or even mentioned in the legislation is inconsistent with the principles articulated in *Adams* and *Côté*, and with the principles of the fiduciary relationship that guides the s. 35 analysis generally.

> In isolated portions of the Northwest Territories and Yukon Territory, Indians and Eskimos who apply for permission to mine small quantities of coal may be granted permission so to do by an agent of territorial lands or a member of the Royal Canadian Mounted Police stationed in the area, free of charge, without being required to make application under the provisions of these Regulations.

This reduces indigenous peoples to the position of supplicants on their own lands. See also the Inuvialuit Final Agreement, *supra* note 55, s.16(3). We do not suggest either as a model but simply as examples of provisions that accord some special status to aboriginal people.

293 For discussion of benefits agreements see J. Keeping, *supra* note 167.

294 See Keeping, *id.*, at 198-202.

295 Keeping, *id.*, argues that other provisions of the Act indicate that the Act contemplates monetary compensation only. Further, s. 15 arguably limits the conditions that may imposed on licences to technical matters and does not contemplate forcing a company to provide socio-economic benefits.

Second, benefits agreements, even if required by government, are often negotiated between industry and aboriginal peoples, and are often not intended to be legally enforceable.[296] If the government enters into an agreement with industry, or requires a benefits agreement as a condition of a licence, the aboriginal beneficiaries are third parties and may have difficulty enforcing the agreement. Third, benefits agreements provide for jobs, training, opportunities to provide services and supplies to the project developer, and other benefits such as scholarships.[297] Their scope is such that some types of infringements will fall entirely outside their ambit; they are typically negotiated shortly before a mine goes into production, long after the disposition has been made.

We must, however, concede that each regime does provide a mechanism (the discretionary withdrawal power) for recognizing the reality of prior occupation by aboriginal people. Whether this represents an adequate mechanism for the protection of the aboriginal interest in the lands pending a full and equitable settlement of aboriginal claims depends upon the extent to which it has actually been used in any particular case. The justification must be fact-specific for clearly the Crown cannot justify an infringement merely by pointing to the existence of the power.[298] As demonstrated in the discussion of *prima facie* infringement above, on its own, the withdrawal power or its exercise does not reflect the priority of aboriginal title.

We do think that the Crown may be able to justify an infringement if it has entered into good faith negotiations with the aboriginal people concerned with a view to expeditiously identifying and then

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296 *Id.*, at 208. An example of a regime requiring enforceable benefits agreements is under the Nunavut Land Claims Agreement *supra* note 54. Article 26.9.1 provides:

> An [Inuit Impact and Benefit Agreement] may be enforced by either party in accordance with the common law of contract. The parties may negotiate liquidated damages clauses for the eventuality of default and such a clause, however phrased, shall not be construed as constituting a penalty.

297 *Id.*, at 204.

298 *Adams, supra* note 208 at paras. 52-59; and *Côté, supra* note 208 at paras. 76-82.

protecting title lands by withdrawing them from disposition.[299] It is hard to over emphasise the importance of this point. The withdrawal power is so powerful (it effectively suspends the operation of the legislation) that a liberal exercise of this power may, in the right circumstances, accord the Crown a full justification defence to any finding of infringement or even preclude a finding of prima facie infringement. Nevertheless, precisely because it is so far-reaching, the Crown is typically reluctant to exercise the power; it is too blunt an instrument for most purposes. In any case if the Crown seeks to rely on the withdrawal power it must act quickly and diligently to identify and protect these lands. Inertia results in staking and staking accords priority to third party mineral interests at the expense of aboriginal title interests.

3.5.2.2 Consultation

In *Delgamuukw,* Chief Justice Lamer also suggested that there might be jurisdictional or procedural dimensions to the process of justifying an infringement of an aboriginal title. This flows from the fact that title encompasses the right to decide what to do with one's lands. Justification may therefore require "the involvement of aboriginal peoples in decisions with respect to their lands."[300] What might this mean? Consultation of course is required because there is always a duty of consultation but the scope of that duty

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[299] It is not clear how much land the Crown would have to withdraw to justify the regime. If it withdrew from disposition all lands that the First Nation regarded as important, or all lands on which they do did not want mining or prospecting activity, that would probably suffice. Equally, if it withdrew only 10% of those lands that should not suffice. There is no doubt a grey area in the middle, but if an aboriginal title is exclusive we suggest that the exercise of the withdrawal power must show substantial deference to the First Nation owner if the Crown is to justify its infringement. The extent of existing interests, and the protection of existing claims on withdrawn lands, may also be significant in this context, as these factors indicate the degree to which the Crown has acted in a manner respectful of the prior nature of title rights. In current land claims negotiations, existing interests granted under the mineral legislation, which is subordinate to constitutional rights, are not on the table. For example, as noted at *supra* note 27, seventy-five percent of the Dogrib's territory is subject to mineral claims. Even if their entire territory were withdrawn, they are precluded from the outset from being able to regain exclusive occupation and land use decision powers over most of their lands. This kind of analysis may be relevant in the context of a minimal impairment inquiry, the topic of the next section of this paper. Can it be said that the government only infringed upon title so far as necessary to achieve its objective when existing rights are not even on the table? See also the discussion of *Apsassin*, *supra* notes 113 - 114.

[300] *Supra* note 4 at para. 168.

will vary:[301]

> In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to an aboriginal title. Of course even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of those aboriginal peoples whose lands are at issue. In most cases it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

These comments reinforce the growing body of decisions from provincial superior courts[302] that have emphasised the central importance of consultation where the Crown is disposing of public resource rights within the traditional territory of a First Nation. Together they put flesh on the almost offhand remarks of the court in *Sparrow,* and suggest that absent what the courts see as adequate consultation, government cannot claim that its decision reflects the prior interests of title holders, or that its decision impairs aboriginal interests as minimally as possible. A particularly useful superior court decision by way of example is Justice Dorgan's decision in *Halfway River First Nation* v. *British Columbia (Ministry of Forests).*[303]

Canadian Forest Products (Canfor) held a Crown forest licence within the boundaries of Treaty 8. The Halfway Nation are descendants of Treaty 8 signatories, who use an area known as the Tusdzuh area for traditional practices and had commenced a treaty land entitlement claim for this area. In 1996 the Crown granted Canfor cutting permits within the Tusdzuh area. The Halfway Nation argued that this action was in breach of certain principles of administrative law but also argued that the Crown had breached its constitutional and fiduciary obligations to the Halfway Nation. The court found a *prima facie* infringement

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301 *Id.*, at para. 168.

302 In addition to *Halfway, supra* note 263, see *R.* v. *Jack* (1995), 16 B.C.L.R. (3d) 201 (C.A.); *Sampson, supra* note 252*; R.* v. *Little* (1995), 131 D.L.R. (4th) 220 (B.C.C.A.); *Klahoose First Nation* v. *British Columbia (Minister of Forests)* (1995), 13 B.C.L.R. (3d) 59 (B.C.S.C.), aff'd, (1996), 18 B.C.L.R. (3d) 194, leave to appeal dismissed [1996] S.C.C.A. No. 263 (QL); *R.* v. *Jones* (1993), 14 O.R. (3d) 421 (Prov. Div.); *R.* v. *Noel,* [1995] 4 C.N.L.R. 78 (N.W.T. Terr. Ct.); *Ardoch Algonquin First Nation* v. *Ontario* (*Re Perry et al. and The Queen in right of Ontario*) (1997), 148 D.L.R. (4th) 96 (Ont. C.A.); *Cheslatta Carrier Nation v. British Columbia (Environmental Assessment Act, Project Assessment Director),* [1998] B.C.J. No. 178 (QL) (S.C).

303 *Id.*

of the Nation's right as discussed above[304] and also ruled that the Crown had failed to justify the infringement, primarily on the basis of inadequate consultation. The court framed the duty as follows:

> Based on .... [a list of] cases the Crown has an obligation to undertake reasonable consultation with a First Nation who may be affected by its decision. In order for the Crown to consult reasonably, its must fully inform itself of the practices and of the views of the Nation affected. In so doing, it must ensure that the group affected is provided with full information with respect to the proposed legislation or decision and its potential impact on aboriginal rights.[305]

Although there had been consultation in the case, even extensive consultation, the court held that it fell short of the constitutionally required standard because Halfway was not invited to attend the meeting at which the cutting permit in question was approved, the government delayed in providing a report on the potential impacts of cutting on fish and wildlife resources, Halfway was not provided with a "real opportunity to participate in the CHOA [Cultural Heritage Overview Assessment]", and the forest company's application for the permit was not provided to Halfway until after the decision to issue the permit.[306] It was not enough that the Ministry of Forests (MOF) made efforts to inform itself, because the measures that it took were inadequate.[307]

The onus is on the government to initiate consultation with aboriginal peoples at the earliest stage possible in decision making.[308] Dorgan J. rejected the MOF's submission in *Halfway* that the duty to consult only arises once the aboriginal group has established a *prima facie* interference.[309] *Adams* and *Côté* suggest that legislation whose operation risks infringing aboriginal rights should be structured to accommodate those

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304 Text to notes 263 *et seq. supra.*

305 *Supra* note 263 at para. 133.

306 *Id.*, at para. 141.

307 *Id.*, at para. 142.

308 *Nikal, supra* note 208 at 1065; *Sampson, supra* note 252 at 252; and *Jack, supra* note 302 at 222.

309 *Halfway, supra* note 263 at para 132.

rights;[310] provisions would seek to ensure that no rights to lands are disposed of without consulting potentially affected aboriginal rights holders. The aim of consultation should be to avoid infringements where possible and come to a compromise respecting which infringements are unavoidable.

Even in those "rare cases when the minimum acceptable standard is consultation" it is clear that the government must ensure that it is fully informed of aboriginal uses of the land. In *Jack*, the British Columbia Court of Appeal held that the government must provide the aboriginal group with complete information on the measures to be taken and their effect on the Band, and that it has to fully inform itself of the group's practices or rights and the group's views of the proposed measures.[311] In *R.* v. *Noël*, the Northwest Territories Territorial Court held that alternative measures proposed by aboriginal peoples must be seriously considered.[312] That Court also found that rushed decision making in response to a short "time frame for action" is no excuse for inadequate consultation.

The British Columbia Environmental Appeal Board has emphasised the importance of consultation in the context of forestry allocations.[313] In one decision, the Panel found that the consultation with the Heiltsuk on the issue of herbicide use was inadequate because it "implies that First Nations have no particularly greater influence on the decision than other members of the public or environmental groups." In a letter to the Band informing them of the issuance of the permit, no reasons for the decision were provided. The Panel also found that the consultation process was adversarial, and treated as a "bureaucratic requirement," and that the Ministry failed to comply with its own policy.

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310 *Adams*, *supra* note 208 at para. 54, and *Côté*, *supra* note 208 at para. 76. Nonetheless, in *Siska*, *supra* note 265 at para. 17, the Crown argued that a duty consult does not arise until title is established. This particular issue was left undecided, but the court does not appear to have accepted it.

311 *Jack*, *supra* note 302 at para. 77.

312 *R.* v. *Noel*, *supra* note 302.

313 Appeal No. 95/33(b) (February 1997).

The courts, however, will not allow aboriginal peoples to frustrate the requirement of consultation by refusing to cooperate,[314] and they will look to the reasonableness of the government's efforts to consult.[315] While it is possible that in a particular case consultation in the context of a mineral disposition may be adequate, it is significant that neither territorial mineral regime provides for consultation with aboriginal title or rights holders for the purpose of satisfying obligations to accord priority to those rights. In light of the serious nature of infringements upon title potentially resulting from the operation of the *YQA* and *CMR*s, the consultation required is arguably significantly deeper than good faith discussion or "mere consultation". While title holders have the right to exclusive occupation of the land and the right to make land use choices, in neither territory does the legislation provide for any kind of involvement of aboriginal title holders in "decisions with respect to their land". Rights to title lands are allocated on the assumption that such title does not exist.

3.5.2.3 As Little Infringement as Possible

In *Gladstone* as part of its discussion of the *Sparrow* priority principle, the Supreme Court pointed out that if applied literally, a policy of interfering with aboriginal rights as little as possible would result in the aboriginal people concerned having the exclusive right to harvest the resource. Such a blanket requirement would not be appropriate especially where the right was not subject to internal limitations and where several aboriginal peoples might have rights in relation to the same resource.[316]

Instead, the court will look at the overall reasonableness of the government's actions to see whether "it has acted in a fashion which reflects that it has truly taken into account the existence of the aboriginal right" and

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[314] See *Ryan* v. *Shultz* (January 25, 1994), Smithers Registry, No. 7855 (B.C.S.C.).

[315] *Nikal, supra* note 208 at 1065: government must make "every reasonable effort...to inform and to consult."

[316] *Gladstone, supra* note 208 at para. 62.

"the importance of such rights."[317] However, the Court in *Sparrow* held that to justify an infringement the government would be required to show that it is necessary in order to achieve the legislative objective.[318] In *Nikal*, the Court modified this aspect of the justification analysis to require the government to show that "the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible."[319]

Other fisheries cases have emphasised that the government might be required to take quite aggressive steps to reduce the impact of attaining the objective on the First Nation. For example, in both *Jack*[320] and *Sampson*[321] there was evidence that small and threatened runs of salmon might be most efficiently protected by limiting harvesting in the immediate vicinity of the spawning grounds and the spawning river. Such a scheme significantly interfered with the preferred harvesting activities of the accused. There was also evidence to the effect that the objective of protecting escapement could be achieved by eliminating the sport fishery and perhaps imposing major reductions in the intercept commercial fishery. The Crown objected to the latter on the basis that a comparatively large reduction in the commercial offshore take would only deliver relatively small benefits[322] to a particular stock which was irretrievably commingled in offshore areas with other more healthy stocks. Despite this, the Court of Appeal held that the trial judge had not erred in concluding that the Crown had failed to apply alternative less invasive means of achieving its objectives.[323]

It is not clear how the courts will apply this branch of the justification analysis in the present context. Clearly

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317 *Id.*, at para. 63.

318 *Supra* note 208 at 1121.

319 *Nikal*, *supra* note 208 at para 110.

320 *R.* v. *Jack*, *supra* note 301.

321 *R.* v. *Sampson*, *supra* note 252.

322 *Jack*, *supra* note 302 at para. 61: a 30% reduction in northern commercial and sport fisheries would effect only an 8.5% increase in the return of chinook to rivers on the west coast of Vancouver Island.

323 *Jack, id.*, at paras. 65 and 89; *Sampson*, *supra* note 252 at paras. 91 - 92.

the courts can be expected to show significant deference to government in the details of the design of a disposition regime.[324] However, we think that a court might reasonably pose the following questions:

1. Has government re-examined the mineral disposition legislation since the entrenchment of aboriginal rights in 1982 to see if government has truly taken account of the existence and importance of aboriginal rights and title?[325]

2. Has government examined other types of disposition regimes to see if they might better take account of the interests of First Nations in their traditional territories? Such regimes might include a leasing regime or a negotiated concession regime, or a substantially modified free entry regime that incorporates some elements of ecologically-based land use planning as well as aboriginal priorities.[326]

We suspect that the answer to both of these questions is negative. Certainly, in relation to the *Canada Mining Regulations*, we know that the federal government's position is that it will not fundamentally re-examine the nature of the mining legislation until after land claims are settled.[327] There are on-going reviews of the *CMR*s,[328] and, as noted above, the *YQA* has been amended to try to take account of changing

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[324] See, for example, *Gladstone, supra* note 208 at para. 83.

[325] In *R.* v. *Jones et al.*, (1993) 14 O.R. (3d) 421 (Ont. Ct (Prov. Div.)), at 451-2, the court noted that in the context of fishery quotas: "In the years since the imposition of the quotas, even following the clarification of the effect of s. 35(1) by the Supreme Court of Canada, the evidence does not disclose any serious attempt by the Ministry to reconsider the restrictions imposed at a time when their constitutional implications were perhaps not so clearly understood."

[326] Barton *supra* note 48, briefly discusses leasing, concession and administrative regimes. He expands on this analysis in the companion working paper in this series: *Reforming the Mining Law of the Northwest Territories: comparison of options*, 1998.

[327] Letter from Minister Stewart to Bankes and O'Reilly in response to petition under the *Auditor General Act*, August 27, 1997. See also *Program Guidelines*, *supra* note 112 at 1 and 2.

[328] See for example *Discussion Paper, Proposed Amendments to the Northwest Territories Mining Royalty Regime in the Canada Mining Regulations*, 1996 and *Discussion Paper, Amendments to the Canada Mining Regulations*, 1997.

environmental values,[329] but there has been no fundamental re-thinking of the free-entry system in either jurisdiction in light of the entrenchment of aboriginal and treaty rights in the Constitution.[330]

3.5.2.4 Compensation

Delgamuukw signals that where there is an infringement of an aboriginal title, "fair compensation" will ordinarily be required as part of a justification analysis. However, there is considerable room for discussion as to the amount of compensation that will be payable and the methodology for calculating that amount. The issue was not argued in *Delgamuukw* and Justice Lamer contented himself with the following brief comment:

> The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.[331]

Justice La Forest also supported the principle of compensation. He traced the basis of a claim to compensation through *Sparrow*[332] back to the terms of the Royal Proclamation of 1763.[333] He did however add this caveat:

It must be emphasised, nonetheless, that fair compensation in the present context is not equated with the

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329 See section 2.3.3, above, for a discussion of these amendments.

330 The Regulatory Impact Statement included in a fairly recent amendment to the *CMR*s indicates that aboriginal title or other interests are not a priority:

> Given the mineral potential of the North and the importance of mining to the territorial economies and to Canada, any ineffective, inefficient or inadequate sections of the C.M.R. need to be addressed in order to facilitate mining operations in the North. These amendments are necessary in order to reduce operating costs, provide faster processing of applications and reduce the paper burden on the individual prospectors, the mining industry and the federal government.

SOR/97-117.

331 *Supra* note 4 at para. 169.

332 *Sparrow*, *supra* note 208 at 416 to 417.

333 *Delgamuukw*, supra note 4 at para. 203.

price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. Thus, generally speaking, compensation may be greater where the expropriation relates to a village area as opposed to a remotely [*sic*] visited area.[334]

There is certainly nothing in either the *CMR*s or the *YQA* that explicitly contemplates compensating aboriginal title holders for interference with the mineral content of an aboriginal title. Furthermore, although there are several provisions in the *YQA*,[335] the *Yukon Surface Rights Board Act*[336] and the *CMR*[337] that deal with the payment of compensation to surface owners,[338] it is not clear that these provisions contemplate payment of compensation to persons claiming under an aboriginal title except in the case of the *YSRBA* where title lands also constitute settlement lands.[339]

3.6 Conclusions

We began this part with the assumption that some of the aboriginal peoples of the Yukon and Northwest Territories could claim and establish an existing aboriginal title, and it is on that basis that we have proceeded.

Do the free entry regimes contained within the *YQA* and the *CMR*s amount to a *prima facie* infringement of

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334 *Delgamuukw*, *id.* How often a site is visited, or how remote it is from village sites, does not determine its importance to an aboriginal community.

335 See *YQA*, *supra* note 2, s. 15 (security is payable where lands "owned or lawfully occupied" by another person, and disputes go to the YSRB); s. 15.1 (compensation is payable for loss or damage to the "owner or occupant of the lands").

336 The *YSRBA*, *supra* note 129, deals with mineral rights disputes on non-settlement lands.

337 *Id.*, ss. 70-72.

338 See the discussion in s. 2.2.4. *supra*.

339 Under the terms of the Yukon Final Agreements, *supra* note 59, Yukon First Nations continue to hold some lands as aboriginal title lands although Category A surface and Category B lands are deemed to encompass the rights obligations and liabilities equivalent to those held by a fee simple title holder: UFA, ss.2.5.1 and 5.4.1. Part II of the *YSRBA* deals with compensation payable with respect to operations requiring surface access to settlement lands for mining and other purposes.

an aboriginal title? The case law requires that we examine each of the two disposition schemes as a whole, rather than the details of a particular disposition, in order to reach our conclusion.

We think that the regimes constitute a *prima facie* infringement simply because they allow third parties to gain access to aboriginal title lands and to assert a property interest that is inconsistent with the aboriginal title interest. The *Delgamuukw* decision held that an aboriginal title is exclusive and includes the right to decide what use is made of title lands. Legislation authorizing third party access and acquisition of title by those third parties is plainly inconsistent with the exclusive nature of aboriginal title and the discretion it accords aboriginal peoples regarding land use on title lands. We have also argued that the lack of discretion in the free entry systems prevents the accommodation of aboriginal title rights and that that feature itself is a *prima facie* infringement. Rather than attempt to accommodate rights flowing from aboriginal title, free entry mining legislation encourages others to stake claims in disputed lands and requires that those claims be recorded.

Can the federal Crown justify the infringement? We think that the Crown will have little difficulty establishing that mineral development constitutes a valid legislative objective. The threshold is clearly very low. But can the Crown meet the second branch of the justification test? Is this legislation consistent with maintaining the honour of the Crown? We think not subject to what we have to say about the actual exercise of the discretionary withdrawal powers in any particular case.

First, as indicated above, we do not believe that either regime accords priority to First Nation and aboriginal interests. Mineral development clearly takes priority over aboriginal title. Withdrawal powers are discretionary, and though they may in practice justify particular instances of infringements, they do not justify the infringement of title resulting from the scheme as a whole. Arguably, and at a minimum, the legislation needs to be amended to require withdrawals to protect aboriginal title interests. A policy if consistently applied and followed may justify individual infringements, but a legislated withdrawal requirement that ensures early and sufficient protection of title lands would clearly be preferable.

In the context of specific infringements, the consequences of the exercise of withdrawal powers may also be significant. Withdrawals occur only once the government has accepted a claim for negotiation, and once negotiations have begun. As noted at the outset of the paper, not all aboriginal peoples have reached this stage in the land claims settlement process, and thus their entire title lands could be open for mineral development. Staking continues until negotiations reach a stage where government is ready to withdraw lands and the rights previously acquired are grandparented by the withdrawal and by land claim agreements. Mineral interests clearly take priority over aboriginal interests, regardless of the importance of the area staked to the aboriginal title holders, and irrespective of the stage of mineral development. As long as the land is staked, the mineral interest holder has priority over an aboriginal title holder.

Second, there is no evidence that government has attempted to ensure that mining legislation avoids unnecessary infringements of title, or that it has reviewed the legislation for this purpose since 1982. Again the withdrawal power as it is currently used does not seek to minimally impair rights. There is no mechanism to even identify those rights. Further, as seen in Part 2 of this paper, that legislation, like the mineral legislation itself, is not concerned with honouring aboriginal title in the territories.

Third, there is absolutely no provision for consultation in either the *CMR*s or the *YQA*. While in practice consultation may occur in particular instances, we think that this is inadequate given the pervasive application of these regimes.

Finally, we have argued that the Crown cannot justify an infringement on the basis of benefits agreements that have been negotiated between operators and the Crown or between operators and aboriginal peoples. To this point, such agreements are purely ad hoc and there is no legislative requirement to negotiate such an agreement. Furthermore it will frequently be hard to demonstrate an adequate nexus between the infringement and the agreement so as to constitute justification. With respect to the environmental and land and water use legislation discussed in Part 2, its use in a particular instance may serve to justify an

infringement, but its mere existence does not.

4.0 The 1870 Order

4.1 Introduction

We are now in a position to consider the second hypothesis of this paper, namely that current mineral disposition regimes may also violate the terms of the 1870 Order in Council.

The *1870 Order* transferred the two territories known as Rupert's Land and the North-Western Territory from the United Kingdom to Canada.[340] The transfer was anticipated by the terms of s.146 of the *Constitution Act, 1867* which provided that:

> It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council ... on Address from the Houses of Parliament of Canada to admit Rupert's Land and the North-western Territory or either of them, into the Union on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

Rupert's Land consisted of the lands granted to the Hudson Bay Company by Royal Charter in 1670. Although there continues to be some academic dispute as to the precise boundaries of the grant,[341] at its largest it encompassed all the lands that drained into Hudson Bay. The boundaries of the North-western Territory may be equally uncertain but, in the opinion of Professor McNeil "they embraced all British

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340 *Supra* note 5.

341 For the best recent account see K. McNeil, *supra* note 7; see also K. McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory* (Saskatoon: University of Saskatchewan, Native Law Centre, 1982); E.E.Rich, *The Fur Trade and the Northwest to 1857,* (Toronto: McClelland and Stewart, 1967).

territory north of the United States and north and west of Canada [i.e. pre-Confederation Canada] which was not part of Rupert's Land, British Columbia or Vancouver Island ... the same territory over which the Hudson's Bay Company held its trading licence from 1821 to 1859."[342]

4.2 The 1867 and 1869 Addresses

Canada submitted an Address seeking the transfer of the two territories in 1867.[343] That Address contained the following term:

> ... upon the transference of the territories in question to the Canadian Government, the claims of Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which uniformly governed the British Crown in its dealings with the aborigines.

We shall call this the "equitable principles" clause. The 1867 Address was rejected at the time because the British authorities believed that it was first necessary to settle with the Hudson Bay Company and that this would require an Act of Parliament. The result was the *Rupert's Land Act* of 1868[344] which affirmed s.146 of the *Constitution Act* and permitted the Crown to accept a surrender of the Hudson Bay grant. The terms of the surrender were worked out between Canada and the company with the active intervention of the Colonial Secretary. They were incorporated in a memorandum of March 1869 and included in a set of Resolutions passed by both the House and the Senate in May 1869. The conditions and resolutions were incorporated in a second Address (the 1869 Address) later that month. The 1869 address indicated that the union of the territories was sought for the North-west Territory on the basis of the terms included in the 1867 address and, for Rupert's Land on the basis of the terms contained in the 1869 resolutions.

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342 McNeil, *Canada's Constitutional Obligations, id.*, at 4 - 5.

343 The following account relies heavily on McNeil, *Canada's Constitutional Obligations, id.*

344 R.S.C. 1985, Appendices, Appendix II, No. 6, 32-33 Vict. c.3.

The 1869 resolutions which incorporated the May 1869 memorandum contained additional terms relevant to aboriginal people. First, the memorandum contained a clause (clause 8) incorporating the understanding of the Company and Canada as follows:

> 8. It is understood that any claims of the Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government, in communication with the Imperial Government, and that the Company shall be relieved of all responsibility in respect of them.

Canada also undertook in the 1869 Resolution that:

> ... upon transference of the territories in question to the Canadian Government, it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well being are involved in the transfer.

We shall call the "well being of the tribes" clause. Finally, the terms of the *1870 Order* itself reframed the undertaking between Canada and the Company as a clear obligation owed to the Imperial Crown as much as to the Company:

> 14. Any claims of the Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.

McNeil highlights two issues in light of the above texts. First, he notes that while the North-Western Territory was to be admitted on the basis of the terms contained in the 1867 address, Rupert's Land was to be admitted on the basis of the terms contained in the 1869 Order. Thus it is possible that the "equitable principles" clause only applies to lands within the North-Western Territory whereas Term 14 of the Rupert's Land Order and the well being of the tribes clause may only apply to Rupert's Land.

Second, McNeil raises some concern as to whether all of the above texts constitute terms and conditions

approved by Her Majesty as required by s.146 of the *Constitution Act, 1867*.[345] He suggests that it is possible that Canada's resolution to make adequate provision to protect the tribes whose interests and well being were involved in the transfer was not approved by Her Majesty. Nevertheless he concludes that the term is at least morally binding,[346] and although we do not believe that he addresses the point, it might well be the case that the condition was effectively constitutionalised in 1982 by s. 52 of the *Constitution Act, 1982* even had it not been in 1870.[347]

4.3 Interpretation

For present purposes we can afford to ignore these difficulties since we are primarily interested in the old North-Western Territory for it is in this area that we find the principal areas (of the two modern territories) in which land claims have still to be settled. Consequently, we shall focus on the equitable principles condition which clearly applies to the areas of Yukon and the current Northwest Territories that lie to the west and north of the Hudson Bay drainage basin. For ease of reference we will reproduce the relevant clause again:

> ... upon the transference of the territories in question to the Canadian Government, the claims of Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which uniformly governed the British Crown in its dealings with the aborigines.

The text suggests that: (1) when lands are required for settlement, (2) the Canadian government shall consider and settle the claims of the tribes, (3) in conformity with the equitable principles that have uniformly governed the British Crown in dealing with aboriginal people. In the *Paulette* case, Justice Morrow recited

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345 McNeil, *supra* note 7 at 11.

346 *Id.*, at 12.

347 McNeil deals with the effect of the *Constitution Act, 1982* at *id.*, 27 - 31 but does not deal with the point.

the above clause as well as s.146 of the *Constitution Act, 1867* and then went on to say:[348]

> It would seem to me from the above that the assurances made by the Canadian Government to pay compensation and the recognition of Indian claims in respect thereof did, by virtue of s.146 above, become part of the Canadian Constitution and could not be removed or altered except by Imperial statute. To the extent, therefore, that the above assurances represent a recognition of Indian title or aboriginal rights, it may be that the Indians living within that part of Canada covered by the proposed caveat may have a constitutional guarantee that no other Canadian Indians have.

4.3.1 What are "lands required for purposes of settlement"?

The key issue here is what is meant by the words "required for settlement". Are the requirements of settlement limited to the requirements of homes and residences and the like, or does the phrase extend to any purpose for which lands might be taken up including the varied purposes listed in the later numbered treaties such as lumbering, mining, agriculture etc. McNeil concludes after a careful review of dictionary definitions and context based on the numbered treaties that were negotiated subsequent to the *1870 Order*, that the narrower meaning is to be preferred.[349] In part this analysis seems to be driven by result-oriented reasoning designed to support an attack on those numbered treaties that were negotiated to free-up land for purposes other than settlement as narrowly defined. McNeil concludes on the point as follows:[350]

> It is suggested that the government's restricted use of the term in the treaties supports a narrow interpretation of the term as used in the "equitable principles" condition of the 1867 Address. *If that condition limits the Canadian government's authority to negotiating surrenders of Indian lands actually required for settlement, then the validity of surrenders for other purposes may be open to question.* (emphasis supplied)

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348 *Paulette*, *supra* note 7 at 136.

349 McNeil, *supra* note 7 at 19.

350 *Id.*

With respect, this point seems misconceived or at least misses a step in the logic. In order for McNeil's argument to be compelling, he must establish not only that settlement has this narrow meaning but also that this narrow meaning established a constitutional touchstone against which we must measure the validity of subsequent treaties and that "settlement" was the only purpose for which a treaty could be negotiated. McNeil does not deal with this point explicitly (although he does seem to recognize the difficulty with his use of the conditional "*if*") and we doubt that he could establish the claim. In our view the Canadian government does not need the *1870 Order* to provide it with authority to negotiate treaties; it has this authority by virtue of the peace, order and good government power of s.4 of the *Constitution Act, 1871*.

Notwithstanding McNeil's careful analysis, we think that there is little doubt that a court would prefer the broader interpretation primarily because the broader interpretation is more consistent with both the purposive interpretation adopted by the Supreme Court in relation to constitutional instruments in general[351] and the liberal interpretation adopted by the Court in relation to instruments affecting aboriginal peoples.[352] We think that a purposive interpretation would conclude that this clause was inserted in the Terms for protective purposes, and that it makes no sense to limit the need to settle with the Indians to the comparatively limited requirements of "settlement" strictly construed. The demands of settlers for lands for a range of purposes other than simply for the "purposes of inhabitation" would have been well known at the time that the *1870 Order* was drafted.

4.3.2 Consider and Settle the Claims of the Indian Tribes

There are several issues here. First, what is meant by the term "Indian tribes"? McNeil suggests that the term should have the same meaning as the term "Indians" as used in the 1867 Act. Thus, given the Supreme

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351 *Van der Peet, supra* note 208, esp. at para. 21 *per* Lamer C.J.C. and at para. 142 *per* L'Heureux -Dubé J.

352 *Nowegijick* v. *R.* (1983), 144 D.L.R. (3d) 193 (S.C.C.), *Mitchell* v. *Sandy Bay Indian Band* (1990), 71 D.L.R. (4th) 193 (S.C.C.).

Court's decision in *Reference re Eskimos*,[353] the term must be taken to include Inuit, and, in his view, for somewhat different reasons, must include the Métis as well. Furthermore, he argues that although the text adopts the word "tribes" and thereby emphasises the collective,[354] "the use of this word should not be regarded as excluding Indian groups which were not organized in tribal societies."[355] The second point is that the Canadian government undertakes a duty not just to consider but also to "settle" the claims of the Indian tribes. The *Shorter Oxford*[356] provides six different main meanings for the verb "to settle". Of these different meanings it is the sixth main meaning that seems most appropriate. This meaning emphasises the importance of fixing that which is uncertain, generally by mutual agreement rather than unilaterally. Implicit in this idea therefore is the concept of negotiations and not simply unilateral action on the part of the Canadian government.

4.3.3 The Equitable Principles

Not only is there a duty to settle the claims of the Tribes through negotiations, the Terms also establish a standard against which to measure those negotiations: they must be conducted in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines. What are those principles? To be eligible for consideration they must be both equitable and must have uniformly governed the conduct of the Crown. The most authoritative source of those principles is undoubtedly the Royal Proclamation of 1763[357] and we are entitled to advert to that as a source of the relevant principles whether or not the Proclamation applied on its own terms to the North-Western

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353 [1939] S.C.R. 104.

354 Others have noted as well that the term tribes carries with it some recognition of self-governing status.

355 McNeil, *supra* note 7 at 13.

356 *Shorter Oxford English Dictionary*, volume II, at 19550 1956.

357 *Supra* note 234.

Territory. We suggest that it is possible to extract the following principles.[358]

1. The lands of aboriginal peoples should not be alienated by the Crown until the Crown has settled with the peoples concerned. Persons who have settled on these lands should remove themselves and no persons should settle on these lands until the lands are ceded to, or purchased by, the Crown.

2. In order to avoid frauds and abuses, no persons other than the representatives of the Crown should deal with aboriginal peoples for a cession or disposition of their lands.

3. Land purchases by the Crown from the Indians should occur at some public meeting or other assembly of the Indians called for that purpose, and only if the Indians are inclined to dispose of the lands in question.

These principles derived from the Royal Proclamation have a large procedural content that seems designed to protect Indian lands; indirectly, they will also have the effect of preserving the Indians' significant bargaining power. To the extent that third parties are allowed to breach these requirements and acquire interests in Indian lands without going through the Crown, or without the Crown having first obtained a surrender, the bargaining position of the tribes will be reduced. Arguably, therefore, one of the reasons for obliging Canada to conform to these principles was to maintain the bargaining position of the tribes.

The principles extracted from the Royal Proclamation certainly meet the standard of uniformity. The

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358 See, generally, B. Slattery, *The Land Rights of Indigenous Canadian People, as Affected by the Crown's Acquisition of Their Territories* (Saskatoon: University of Saskatchewan, Native Law Centre, 1979) esp. at 217 for a comprehensive assessment of the Royal Proclamation. See also *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1996), 141 D.L.R.(4th) 1 (Ont. C.A.) esp. at 5: "The underlying rationale for the *Royal Proclamation* and for those provisions of the *Indian Act* was to prevent aboriginal peoples from being exploited: *Guerin v. The Queen* ... The *Royal Proclamation* and the statute protected the aboriginals' interest in their reserve land and at the same time permitted them to make their own decisions about the land."

principles were incorporated into the predecessors of the post-confederation *Indian Act*[359] and they have long since been used to strike down interests acquired by third parties from Indians.[360] While the Proclamation itself only had the authority of a statute, the incorporation of the principles in a constitutional document such as the *1870 Order* gives the principles a stronger normative effect.[361] In addition to meeting the standard of uniformity, the principles must also be "equitable" by which is probably meant "fair, just and reasonable".[362] McNeil suggests that the settlement must also reach an equitable result.[363] This interpretation, with respect, seems to read too much into the section. We suggest that the term "equitable" allows us to identify which of the uniform practices of the Crown are applicable. It does not dictate a particular result although we would contend that if the bargaining position of the tribes is maintained through the principles contained in the Royal Proclamation, then the result should be equitable.

4.4 Application

We think that it is possible to show that the continued application of the *YQA* and *CMR*s to those areas of the Yukon and NWT which were formerly part of the North-Western Territories and that are still the subject of an existing title claim, is inconsistent with the constitutional commitments contained in the *1870 Order*. The analysis differs from that developed for s.35 of the *Constitution Act, 1982* in several ways. First, it is not obvious that we need any justification analysis. The 1870 commitment was provided as part

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359 R.S.C. 1985, c. I-5, ss. 37 - 39; for pre-confederation Canada see *An Act to Prevent Trespasses to Public and Indian Lands*, C.S.U.C. 1859, c.81, ss.21-34.

360 See *Easterbrook* v. *R.*, [1931] S.C.R. 210; and *R.* v. *McMaster*, [1926] Ex. C.R. 68.

361 Note that the *1870 Order* entrenches the substantive effect of these principles. This is certainly stronger than the specific reference to the Proclamation in s.25 of the Constitution Act. That reference, while important, establishes a rule of interpretation for the balance of the Charter. See William Pentney, "The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982* - Part I: The Interpretive Prism of Section 25" (1988) 22 U.B.C. L. Rev. 21 at 49-53.

362 McNeil, *supra* note 7 at 21.

363 *Id.*, at 21.

of the consideration for a transfer of territory. Thus, while the court has developed a justification analysis for infringements of aboriginal rights and title protected by s.35, it is not clear that the same sort of (or any) justification analysis is appropriate for commitments contained in the *1870 Order* which were part of a commercial settlement with the Hudson Bay Company.[364] Doubtless the company would have been surprised to hear that Canada's commitments to it could be breached, provided that those breaches could be justified. The remedies available for breach of the 1870 Order should include in appropriate cases a declaration of invalidity, injunctive relief[365] and damages.

Second, the scope of the attack under the *1870 Order* is somewhat broader. The s.35 attack needs to focus very much on the specific disposition arrangements under the *CMR*s and the *YQA*. This may not be an issue at the stage of *prima facie* infringement, but at the justification stage one needs to focus on a particular disposition regime. The details of a disposition scheme may be less relevant with respect to the *1870 Order* if we are correct in asserting that the Order incorporates the policy that the Crown should not alienate land within the territory of a First Nation without first settling the claims of that First Nation. Consequently, while we argue that the current free entry systems breach the *1870 Order*, it is conceivable that another leasing regime might also breach the Order. However, a conventional leasing regime should accord the Crown much greater control and allow it to restrict dispositions to areas where claims have been settled. Thus, while it might be possible to contest the validity of particular dispositions under a mineral leasing regime, it would be hard to establish that the entire regime was unconstitutional.

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364 In *AGBC* v. *AG Canada (Precious Metals)* (1889), 14 App. Cas. 295 at 304, the Privy Council interpreted the railway belt provision of the BC Terms of Union in the same way that they would have interpreted a commercial contract. Note though that in *R.* v. *Badger* (1996), 133 D.L.R. (4th) 324 (S.C.C.) at paras 73 and 85, the court, per Cory J. applied a justification analysis to breaches of rights guaranteed by the Natural Resources Transfer Agreements; see also the comments in *Côté, supra* note 208 at para. 87 with respect to s.88 of the *Indian Act*.

365 On interlocutory injunctive relief note the limits dictated by *Manitoba (Attorney General)* v. *Metropolitan Stores* (1987), 38 D.L.R. (4th) 321 (S.C.C.). In *Kitkatla Band* v. *British Columbia (Minister of Forests)*, [1998] B.C.J. No. 1600 (C.A.) (QL), Vancouver Registry No. CA024761, the British Columbia Court of Appeal held at para. 15 that *Delgamuukw, supra* note 4, did not change the law of injunctions. See also *Siska, supra* note 267.

5. 0 Conclusions

We began this paper with two hypotheses, each of which questions the constitutionality of mineral legislation in the territories. The first hypothesis is that a mineral leasing regime premised upon free entry principles is inconsistent with an existing aboriginal title and therefore only constitutional if justified under the s. 35(1) analysis applied by the courts. The second hypothesis is that the 1870 Imperial Order in Council which effected a transfer of Rupert's Land and the Northwest Territories from Great Britain to Canada included conditions that preclude Canada from alienating aboriginal lands before there has been an equitable settlement of their claims.

The first hypothesis requires an examination of the particular mineral disposition regimes, because the Supreme Court has developed a test for s. 35(1) which protects aboriginal rights including title, but allows the government to infringe rights where the infringement is justified. The s. 35(1) analysis begins with whether there is an existing aboriginal or treaty right, and for this purpose we think it fair to assume that northern peoples with unsettled claims have unextinguished aboriginal title to their traditional territories. Proceeding from this assumption, we examined the *YQA* and *CMR*s to determine whether they constitute a *prima facie* infringement.

We think they do. Two underlying principles of the free entry legislation in the territories, namely that all land is open for staking, and that mineral development is the highest and best use of all lands in the territories, are blatantly inconsistent with the content of an existing aboriginal title, which encompasses the right to exclusive occupation of title lands, and the right to decide to what use title lands are put.

The *YQA* and *CMR*s allow others to enter upon title lands to stake, prospect and develop minerals, and assume without the consent of title holders that the best use of title lands is mineral development. Any actual interference with the exercise of rights is a *prima facie* infringement, and clearly the mineral regimes currently operating in the territories interfere with the exercise of title insofar as they remove the ability to

exclusively occupy title lands and to make land use choices. We noted that the Court has indicated that legislation which potentially interferes with the exercise of aboriginal rights, including title, in a substantial number of applications, must be structured by the legislation itself or regulations, in order to ensure that aboriginal rights are accommodated so far as possible in achieving the purpose of the legislation. As neither the *YQA* nor the *CMR*s seek to accommodate the existence of aboriginal title in the territories, they are *prima facie* infringements.

We do not think that the existence of a withdrawal power affects these conclusions; it does not give title holders exclusive occupation or the ability to decide what title lands may be occupied by others, and does not leave land use decisions with the title holders. Further, while we think the *Delgamuukw* decision indicates that title encompasses rights in minerals, even if it is confined to surface rights there is a *prima facie* infringement. This is because the legislation does not respect the exclusive rights of the title holder to the surface of their lands, and does not accord title holders the right to withhold consent to the use of the surface of their title lands for mineral exploration and development. Land and water legislation, as well as environmental legislation, also do not prevent the *prima facie* infringement on title resulting from the mineral legislation.

Can government justify the *YQA* and *CMR*s' infringement of title? Courts at this stage consider two questions. First, are the *YQA* and *CMR*s aimed at achieving a valid legislative objective? Second, if government is pursuing a valid legislative objective, does the means by which the legislation in question seeks to achieve that objective uphold the honour of the Crown in its fiduciary relationship with aboriginal peoples? We noted that courts will not likely scrutinize government's legislative objective, but they will scrutinize closely the manner in which government has sought to achieve it. It is thus the means analysis which is the key to the first hypothesis. The essence of the inquiry is whether government has sought to accord priority to aboriginal title, and whether the legislation, though infringing upon title, nevertheless reflects the prior nature of title.

The *CMR*s and *YQA* clearly do not recognize the priority of title. Instead, both schemes accord priority to rights derived under the mineral legislation. Even when there is a withdrawal of title lands for the purpose of settling land claims, any disposition under the legislation, regardless of when issued or the stage of development of the claim, is protected and given priority over aboriginal interests. Until there is a withdrawal, which does not occur until negotiations have reached a fairly advanced stage, staking continues and therefore others gain rights and interests in title lands which take precedence over title interests. Neither piece of legislation has been reviewed since 1982 to ensure that the prior nature of title interests is accommodated or even reflected. While we think particular withdrawals may justify particular infringements, in general, the withdrawal power does not reflect the priority of title interests and therefore does not justify the infringement resulting from free entry regimes.

Another consideration in the means analysis is consultation with title holders before authorizing land or resource use which may affect their rights. In the context of title, consultation may translate into consent, and at a minimum (that is, in the context of minor infringements), requires discussion with title holders. While the mineral legislation potentially effects very substantial infringements, there is nothing in the legislation to ensure the participation of or consultation with title holders.

Further, legislation will be justified when government has done all it can to avoid any unnecessary infringements in the achievement of its valid legislative objective. Insofar as there are alternatives to a free entry regime which may be less intrusive upon title, we think at a minimum government must consider them. There is no evidence that it has done so. Instead, recent amendments to the CMRs for example, seeks to facilitate the acquisition of interests in title lands by others. There is no evidence in either regime of an attempt to ensure that infringements are necessary and minimal. The withdrawal power does not ensure minimal infringements for the same reasons that it does not reflect the priority of title, though its exercise in a particular instance may result in minimal impairment and may justify that particular infringement.

Finally, the courts inquire into whether fair compensation is available in the legislation. While both regimes

include compensation provisions, they are not aimed at compensating title, and in fact, there is no evidence that these provisions have been used to properly address issues of compensation arising from interference with title as opposed to Crown-derived rights.

It is also necessary in the justification analysis to consider the land and water use regulatory regime, as well as environmental assessment legislation operating in the territories as it affects mineral development. As with the withdrawal power, we conclude that while the use of such legislation in particular instances may justify an infringement (though likely only a minor one given the content of aboriginal title), its mere existence does not justify infringements.

In sum, we do not think the free entry mineral regimes in the territories uphold the honour of the Crown. At a minimum the legislation should be reviewed to ensure that the priority of aboriginal title to the lands is reflected and accommodated in the legislation, through the required consideration of less intrusive alternatives.

The second hypothesis, the *1870 Order* hypothesis, considers the conditions upon which Canada acquired Rupert's Land and the North-Western Territory. That order requires "the claims of the Indian tribes to compensation for lands required for the purpose of settlement [to] be considered and settled in conformity with the equitable principles which uniformly governed the British Crown in its dealings with the aborigines." The terms of the order are part of the Constitution, incorporated by virtue of s. 146. This, we conclude, means that equitable settlement of claims is a precondition to dispositions. Those equitable principles are, we suggest: (1) lands of aboriginal peoples will not be alienated until the Crown has settled with title holders; (2) in order to avoid fraud and abuse, only government representatives should accept cessions or dispositions of aboriginal lands from the peoples concerned; (3) land purchases are to occur at public meetings or though an alternative public procedure, and only if aboriginal peoples wish to dispose of their lands. We conclude that the application of the *YQA* and *CMR*s to the title lands of aboriginal peoples who have yet to settle their claims is inconsistent with these principles. The *1870 Order* does not demand a

justification analysis and therefore there is no need to consider the specifics of the infringing legislation, including the details of the disposition scheme or the land, water and environmental legislation that may circumscribe its operation. Any disposition occurring before claims are settled equitably is an infringement of the *1870 Order* and arguably unconstitutional.