'CLEAR AND PLAIN INTENTION' Extinguishment of Native Title in Australia and Canada post-*Wik*

Shaunnagh Dorsett[*]

Introduction

At the heart of the decision in *The Wik Peoples v Queensland* is the issue of extinguishment of native title.[1] The question, broadly put, of whether the grant of a pastoral lease under the Queensland *Land Acts* (1910 and 1962) necessarily extinguishes native title required the High Court to further elaborate on the general principles relating to extinguishment of native title which were laid down in *Mabo v State of Queensland (No 2)*.[2] The Australian High Court's decision in *Wik* adds to a growing body of decisions in which the issue of extinguishment of native title, or Aboriginal rights, has been considered. Although accepted in all jurisdictions that Aboriginal rights can only be extinguished by a legislative enactment which exhibits a clear and plain intention to extinguish such rights, the parameters of the clear and plain doctrine are still being refined. It was accepted, for example, in *Mabo*, *Wik* and *Western Australia v The Commonwealth*[3] that the requirement of clear and plain intention does not necessarily connote that express language must be used. Rather:

> [a]fter sovereignty is acquired, native title can be extinguished by a positive act which is expressed to achieve that purpose generally ... provided that the act is valid and its effect is not qualified by a law which prevails over it or over the law which authorises the act. Again, after sovereignty is acquired, native title to a particular parcel of land can be extinguished by the doing of an act that is inconsistent with the continued right of Aboriginals to enjoy native title to that parcel — for example, a grant by the Crown of a parcel of land in fee simple — provided that the act is valid and its effect is not qualified by a law which prevails over it or over the law which authorises the act.[4]

This process, whereby native title can be extinguished by the grant of an interest which is inconsistent with that native title, is generally referred to as extinguishment by necessary implication and it is with this doctrine that much of the recent case law on extinguishment in Canada, the United States and Australia has been concerned. Although decisions in these jurisdictions

---

* Faculty of Law, Griffith University

1 *The Wik Peoples v Queensland* (1996) 187 CLR 1 (hereafter *Wik*).

2 *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 (hereafter *Mabo*).

3 *Western Australia v The Commonwealth* (*Native Title Act* case) (1995) 183 CLR 373.

4 Ibid at 422.

all begin with the requirement of clear and plain intention, the way in which that requirement has been interpreted differs between jurisdictions. As will be seen, the legislative purpose underlying enactments and the historical context in which those enactments were made provide connective threads between decisions of different jurisdictions. However, there are also a number of differences, particularly with respect to the issue of what kind of Crown interests native title can co-exist with. As will become apparent, the High Court's test for extinguishment in *Wik* is more stringent than that of other jurisdictions.

The first part of this article considers recent US and Canadian case law in this area. The requirement of clear and plain intention derives from the decision of the US Supreme Court in *United States v Santa Fe Pacific Railway*;[5] recent decisions of that court have provided further elaboration on the clear and plain requirement. Further, Canadian courts have in recent years handed down a number of decisions which have considered the issue of extinguishment of Aboriginal rights. Undoubtedly, these cases will be of importance in Australia in the future, given the increasing tendency in Australian and Canadian courts to have regard to each others decisions. The second part of the article considers those parts of the recent decision of the High Court of Australia in *Wik* which relate to extinguishment. Finally, some comparisons are made between the three jurisdictions.

Extinguishment of Indian Title in the United States and Canada

The United States

US case law can provide guidance with respect to two issues. The first is the meaning of 'clear and plain intention'. Does 'clear and plain' require express language in the United States or does it include the notion of necessary implication? The second issue relates to the first and considers *who* may extinguish native title. This is relevant to the discussion in *Wik* of *what* extinguishes native title. If only the government may extinguish, then it must be the actual grant of an inconsistent interest that extinguishes native title rather than subsequent actions of the grantees or other third parties, notably the holders of pastoral leases.

In the United States, the classic case on the meaning of 'plain and clear indication' is *Santa Fe Railway*. In 1865, Congress passed an Act which allowed traditional Walapais' land to be set aside as a reservation. Some time later that land was conveyed to the predecessor in title of the Santa Fe Railway Company. The 1865 Act did not expressly indicate that in creating the reserve, it intended to extinguish the rights of the Walapais to their land. Rather, the Supreme Court held that Congress was merely making an offer to the Walapais, an offer which they did not accept.[6] Thus, the Walapais argued that when the land was conveyed to Santa Fe Railway Company, the fee simple was conveyed subject to their Indian title. Unlike in Australia, in the United States it is clear that the government holds more than mere

5 *United States v Santa Fe Pacific Railway* 314 US 339 (1941).

6 Ibid at 353.

radical title. Rather, it holds all unallocated land in fee simple. Thus, Indian title is a burden on the fee simple of the government and, if not extinguished, continues to burden that fee simple even after its conveyance to a third party.[7] The Supreme Court held that the Act creating the Colorado River reservation did not show any 'clear and plain indication' that Congress intended to extinguish the Walapais' rights in their ancestral lands.[8] However, the Supreme Court gave no indication as to what actions would have indicated a clear and plain intention.

Not surprisingly, some doubt remained after *Santa Fe Railway* as to the meaning of 'clear and plain intention'. However, in the more recent case of *United States v Dion*, the Supreme Court provided some guidance as to this issue.[9] In that case, a member of the Yankton Sioux Tribe was convicted of shooting four bald eagles in violation of the *Bald Eagle Protection Act* which makes it a federal crime to hunt bald or golden eagle, except where such hunting has been authorised pursuant to a permit issued by the Secretary of the Interior 'for the religious purposes of Indian tribes' or for certain other narrow purposes compatible with preservation of the species.[10] As a defence, Dion argued that he was exercising a treaty right to hunt and fish. The question before the Supreme Court was whether or not the Act showed a clear intention to abrogate (ie extinguish) that right to hunt bald eagle. Although this case concerns a treaty right, the Supreme Court has long held that treaty rights are merely a reservation of pre-existing Aboriginal rights.[11]

The Supreme Court affirmed the test in *Santa Fe Railway* that Congress' intention to abrogate Indian treaty rights must be clear and plain. The court noted, however, that over the years the standard for determining how a clear and plain intention is to be demonstrated has varied. It held that although an explicit statement by Congress is preferable, the test is whether there is clear evidence that Congress actually considered the conflict between its intended action on one hand and the Indian treaty rights on the other and chose to resolve that conflict by abrogating those rights.[12] The *Bald Eagle*

7 *Buttz v Northern Pacific Railway* 119 US 55 (1886).

8 *United States v Santa Fe Pacific Railway* 314 US 339 at 353 (1941).

9 *United States v Dion* 476 US 734 (1986).

10 *Bald Eagle Protection Act* 16 USC § 668.

11 In *United States v Winans* 198 US 371 (1905), the Supreme Court made it clear that, in general, treaties with Indians do not create rights but reserve part of an Indian nation's already existing rights. In that case, the Yakima Nation of Indians signed a treaty with the United States, art III of which stated, *inter alia*, that 'the right of taking fish in all usual and accustomed places, in common with the citizens of the territory [was secured to the Yakima Nation]'. The court held that the treaty was a mere limitation on pre-existing rights (at 381). Further, in *United States v Nuesca* 945 F 2d 254 (1991), in which a native Hawaiian argued that his right to hunt monk seal had not been abrogated by the *Endangered Species Act* 16 USC §1533(a)(1), the Court of Appeal for the Ninth Circuit was prepared to apply the test in *Dion* to a traditional Hawaiian custom rather than a treaty right. However, Nuesca could establish neither (at 257).

12 *Dion* 476 US 734 (1986) at 740.

Protection Act did not explicitly abrogate treaty rights to hunt. However, the court held that Congressional intention to abrogate was strongly suggested on the face of the Act.

> The provision allowing taking of eagles under permit for the religious purposes of Indian tribes is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians, a recognition that such a prohibition would cause hardship for the Indians and a decision that the problem should be solved not by exempting Indians from the coverage of the statute, but by authorising the Secretary to issue permits to Indians where appropriate.[13]

Further, the court held that the legislative history of the statute supported that view. In its original 1940 form, it contained no references to Indians and the exception allowing for Indians to apply for permits to hunt was not introduced until 1962. The House Committee considering the amendments specifically alluded to the importance of hunting these creatures to the Indian tribes.[14] Therefore, the court considered that Congress believed that, in passing the amendment, it was abrogating treaty rights.[15]

The decision in *Dion* was applied in *South Dakota v Bourland*.[16] In *Bourland*, the Supreme Court considered the right of members of a former reserve to control access to hunting and fishing on those former tribal lands. Following severe flooding along the Cheyenne River, Congress passed the *Flood Control Act* of 1944 and the *Cheyenne River Act* of 1954 which allowed for the taking of tribal land in South Dakota for the construction of several dams and reservoirs required for flood relief measures. The Cheyenne River Sioux Tribe received compensation for the land as well as the right of free access to the shoreline of the new reservoir in order to hunt and fish. Between 1945 and 1988, the tribe and the State of South Dakota enforced their respective game and fishing regulations in the taken area. However, in 1988, the tribe refused to continue to recognise state hunting licences on former reserve lands. South Dakota sought to enjoin the tribe from excluding non-Indians from former trust lands.

The Supreme Court held that Indian regulatory control over hunting and fishing had not survived the passing of the *Flood Control Act*. This decision was supported in part by its earlier decision in *Dion*. The court reiterated that what is required is evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other and chose to resolve the conflict by abrogating the treaty. As in *Dion*, such a finding in *Bourland* did not require explicit wording in the Act to achieve this. The court found that s 4 of the *Flood Control Act*, which provides that the lands taken were to be open for general recreational

13 Ibid.

14 Ibid at 742–743.

15 Ibid at 743 and 745.

16 *South Dakota v Bourland* 508 US 679 (1993).

use by the public, had divested the tribe of its exclusive control of the area. Further, s 10 of the *Cheyenne River Act* had given the Army Corps of Engineers regulatory control over the area, thus extinguishing the tribe's regulatory control over licensing. The Court of Appeals for the Eight Circuit had found that these Acts did not extinguish the ability of the tribe to regulate hunting and fishing, as the purpose of the Acts was only to acquire the property rights necessary to construct the dams, not 'the destruction of tribal self-government'.[17] In other words, there had been no plain and clear intention. The Supreme Court, however, noted that although Congressional policy and the legislative debates were relevant to determining whether rights had been extinguished, in the end what is relevant is the effect of the alienation of land on Indian rights, not the underlying purposes of the legislation authorising that alienation.

> Thus, regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress had broadly opened up such land to non-Indians, the effect of the transfer if the destruction of pre-existing Indian rights to regulatory control.[18]

Thus, it would appear that in the United States, neither express language nor Congressional intent (other than that intent which appears on the face of the statute) is required to extinguish Indian interests.

Canada

Co-existence and Necessary Implication

There have been a number of cases in recent years which have considered the question of extinguishment of Aboriginal Rights. 'Aboriginal rights' is a broad classification of Indigenous rights that includes Aboriginal title, traditional hunting and fishing rights and other forms of customary law, such as customary marriage or adoption. In Canada, Aboriginal or native title is considered a 'subset' of Aboriginal rights, just as Brennan J noted in *Mabo* that native title is a type of customary law, albeit a 'special form of customary law'.[19] In *R v Van der Peet*,[20] L'Heureux-Dubé noted that:

> it has become accepted in Canadian law that aboriginal title, and aboriginal rights in general, derive from historic occupation and use of ancestral lands by the natives.... The traditional and main component of the doctrine of aboriginal rights relates to aboriginal title.... The concept of aboriginal title, however, does not capture the entirety of the doctrine of aboriginal rights. Rather, as the name indicates, the doctrine refers to a broader notion of aboriginal rights arising out of the historic occupation and use of native ancestral

17 Ibid at 691.

18 Ibid at 692.

19 *Mabo* at 42.

20 *R v Van der Peet* (1996) 137 DLR (4th) 289.

> lands, which relate not only to aboriginal title, but also to the component elements of this larger right — such as aboriginal rights to hunt, fish or trap, and their accompanying practices, traditions and customs...[21]

The majority of recent Canadian decisions involving Aboriginal Rights have been decided in the context of s 35 of the *Constitution Act* 1982. Section 35 was inserted into the *Constitution Act* at the time of the repatriation of the Constitution and stands outside the *Canadian Charter of Rights and Freedoms*. The key subsection, s 35(1), provides that '[t]he existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed'.[22]

There is no doubt that the law relating to Aboriginal rights has been enormously influenced by s 35(1) of the *Constitution Act* 1982 and this influence should not be underestimated, even where unspoken. However, Aboriginal rights, which include native title, *do* have an independent legal existence. They are not created by s 35(1) but merely protected by it. For this reason, although the case law on extinguishment of Aboriginal rights arises in a different context, it is nevertheless applicable to Australian circumstances.

In 1996, the Supreme Court of Canada reconsidered extinguishment in a number of cases. The two leading cases are those of *Van der Peet* and *R v Gladstone*.[23] In *Van der Peet*, the appellant was convicted of selling 10 salmon contrary to the *British Columbia Fishery (General) Regulations* and the province's *Fisheries Act* 1970. The offence was selling fish caught under the

---

21 Ibid at 331–332.

22 The leading case on the interpretation of s 35 remains that of the Supreme Court of Canada in *R v Sparrow* (1990) 70 DLR (4th) 385. In *Sparrow*, the appellant, a member of the Musqueam Nation in British Columbia, was charged under the *Fisheries Act* 1910 with fishing with a drift net longer than that permitted by the terms of his Band's Indian food fishing licence. He admitted that the facts alleged constitute the offense but defended the charge on the basis that he was exercising an existing Aboriginal right to fish; further, he stated that the net length restriction contained in the Band's licence was invalid in that it was inconsistent with s 35(1) of the *Constitution Act* 1982. The court unanimously held that s 35 provides constitutional protection to those Aboriginal rights which were not extinguished prior to the coming into force of the *Constitution Act* 1982. It was further held, however, that the Federal parliament still has the power to infringe these rights by regulation, provided that the legislation which so infringes meets a test laid down by the court. In order for a piece of legislation which infringes Aboriginal rights to be valid, it must pass a twofold test. The first requires that that it be shown that the law interferes with an activity which is within the scope of an existing Aboriginal right. The second requires it to be shown that there was a valid reason for making the law, eg conservation, that the law upholds the honour of the Crown, for example, by giving Aboriginal fishing priority, and that the government has addressed all other relevant factors, eg compensation if appropriate.

23 *R v Gladstone* (1996) 137 DLR (4th) 648.

authority of an Indian fish licence. The appellant, who was a member of the Sto:lo, did not contest the facts leading to the conviction but rather defended the charges on the basis that, in selling the fish, she was exercising an existing Aboriginal right to sell fish which was protected under s 35(1) of the *Constitution Act* 1982. In *Gladstone*, the accused, members of the Heiltsuk Band, invoked s 35(1) as a defence to offences involving the sale of herring spawn on kelp in contravention of the *British Columbia Fishery Regulations*. In effect, the appellants argued that they had an Aboriginal right to commercially exploit herring spawn on kelp, that Aboriginal right taking the specific form of the right to sell the spawn.

In *Van der Peet*, the majority found that the appellant's Aboriginal right did not include the sale of fish and therefore did not consider the question of whether that right had been extinguished. However, some of the same regulations were at issue in *Gladstone*. In that case, the majority accepted that commercial trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk prior to contact and was not merely incidental to social or ceremonial activities. Thus, an Aboriginal right to trade herring spawn on kelp on a commercial basis was established. The question arose whether such a right had been extinguished. The Court affirmed the test for extinguishment from *Sparrow*.

> Relying on the judgment of Hall J in *Calder v Attorney-General of British Columbia* [1973] SCR 313, the Court in *Sparrow* held at p 1099 that '[t]he test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be plain and clear if it is to extinguish an aboriginal right'.[24]

However, the court was not unanimous as to what constituted a clear and plain intention. In *Gladstone*, two different sets of regulations were at issue. The first consisted of a 1917 Order in Council[25] which, after a lengthy preamble, purported to generally limit Aboriginal rights to fish to subsistence rights. The preamble noted that since time immemorial, it had been the practice of the Indians of British Columbia to catch salmon by spear in the upper non-tidal portions of the river and that it had been the practice to allow the Indians to catch salmon for subsistence purposes. However, as great difficulty was being experienced in preventing the Indians from catching salmon in such waters for commercial purposes, a licensing scheme was introduced and the following subsection, s 8(2) of the *Special Fishery Regulations* for the Province of British Columbia was substituted for the original.

> An Indian may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for himself and his family, but for no other purpose.... An Indian shall not fish for or catch fish pursuant to the said permit except in the waters by the

24 Ibid at 663.

25 Order in Council, PC 2539, 11 September 1917 (British Columbia).

> means or in the manner and within the time expressed in the said permit, and any fish caught pursuant to such permit shall not be sold or otherwise disposed of and a violation of the provisions of the said permit shall be deemed to be a violation of these regulations...[26]

The second set of regulations consisted of those provisions of the *British Columbia Fishery Regulations* which expressly related to the herring spawn on kelp fishery and provided that no person shall take, collect, buy, sell or barter herring eggs but that an Indian may at may time do so for subsistence purposes.[27]

The majority[28] held that neither set of regulations extinguished the Aboriginal right at issue, as there was no plain and clear intention to do so. According to their Honours, the Order in Council had not generally extinguished Aboriginal rights to fish commercially. Rather, its purpose was to ensure that conservation goals were met so that salmon reached their spawning grounds in the upper parts of the river and to ensure the special protection of the Indian subsistence food fishery.[29] The purpose was not to eliminate Aboriginal rights to fish commercially. Thus, the failure to recognise an Aboriginal right, here the right to fish commercially, and the failure to grant special protection to it did not constitute a clear and plain intention to extinguish.

La Forest J specifically disagreed with the majority on this point. He held that the Order in Council exhibited a 'plain, clear and unequivocal intention on the part of the Crown to extinguish aboriginal rights relating to commercial fisheries in British Columbia'.[30] The preamble and s 8(2) made it clear that the 'concession' on the part of the Crown in favour of Aboriginal peoples regarding traditional fishing practices was not to have any commercial dimension. According to his Honour, it expressly provided that the engaging of commercial practices in the exercise of the Indian statutory right to fish for food was regulatory offence. Hence, where the Crown expressly addresses an issue and limits the scope of the right, the excluded rights are extinguished.[31]

The remaining judges, McLachlin and L'Heureux-Dubé JJ, followed their own decisions in *Van der Peet* and *NTC Smokehouse*[32] respectively and determined that the Aboriginal right to fish commercially was not extinguished. In *Van der Peet*, McLachlin J adopted the US Supreme Court's test in *Dion* that what is essential to satisfy the 'clear and plain intention' test is clear evidence that the government actually considered the conflict

26 The Order in Council is reproduced in full in *Gladstone* (1996) 137 DLR (4th) 648 at 665.

27 *British Columbia Fishery Regulations*, s 21A.

28 Lamer CJC, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.

29 *Gladstone* (1996) 137 DLR (4th) 648 at 666.

30 Ibid at 697.

31 Ibid.

32 *R v NTC Smokehouse* (1996) 137 DLR (4th) 528. This case was determined at the same time as *Gladstone* and *Van der Peet*.

between its intended action on the one hand and the Indian right on the other and chose to resolve the conflict by abrogating the Aboriginal right.[33] Consistent with this approach, McLachlin J held in *Gladstone* that a measure aimed at the conservation of a resource is not inconsistent with a recognition of an Aboriginal right to make use of that resources and thus did not extinguish it. The prohibition on possessing herring spawn on kelp was a conservation measure and did not extinguish the Aboriginal right at issue.[34] Although her Honour's approach appears in keeping with *Dion*, in fact her analysis reveals a more generous approach than that of the US Supreme Court in determining whether a right has been extinguished. In *Bourland*, the Supreme Court, applying *Dion*, noted that:

> [w]hen Congress reserves limited rights to a tribe or its members, the very presence of such a limited reservation [of free access to former hunting and fishing grounds] suggests that the Indians would otherwise be treated like the public at large.[35]

Thus, in *Dion*, the fact that the *Bald Eagle Preservation Act* contained an exemption allowing the Secretary of the Interior to permit the taking of an eagle for religious purposes was explicable only in terms that it otherwise banned the taking of all eagles (and, hence, the right to do so was extinguished). To the contrary, McLachlin J, along with other members of the court, held in *Gladstone* that the fact that Parliament allowed hunting for subsistence purposes with a permit was merely evidence of a protection of that right and did not extinguish other Indian rights, notably the Indian right to take fish commercially.

In *NTC Smokehouse*, L'Heureux-Dubé J stated that she was prepared to accept that extinguishment of Aboriginal rights can be accomplished through a series of legislative acts but the intention to extinguish must still be clear and plain. Extinguishment cannot be achieved by merely regulating an activity. Her Honour was of the opinion that in order to extinguish, the government must directly address the Aboriginal activities in question and explicitly extinguish them by making them no longer permissible.[36] She also rejected the argument that the plain and clear intention test is met when the Aboriginal right and activities contemplated by the legislation cannot co-exist.[37] In other words, her Honour rejected the 'necessary implication' doctrine.

As regards the second set of regulations at issue in *Gladstone*, those which directly related to the sale of herring spawn on kelp, the majority again found that these did not extinguish the Aboriginal right at issue. The *British Columbia Fishery Regulations* failed to express a clear and plain

33 *Van der Peet* (1996) 137 DLR (4th) 289 at 385.

34 *Gladstone* (1996) 137 DLR (4th) 648 at 713.

35 *Bourland* 508 US 679 at 694 (1993).

36 *NTC Smokehouse* (1996) 137 DLR (4th) 528 at 555; see also *Gladstone* (1996) 137 DLR (4th) 648 at 707.

37 *Gladstone* (1996) 137 DLR (4th) 648 at 707.

intention to extinguish the Heiltsuk Band's rights. The majority held that express language was not required but that more must be shown than that the exercise of an Aboriginal right has been subject to a regulatory scheme.[38] The legislative history revealed that at various times Aboriginal peoples had been entirely prohibited from harvesting herring spawn on kelp, had been allowed to harvest for food only, had been allowed to harvest with written permission, and had been allowed to harvest for food with a licence. Such an inconsistent and varied scheme did not express a clear and plain intention.[39] Thus, total prohibition of an activity does not extinguish it.

La Forest J stopped short of stating that a total prohibition of an activity indicated a plain and clear intention to extinguish. Having decided that the right was extinguished by the Order in Council, it was unnecessary for his Honour to determine the effect of the Regulations on the right. However, the tenor of his judgment is that his Honour was of the opinion that a total prohibition may well extinguish an Aboriginal right.[40] His Honour also declined to comment on the 'necessary implication' doctrine.

> I prefer not to discuss this issue [of whether regulation can amount to a clear and plain intention to extinguish] in further detail and will not, therefore, discuss whether the prohibition relating to commercial harvesting of herring spawn on kelp in force until 1974 in itself indicates a plain and clear intention on the part of the Crown to extinguish the aboriginal right claimed by the appellants. It is not necessary for me to do so since I have already concluded that the Crown has expressed a clear and plain intention in Order in Council PC 2539 to extinguish any aboriginal rights relating to commercial fisheries in British Columbia, assuming they ever existed. The question whether extinguishment of aboriginal rights can occur by necessary implication and if so, in what circumstances, is therefore left to another day.[41]

McLachlin and L'Heureux-Dubé JJ came to the same conclusions on the question of the effect of the Order in Council.

The final Canadian decision of relevance here is that of the British Columbian Court of Appeal in *Delgamuukw v R.*[42] Unlike the decisions discussed above, *Delgamuukw* is not primarily a s 35(1) case. Rather, *Delgamuukw* concerned an action by 51 hereditary chiefs representing two groups of Aboriginal peoples for ownership and jurisdiction over a large area of land in northern British Columbia, a claim based on occupation since time immemorial. One of the issues before the court was that of what was called 'implicit extinguishment' or, as it is more often known, extinguishment by necessary implication. More precisely, the question before the court was

38 Ibid at 664.

39 Ibid.

40 To the contrary, however, see the decision of Dickson CJ in *Kruger and Manuel v R* (1977) 75 DLR (3d) 434 at 437.

41 *Gladstone* (1996) 137 DLR (4th) 648 at 700.

42 *Delgamuukw v R* (1993) 104 DLR (4th) 470.

whether a series of instruments which, *inter alia*, declared that all lands belonged to the Crown in fee, authorised colonial authorities to survey land and provided for public sales of land extinguished native title.

With regards to the doctrine of necessary implication, Lambert JA, who dissented as to the outcome of the appeal, held that:

> [i]mplicit extinguishment is extinguishment brought about by the sovereign power acting legislatively in an enactment which does not provide in its terms for extinguishment, but which brings into operation a legislative scheme which is not only inconsistent with aboriginal title or aboriginal rights but which makes it clear and plain by necessary implication, that to the extent governed by the existence of the inconsistency, the legislative scheme was to prevail and aboriginal title and aboriginal rights were to be extinguished.[43]

His Honour further noted that extinguishment could occur either as a result of the legislative enactment itself or by virtue of executive action authorised by that legislation.

> In the case of implicit extinguishment the extinguishment brought about by the clear and plain intention demonstrated by the necessary implication may be brought about by the enactment of the legislation itself, because the necessity for extinguishment may occur at that point ... or it may be brought about by the administrative or executive actions authorised by the legislation, because the necessity for extinguishment may occur only when the administrative or executive action occurs...[44]

Macfarlane JA agreed that native title could be extinguished by necessary implication but held that such a result would not lightly be inferred.

> [L]ike vested rights and property rights, [indigenous rights] may be impaired or extinguished with or without compensation by a clear and plain exercise of competent legislative power. However, the legislative intention to do so will be implied only if the interpretation if the statute permits no other result.... Before concluding that it was intended that an aboriginal right be extinguished one must be satisfied that the intended consequences of the ... legislation were such that the Indian interest in the land in question, and the interest authorised by the legislation, could not possibly co-exist. And if the consequence is only impairment of the exercise of the right it may follow that extinguishment ought not to be implied.[45]

According to Macfarlane JA, in order to determine whether the consequences of the legislation is such that that Indigenous and non-Indigenous

43 Ibid at 668 per Lambert JA.

44 Ibid at 688.

45 Ibid at 525.

interests can co-exist, it is necessary to look at the underlying purpose of the legislation or colonial instruments and the historical context in which their enactment or proclamation was made.

> As to the general proposition that the introduction of a land settlement scheme was sufficient to extinguish aboriginal interests in land, it is my opinion that a clear and plain intention to extinguish the Indian interest is not to be inferred from the Colonial Instruments. Their purpose was to facilitate an orderly settlement of the province, and to give the Crown control over grants to third parties. Putting in place such a statutory scheme did not necessarily mean that the aboriginal interest was to be disregarded, and that the Indians were denied any recourse in respect of that claim. The Colonial Instruments did not foreclose the possibility of treaties, or of the co-existence of Indian interest and Crown interests.[46]

Although the majority of their Honours in the later Supreme Court decisions in *Gladstone* and *Van der Peet* do not couch their judgments in terms of co-existence, the emphasis on legislative purpose and historical context evident in *Delgamuukw* is also evident in the Supreme Court's approach.

From the above, it can be seen that Canadian courts generally accept the doctrine of extinguishment by implication. As will be seen, this accords with the approach of the Australian High Court in *Wik*. Establishing the acceptance of extinguishment by implication is, however, only the first stage. It is also necessary to consider exactly *what* extinguishes Aboriginal title by implication. This question was discussed in *Wik* under the subject of factual/legal inconsistency. Will the simple grant of an interest extinguish an Aboriginal right (legal inconsistency) or is it the exercise of rights under that grant that extinguishes the right (factual inconsistency)?

Factual/Legal Inconsistency

The issue of factual/legal inconsistency has received little attention from Canadian courts. However, two cases can provide guidance: that of the British Columbia Court of Appeal in *Delgamuukw* and that of the Supreme Court of Canada in *R v Badger*.[47]

In *Delgamuukw*, Macfarlane JA held that although the Crown has the power to extinguish native title, whether or not extinguishment has occurred in each case depends upon a comparison of the nature of the Aboriginal interest at issue and the nature of the Crown grant. This comment of itself would not necessarily lead to the conclusion that Macfarlane JA takes the view that factual rather than legal inconsistency is the test. However, he goes on to give an example of interests that can co-exist. The example he gives is that of Aboriginal use of land and the grant of a fee simple interest in the same land.

---

46 Ibid at 530.

47 *R v Badger* (1996) 133 DLR (4th) 324.

> A fee simple grant of land does not necessarily exclude aboriginal use. Uncultivated, unfenced, vacant land held in fee simple does not necessarily preclude the exercise of hunting rights: *R v Bartleman* (1984) 12 DLR (4th) 73.
>
> On the other hand the building of a school on land usually occupied for aboriginal purposes will impair or suspend a right of occupation. Two or more interests in land less than fee simple can co-exist. A right of way for power lines may be reconciled with an aboriginal right to hunt over the same land, although a wildlife reserve might be incompatible with such a right. Setting aside land as a park may be compatible with the exercise of certain aboriginal customs: *R v Sioui* (1990) 70 DLR (4th) 427 at pp 464–465, 56 CCC (3d) 225, [1990] 1 SCR 1025.
>
> The ownership issue aside, logging in forest areas may or may not impair or interfere with an aboriginal interest. For instance, interference may occur in areas which are integral to the distinctive culture of the particular aboriginal people, eg an area of religious significance or where cultural pursuits are followed. In other areas there may be no interference.[48]

This approach is clearly more generous than that of the High Court of Australia in *Mabo*.

Lambert JA made a similar finding that the grant of a fee simple would not necessarily extinguish Aboriginal title.[49] In doing so, he specifically disagreed with Brennan J that it is the effect of the grant that necessarily extinguishes Aboriginal title. After reviewing Brennan J's comments, he stated:

> I do not think that there is any basis in principle for saying that inconsistency between the grant and native title necessarily means that it is the native title that must give way. If the point were addressed in the legislation itself, and a clear and plain intention to extinguish, should there be an inconsistency, were shown, then extinguishment would be the result. But if the clear and plain intention to extinguish in the event of an inconsistency were not shown, then I do not understand the nature of the rule of law or principle which would decree that the new grant should prevail over the long-standing aboriginal title. I do not think that the effect of a grant should determine the test of legislative intention, unless it is clear and plain from the effect that the intention is clear an plain. I should also add that Mr Justice Brennan's proposition that the effect of the grant is enough to extinguish aboriginal title and rights even if the intention is not clear and plain, is contrary to the test enunciated in *Sparrow*, at p 401.[50]

48 *Delgamuukw* (1993) 104 DLR (4th) 470 at 532.

49 Ibid at 670.

50 Ibid at 671–672.

Although there is no direct Supreme Court authority on this point, it appears from the decision in *Badger* that that court would take a similar view. In *Badger*, the three accused were charged with an offence under the *Wildlife Act* SA 1984, c W-9.1 (Alberta), connected with the shooting of moose. All three accused were hunting on lands which had been included in the surrender under the treaty but were now privately owned. It is clear from the decision of the trial judge that the privately owned lands were held in fee simple. The case partly turned on the issue of whether the three had a 'right of access' to those lands as provided under the Alberta *Natural Resources Transfer Agreement* 1930 (*NRTA*).[51] Cory J held that where lands are privately owned, it must be determined on a case-by-case basis whether they are lands 'to which Indians have a right of access' under the Treaty. If the lands are occupied by being put to a visible use which is incompatible with hunting, Indians will not have a right of access. However, if privately owned land is unoccupied and not put to visible use, Indians, pursuant to Treaty No 8, will have a right of access in order to hunt for food.[52]

On the facts, it was found in *Badger* that two of the accused had been hunting on land which was visibly used. Therefore, they had no right to hunt or fish. The third accused was hunting on a portion of the land which showed no signs of occupation. There were no fences or signs. It was not apparent that this land was being put to use. Therefore, he had a right of access for the purposes of hunting for food.[53] As a result, the treaty right to hunt continued even after a grant of an estate in fee simple had been made to a third party. Cory J stated that:

> [n]o fences or signs were present. Nor were there any buildings located near the site of the kill. Although it was privately owned, it is apparent that this land was not being put to any visible use which would be incompatible with the Indian right to hunt for food. Accordingly, the geographic limitations upon the Treaty right to hunt for food did not preclude Mr Ominyak from hunting upon this particular parcel of land.[54]

Notably, there is no indication from the judgment that the hunting rights had not been extinguished because they were constitutionally protection by the *NRTA*. Only lands granted after the *NRTA* came into force would be subject to the guaranteed treaty right to hunt and fish. The court did not consider the date of the Crown grant. It can be presumed, therefore, that they were simply considering the interrelation of a treaty right and a Crown grant.

---

51 On Alberta joining the Dominion of Canada, all ungranted lands, the title to which was held by the Crown in right of Canada, were transferred to the Province. In addition, the 'Indians' were assured access rights to all unoccupied Crown lands for the purposes of hunting and fishing (s 12). Similar agreements were also signed with Manitoba, Saskatchewan and British Columbia.

52 *Badger* (1996) 133 DLR (4th) 324 at 345.

53 Ibid at 351.

54 Ibid.

Thus, it would appear that, at least as far as treaty rights are concerned, the Supreme Court is of the opinion that inconsistency is a question of fact rather than of law. This accords with the view of the majority of the British Columbia Court of Appeal in *Delgamuukw*, which involved common law Aboriginal rights.

The Australian High Court's Decision in *Wik*

The Australian High Court's decision in *Wik* raised three specific issues relating to extinguishment. The first and most obvious is whether clear and plain intention includes extinguishment by necessary implication. If so, this raises a further question of what extinguishes native title. Is native title extinguished by the grant of an interest, regardless of how, or in fact whether, the grantee exercises his or her rights under that grant? Or is an examination of the grantee's activities relevant in determining whether an extinguishment or impairment of native title has occurred. Although phrased differently, in essence this is same question considered earlier in this article with reference to US case law of who can extinguish native title. Thirdly, is the result of any inconsistency between an interest granted or rights exercised and native title necessarily the extinguishment of those native title rights? In other words, what does extinguishment really mean? Until now, it has been assumed that extinguishment connoted a permanent removal or cessation of native title or other customary rights. However, there are indications in several judgments that 'extinguishment' may refer to something less permanent.

'Necessary Implication'

In *Wik*, the majority confirmed that native title could be extinguished by the grant (and possibly by the exercise) of rights in relation to land which are inconsistent with the continued existence of native title. Thus, in the particular context of pastoral leases, the extent to which native title has been extinguished, assuming that it has been extinguished at all, must be determined by a comparison of those rights granted to the lessee under the lease and its authorising legislation with the particular native title rights at issue. Obviously, this is a clear acceptance by the court of the necessary implication doctrine. Such a result is, of course, not surprising, since it was foreshadowed in *Mabo*. However, the majority in *Wik* provided further clarification as to the parameters of necessary implication.

Toohey J examined those parts of Lambert JA's judgment in *Delgamuukw* which dealt with implicit extinguishment and stated that:

> [w]hat emerges from the judgments in *Delgamuukw* is that the emphasis on inconsistency between native title rights and rights created by legislation or by some administrative scheme authorised by legislation, that is, the inability of the two to co-exist. It is that inconsistency that renders the native title rights unenforceable at law

> and, in that sense, extinguished. If the two can co-exist, no question of implicit extinguishment arises...[55]

The key, therefore, to Toohey J's judgment is the notion of the 'inability' of native title rights and other rights to co-exist. Only if co-existence is impossible is native title extinguished.

Kirby J's judgment is similar to that of Toohey J. His Honour refers to the impossibility of the continued exercise of Aboriginal rights in the face of the exercise of the interest granted.[56] In other words, in the particular case of pastoral leases, would the exercise of rights granted under the lease render it impossible for the native title holders to continue to exercise their rights? Clearly, in the case of pastoral leases granted under the Queensland *Land Acts* (1910 and 1962), the answer to this question must be no.

> The exercise of the leasehold interests to their full extent would involve the use of land for grazing purposes. This was of such a character and limited intensity as to make it far from impossible for Aboriginals to continue to utilise the land in accordance with their native title, as they did. In that sense, the nature of the interest conferred by a pastoral lease granted under the successive Land Acts was not, of its legal character inconsistent with native title rights.[57]

Gummow J characterises the question of whether native title has been extinguished in the following way:

> The question is whether the respective incidents [of native title] are such that [they] cannot be exercised without abrogating the statutory right. If [they] cannot, then by necessary implication, the statute extinguishes the existing right.[58]

It is obvious from the above, and unsurprising, given the decision in *Mabo*, that extinguishment of native title in Australia can occur by necessary implication. In this respect, the decision in *Wik* accords with those of Canadian and US courts. Extinguishment by necessary implication will occur when rights granted with respect to an area of land and existing native title rights over the same land cannot co-exist. More difficult is the issue of *what* extinguishes native title. This is particularly so given the unique nature of the interest granted under pastoral leases legislation.

What is it that Extinguishes Native Title?

In the *Native Title Act* case, the High Court confirmed that native title can only be extinguished by the Crown.[59] The actions of third parties cannot

55 *Wik* at 126.

56 Ibid at 249.

57 Ibid.

58 Ibid at 185.

59 *Native Title Act* case (1995) 183 CLR 373.

extinguish native title.[60] A similar conclusion was reached by the court in *Wik*. Kirby J in particular rejected what he referred to as the 'factual inconsistency' doctrine.[61] His Honour referred to this doctrine as the theory that:

> in order to see whether native title, as recognised in *Mabo (No 2)*, had been extinguished by a grant of an estate or interest in land said to be inconsistent, it is necessary to examine that facts relating to the exercise of rights under such estate or interest.[62]

In other words, only Crown action may extinguish native title. Kirby J is of the opinion that to find that acts of the pastoralists could affect their own rights under the lease would be 'tantamount to conferring on the pastoralist a kind of unenacted delegated power to alter rights granted under the *Land Acts*'.[63] Rather, it is the character of the legal rights granted which may or may not impair or extinguish native title.

> In some cases the grant of ... legal rights will have the inevitable consequence of excluding any competing legal rights, such as to native title. But in other cases, although the native title may be impaired, it may not be extinguished. The answer is to be found in the character of the legal rights, not in the manner of their exercise.[64]

However, in *Mabo*, Brennan J also referred to the question of whether there has been a 'clear and plain intention' as being a mixed question of law and fact.

> Where the Crown grants land in trust or reserves and dedicates land for a public purpose, the question whether the Crown has revealed a clear and plain intention to extinguish native title will sometimes be a question of fact, sometimes a question of law and sometimes a mixed question of fact and law. Thus, if a reservation is made for a public purpose other than for the benefit of indigenous inhabitants, a right to continued enjoyment of native title may be consistent with the specified purpose — at least for a time — and native title will not be extinguished. A reservation of land for further use as a school, a courthouse or a public office will not by itself extinguish native title: construction of the building, however, would be inconsistent with the continued enjoyment of native title which would thereby be extinguished.[65]

How do we reconcile the view of Brennan J in *Mabo* that extinguishment is a mixed question of fact and law with the view of the majority in

60 Ibid at 475–476.

61 *Wik* at 235.

62 Ibid at 238.

63 Ibid.

64 Ibid.

65 *Mabo* at 68.

Wik that the test is one of legal and not factual inconsistency? The answer appears to lie in the distinction between land *reserved* or appropriated for public purposes and rights and interests *granted* by the Crown. In the former case, there is no grant of an interest in land. Rather, the Crown exercises its sovereign power to deal with land to merely dedicate that land for public or other use. Strictly speaking, no grant occurs. Thus, extinguishment cannot occur by virtue of the grant of an inconsistent right. This would also accord with Brennan CJ's view in *Wik* that with respect to a lease, it is the creation of the reversionary estate in the Crown that extinguishes native title.[66]

Further, although the majority in *Wik* is of the view that, in order to determine whether native title has been extinguished, it is necessary to examine the legal character of the rights granted, later comments by some judges throw doubt upon this approach. With respect to the Holroyd lease, Gummow J noted that:

> [i]t may be that the enjoyment of some or all native title rights with respect to particular portions of the 2830 square kilometres of the Holroyd River Pastoral Lease would be excluded by construction of the airstrip and dams and by compliance with other conditions [of the lease]. But that would present particular issues of fact for decision. *The performance of the conditions, rather than their imposition by the grant, would have brought about the relevant abrogation of native title.*[67]

Gaudron J observed that:

> [t]he questions [sic] whether performance of the conditions attached to the Holroyd Pastoral Lease effected any impairment or extinguishment of native title rights, and, if so, to what extent are questions of fact and to be determined in the light of the evidence led on the further hearing of this matter in the Federal Court.[68]

However, the fulfilment of conditions imposed on the grant are limited exceptions to the rule that it is the legal not factual inconsistency which determines the extinguishment of native title rights. As a result, it is not the case that all native title rights which are inconsistent with any right granted under a lease, regardless of whether that right has been exercised, are extinguished. For that to occur, according to Gummow J, there would need to be a clear, plain and distinct authorisation by the relevant grant of acts necessarily inconsistent with all species of native title which may have existed.[69] Rather, it appears that native title rights may be incrementally extinguished as the grantee fulfils conditions under the lease.

66 *Wik* at 88–94.

67 Ibid at 203 (emphasis added).

68 Ibid at 166–167.

69 Ibid at 202–203.

In order to determine the character of the rights granted and thus their effect on native title, it may be necessary to consider the underlying legislative purpose of the enactment pursuant to which those interests are granted as illuminated by the historical context of the enactment. In *Wik*, the legal character of a pastoral lease was determined by examining the substantive provisions of the relevant *Land Acts*, the state of the common law as it existed at the time of the enactment and the legislature's purpose in creating pastoral leases. All four members of the majority referred to the particular history of land use surrounding the development of pastoral leases. The majority determined that the purpose of the legislation was to allow for limited form of interest under which grazing and other pastoral activities could take place but to ensure that pastoralists should not acquire freehold title to large areas of land which may be required for other purposes in the future.[70] Kirby J stated that:

> I have ... described the evidence as to the use of the land in the pastoral leases in this case because the emerging facts illustrate vividly the kind of practical physical conditions for which pastoral leases were created by the Queensland Parliament. Those facts also demonstrate the very limited occupation of the land which was expected and regarded as normal under pastoral leases.... The understanding of these facts helps to provide the context against which the application of legal theory must be tested in this case. It also helps to illustrate, and describe, the nature of the pastoral leases which the successive enactments on pastoral leases were designed to permit.... In pastoral leases of the kind described in the evidence in this case, talk of 'exclusive possession' or 'exclusive occupation' had an unreal quality.[71]

However, Gummow J made it clear that the process of determining legislative purpose does not include an examination of whether the legislature *intended* to extinguish native title rights.

> [Clear and plain] 'intention' does not refer to any particular state of mind of the legislators, who may not have averted to the rights and interests of the indigenous inhabitants. Moreover, statute law may be the result of a compromise between contending factions and interests groups and of accommodations between and within political organisations which are not made public and cannot readily be made apparent to a court. To speak here of 'intention' will seldom assist and may impede the understanding of the effect of the legislation in question, unless it be kept in mind that what is involved is the 'intention' manifested by the legislation. As Holmes put it, '[w]e do not inquire what the legislature meant; we only ask what the statute means'.[72]

70 Ibid at 111 per Toohey J.

71 Ibid at 233.

72 Ibid at 168–169, footnotes omitted. See also the decision of the US Supreme

Similarly, Brennan J stated in *Mabo* that:

> [t]he extinguishing of native title does not depend on the actual intention of the Governor in Council (who may not have adverted to the rights and interests of the indigenous inhabitants or their descendants), but on the effect which the grant has on the right to enjoy native title.[73]

Both Toohey and Gaudron JJ referred to early colonial correspondence which confirmed that one of the aims of early legislative enactments under which pastoral leases were granted was to stop the atrocities committed on Aboriginals by squatters and noted that a squatting licence could be revoked if the licensee was convicted of 'any malicious injury committed upon or against any aboriginal native or other persons'.[74] Such provisions indicated to Toohey J that the Crown contemplated that Aboriginals would remain upon licensed lands.[75] Despite this, Toohey J reiterated that intention to extinguish is to be determined solely by reference to the operation of the statute, not the Crown's state of mind.[76]

This approach, of course, contrasts with that of L'Heureux-Dubé J in *Gladstone*, who held that the finding of a clear and plain intention requires an explicit acknowledgment on the part of the Crown of the existence of an Aboriginal right. As noted by La Forest J, such an approach establishes an extremely high threshold for the Crown to attain in order to demonstrate that native title has been extinguished.

> [O]ne must be careful not to set standards that could realistically never be met by the Crown since this would, as a practical matter, render virtually meaningless the Crown's power to extinguish aboriginal rights. Historically, the Crown has always been very reluctant to recognise any legal effect to concepts such as 'aboriginal rights' and 'aboriginal title', as this Court discussed at length in *Sparrow* at pp 1103 *et seq.* This historical reality cannot be ignored in assessing whether a plain and clear intention to extinguish an aboriginal right exists in a given context.[77]

Inconsistent Rights and Extinguishment

From the above, it seems clear that the logical consequence of the doctrine of implication is that native title is extinguished by interests in land with which it cannot co-exist. What then did the High Court mean when it stated that, in the event of an inconsistency between native title rights and other rights,

---

Court in *Bourland* 508 US 679 (1993).

73 *Mabo* at 68.

74 *Wik* at 119 per Toohey J.

75 Ibid.

76 Ibid at 120.

77 *Gladstone* (1996) 137 DLR (4th) 648 at 698.

native title rights must 'yield' to pastoralists' rights or, conversely, that pastoralists' rights 'prevail' over native title rights? Does the exercise of a right inconsistent with native title actually extinguish native title as one might expect or does that right merely temporarily prevail over native title?

The majority judgments are inconclusive with regard to this issue. Toohey J refers to native title 'yielding' to the rights of the grantees.

> If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees. Once the conclusion is reached that there is no necessary extinguishment by reason of the grants, the possibility of the existence of concurrent rights preludes any further question arising in the appeals as to the suspension of native title rights during the currency of the grants.[78]

The implication from Toohey J's judgment is that 'yield' implies something less than extinguishment. On the other hand, Kirby J's finding that pastoralists rights 'prevail' over native title rights may suggest something more permanent. 'If inconsistency is demonstrated in the particular case, the rights under the pastoral lease will prevail over native title. If not, the native title recognised by our law will survive.'[79]

It is tempting to construct an elaborate picture of the effect of interests granted on inconsistent native title rights in order to explain the notion of 'yield'. It has been suggested, for example, that a distinction could be drawn between the effect of the grant of an interest on native title and the later exercise of rights under that interest on native title. Might one extinguish native title rights and the other merely temporarily render those rights unenforceable or in some way suppress those rights?[80] This would perhaps fit with the High Court's idea of concurrent rights. However, in the end, these are artificial distinctions. The holders of pastoral leases, for example, can only exercise those rights allowed under the grant. Presumably, therefore, native title rights inconsistent with those rights have already been extinguished by the grant itself. Similarly, the incremental fulfilling of conditions under the lease will progressively extinguish native title rights inconsistent with those conditions. But it is not the physical fulfilling of the conditions, for example, the building of the shed, which really is the source of the extinguishment but rather the original grant of the interest which included those conditions. The original grant includes a legal obligation to carry out those activities.

In light of this, the idea of native title rights 'yielding' to other interests which is found in Toohey J's judgment may best be explained by his Honour's rather ambiguous attitude to the notion of extinguishment itself.

78 *Wik* at 133.

79 Ibid at 249.

80 Attorney-General's Legal Practice (1997) *Legal Implications of the High Court Decision in the Wik Peoples v Queensland: Current Advice*, Attorney-General's Department, 23 January, p 7.

Until now, the generally accepted notion has been that extinguishment connotes a permanent cessation of rights or at least that they are permanently rendered unenforceable. The focus of inquiry has generally been to examine what extinguishes native title, not what is meant by extinguishment. While it is accepted, for example, that the grant of a fee simple estate extinguishes native title or that the reserving of land for a national park will not necessarily extinguish native title, we have not questioned whether extinguishment refers to anything other than the permanent ceasing of native title rights. However, there are indications in the judgment of Toohey J that his Honour is of the opinion that the grant of a pastoral lease may not necessarily extinguish native title rights to the extent of the inconsistency but rather 'suspend' those rights, pending their revival at the end of the lease. Although, for example, Toohey J declines to actually determine whether native title rights may be suspended by inconsistent grant,[81] his comments generally point towards some uncertainty as to the meaning of extinguishment.

> While the appellants accepted, as they were bound to do in light of *Mabo (No 2)* and the *Native Title Act* case, that native title may be extinguished, there is something curious in the notion that native title can somehow suddenly cease to exist, not by reason of a legislative declaration to that effect but because of some limited dealing by the Crown with Crown land. To say this is in no way to impugn the power of the Crown to deal with its land. It is simply to ask what exactly is meant when it is said that native title to an area of land has been extinguished.[82]

The possibility that native title may only be suspended by the grant of an interest raises further questions. What grants permanently extinguish rights? What grants merely suspend these rights? Whether or not his Honour's comments are confined to the question of what extinguishment means in the context of pastoral leases or whether it is a broader query is uncertain. Certainly, there seems no reason why a pastoral lease, which is of a limited duration, should permanently extinguish native title. After all, a pastoral lease is not a freehold estate. At some stage, subject to rights to renew, the land must revert to the Crown. On the other hand, a fee simple, with its inheritable nature, will never necessarily revert to the Crown. Toohey J was clearly of this opinion.

> [The history of real property legislation] reflects the desire of pastoralists for some form of security of title and the clear intention of the Crown that pastoralists should not acquire the freehold of large areas of land, the further use of which could not readily be foreseen.[83]

81 *Wik* at 131.

82 Ibid at 126.

83 Ibid at 111.

Such an approach to extinguishment is foreshadowed in both *Delgamuukw* and *Badger*. In *Delgamuukw*, both Macfarlane and Lambert JJA use the terminology of 'suspension' in discussing the effect of inconsistent rights on Aboriginal rights. Unfortunately, their Honours provide no guidance as to the circumstances in which Aboriginal rights will be suspended. Rather, the references appear as mere 'throwaway' lines.

> The fact that there is an inconsistency between the exercise of powers granted by the legislation and the exercise of aboriginal rights does not extinguish the aboriginal rights to the extent of the inconsistency, nor does it necessarily suspend them, unless it is clear and plain from the legislation itself that those consequences had been made the subject of clear, plain and considered legislative intention.[84]

Similarly, in *Badger*, Cory J appears to have left open the possibility of suspension of treaty rights rather than outright extinguishment.

Suspension rather than extinguishment was argued by the Thayorre Peoples in *Wik* to follow as a logical consequence of the idea that native title is 'recognised' by the common law rather than a creature of the common law and thus has an internal validity of its own, regardless of whether the common law choses to recognise or enforce it or not in a particular factual situation. Such an argument has its attractions, although apparently not to Kirby J, who rejected it, stating that the real question is not whether Indigenous peoples have been *in fact* excluded from their land but whether those making claim to such land have a *legal right* to exclude them.[85] In other words, while native title may have its own internal validity for which it does not rely on the common law, that is irrelevant. The court's role is merely to determine who holds those rights allocated by the common law system as determined by the rules of the common law system. Of course, as the court does shape the common law, it would presumably be open to their Honours to in fact redefine the parameters of extinguishment to include a notion of suspension in certain circumstances.

Conclusion

As can be seen from the above discussion, the requirement of 'clear and plain intention' differs in Australia from that in other overseas jurisdictions. In Canada, the United States and Australia, 'clear and plain intention' does not require explicit language but includes extinguishment by necessary implication. However, the standard for showing extinguishment by implication varies between these three countries. In Canada and Australia, necessary implication can be determined by considering whether Aboriginal and Crown-derived interests can co-exist. The Aboriginal right will be extinguished only if the interests cannot co-exist. However, Canadian courts have taken a much more lenient approach than their Australian counterparts

84 *Delgamuukw* (1993) 104 DLR (4th) 470 at 670.

85 *Wik* at 237 (original emphasis).

to determining when co-existence is possible. The Australian High Court's emphasis in *Wik* on legal inconsistency, as opposed to the factual inconsistency approach of Canadian courts, leaves less room for the co-existence of Aboriginal and Crown-derived interests. In Australia, any interest which confers exclusive possession will extinguish native title, regardless of whether possession of the land under the grant is actually taken. The mere granting of the estate will extinguish native title.

Further, the legal inconsistency approach inevitably leads to a stricter view of the role played by intention in the 'clear and plain intention' test. In Canada, although the majority of the Supreme Court have not gone so far as to require actual consideration of the effect of the interest or regulation on the Aboriginal right by the legislature, they do take a more subjective view of intention than did the High Court in *Wik*. Whether the High Court can maintain its strict views on intention remains to be seen. As yet, the High Court has had no opportunity to consider the effect of resources legislation relating, for example, to fisheries, on native title. The court may find it difficult to consider the effect of regulations which totally prohibit the exercise of a native title right without importing at least some subjective element into the discussion of legislative purpose.

Postscript

In December 1997, the Supreme Court of Canada handed down the long-awaited decision in *Delgamuukw v British Columbia*.[86] This case constitutes the first definitive statements by the Canadian Supreme Court as to the nature and content of Aboriginal title and affirms a divergence between Australia and Canada on these issues. The judgment also confirmed a split between the test for determining the existence of Aboriginal rights other than Aboriginal title and for determining the existence of Aboriginal title. Although the court did consider extinguishment, the issue before the court on this point was confined to the question of whether, constitutionally, British Columbia had the power to extinguish Aboriginal title post-confederation. The court unanimously determined that it did not have that power. The actual test for extinguishment, that of the requirement of 'clear and plain intention', received virtually no comment.

The majority[87] of the court noted, in passing, that extinguishment cannot occur without clear and plain intent and that there is a distinction between laws which extinguish Aboriginal rights generally and those which merely regulate.[88] The majority confirmed that British Columbian 'laws of general application' (for example, labour relations legislation and motor vehicle laws) do apply to Indians and Indian lands but that those laws do not extinguish Aboriginal rights. The majority noted that this was so even

86 *Delgamuukw v British Columbia* (unreported, Supreme Court of Canada, 11 December 1997).

87 Lamer CJ with Cory, McLachlin and Major JJ. La Forest and L'Heureux-Dubé JJ delivered a separate judgment, while Sopinka J took no part in the decision.

88 *Delgamuukw v British Columbia* (unreported, Supreme Court of Canada, 11 December 1997) para 180.

though those laws may be 'necessarily inconsistent' with the continued existence of particular aboriginal rights.[89] Lamer CJ stated that:

> The only laws with sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, *proprio vigore*, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.[90]

Thus, as British Columbia does not have constitutional power to legislate with respect to 'Indians or Indian lands', any legislation of general application that may apply to Indians or their lands could never display a clear and plain intention to extinguish. This can be contrasted with the situation in Australia, where the states do have the constitutional power to extinguish native title. Thus, the question of whether, in Canada, a regulatory scheme, such as fisheries legislation, can evidence a clear and plain intention to extinguish Aboriginal rights remains uncertain. It seems clear from the majority decision in *Delgamuukw* that provincial regulatory schemes cannot. However, there is no constitutional reason why federal fisheries legislation could not extinguish. Whether it can exhibit a clear and plain intention will presumably depend on the facts in each case.

References

Attorney-General's Legal Practice (1997) *Legal Implications of the High Court Decision in the Wik Peoples v Queensland: Current Advice*, 23 January, Attorney- General's Department.
Bald Eagle Protection Act 16 USC §668.
British Columbia Fishery (General) Regulations.
British Columbia Fishery (Special) Regulations.
Buttz v Northern Pacific Railway 119 US 55 (1886).
Calder v Attorney-General of British Columbia [1973] SCR 313.
Canadian Charter of Rights and Freedoms.
Cheyenne River Act 1954 (US).
Constitution Act 1982 (Canada).
Delgamuukw v R (1993) 104 DLR (4th) 470.
Delgamuukw v British Columbia (unreported, Supreme Court of Canada, 11 December 1997).
Endangered Species Act 16 USC §1533.
Fisheries Act 1970 (BC).
Flood Control Act 1944 (US).
Kruger and Manuel v R (1977) 75 DLR (3d) 434.
Land Act 1910 (Qld).
Land Act 1962 (Qld).
Mabo v State of Queensland (No 2) (1992) 175 CLR 1.
Natural Resources Transfer Agreement 1930 (Alberta)

89 Ibid.

90 Ibid.

Order in Council, PC 2539, 11 September 1917 (British Columbia).
R v Badger (1996) 133 DLR (4th) 324.
R v Bartleman (1984) 12 DLR (4th) 73.
R v Gladstone (1996) 137 DLR (4th) 648.
R v NTC Smokehouse (1996) 137 DLR (4th) 528.
R v Sioui (1990) 70 DLR (4th) 427.
R v Sparrow (1990) 70 DLR (4th) 385.
R v Van der Peet (1996) 137 DLR (4th) 289.
South Dakota v Bourland 508 US 679 (1993).
United States v Dion 476 US 734 (1986).
United States v Nuesca 945 F 2d 254 (1991).
United States v Santa Fe Pacific Railway 314 US 339 (1941).
United States v Winans 198 US 371 (1905).
Western Australia v The Commonwealth (1995) 183 ALR 373.
The Wik Peoples v Queensland (1996) 187 CLR 1.
Wildlife Act SA 1984 c W-9.1 (Alberta).