Case Comments
Commentaires d'arrêt

A Reply To "In Defence of Chippewas of Sarnia Band v. Canada"

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I. *Introduction*

In their article published in the November 2002 issue of the Canadian Bar Review,[2] Paul Perell and Jeff G. Cowan make a number of statements about my own article in the May 2002[3] issue to "prove"[4] that my submissions regarding the decision of the Ontario Court of Appeal in *Chippewas of Sarnia Band v. Canada (Attorney General)*[5] were unfounded. I welcome a frank exchange of views on the important issues raised in the decision regarding the reconciliation of Aboriginal interests and those of the rest of Canadian society[6] and the proper relationship between law and equity. But it is unfortunate that to "prove" their argument, Messrs. Perell and Cowan found it necessary to make the claim that I had misrepresented what the Court had said in its decision and what Mr. Perell said in his book. That claim has no foundation, as will be apparent to any interested reader who takes the trouble to read (or re-read) the decision of the Ontario Court of Appeal, Mr. Perell's book, my article and that by Messrs. Perell and Cowan. They speak for themselves. However, I would like to briefly reply in Parts II and III below to two of their comments which raise important matters of law before dealing in Part IV with the issues raised by the new argument that the application of provincial land law could meet my criticism of the Court's use of the defence of *bona fide* purchaser for value without notice to defeat non-equitable interests.[7]

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[2] (2002) 81 Can. Bar Rev. 727.

[3] (2002) 81 Can. Bar Rev. 97.

[4] *Supra* note 2 at 727.

[5] (2000), 195 D.L.R. (4th) 135 (Ont. C.A.), leave to appeal to the Supreme Court of Canada denied November 8, 2001, S.C.C. Bulletin of Proceedings, 9 November 2001 at 1998; application for reconsideration dismissed June 13, 2002, S.C.C. Bulletin of Proceedings, 13 June 2002 at 925 (Panel: L'Heureux-Dubé, Arbour and Le Bel JJ.).

[6] See *supra* note 3 at 118.

[7] *Supra* note 3 at 115-17.

II. *Royal Proclamation 1763*

Messrs. Perell and Cowan refer to "one other incorrect allegation"[8] supposedly made by me. With regard to my argument on the application of the *Royal Proclamation 1763*,[9] they state my "attack against the court's judgment is unjustified. The court said what it did because it treated the *Royal Proclamation* of 1793[sic] as applicable, notwithstanding *Ontario (Attorney General) v. Bear Island Foundation*".[10] This statement is clearly wrong. The Court did say that "we are bound by our own decision that the surrender provisions of the *Royal Proclamation* were revoked by the *Quebec Act*: see *Ontario (Attorney General) v. Bear Island Foundation*".[11] The Court did not apply the *Royal Proclamation*. Rather, it held that a surrender was necessary as the result of the "established protocol" between the Crown and First Nation peoples.[12] This is an important distinction as explained below.

In the same paragraph, Messrs. Perell and Cowan make another error. They refer to the court addressing "what remedy should be granted to the Chippewas for the improper surrender [sic - there was no surrender at all which is what the case was all about] of reserve lands" They then, in my respectful submission, incorrectly comment that "nothing is added to that particular debate by the applicability or not of the *Royal Proclamation* of 1793[sic]".[13] As I explained in my article,[14] in fact a great deal turned on whether the surrender provisions of the *Royal Proclamation* applied. Since the 1774 decision of Lord Mansfield in *Campbell v. Hall*,[15] it has been held that the *Royal Proclamation* of 1763 has the force of statute.[16] The stature of the *Royal Proclamation* as having the force of a statute was the basis of the decision of the Supreme Court of Canada in *Easterbrook*[17] that a grant of a lease in breach of it was void and the lessee could not assert rights under it. I argued for this reason that the

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[8] *Supra* note 2 at 737.

[9] *Supra* note 3 at 100 to 102.

[10] (1989), 68 O.R. (2d) 394 (Ont. C.A.), appeal dismissed [1991] 2 S.C.R. 570.

[11] *Supra* note 2 at para. 206.

[12] *Ibid.* at para. 19. At 728, Messrs. Perell and Cowan acknowledge that, in the view of the Court, the "protocol" and not the *Royal Proclamation* was the basis for the surrender requirement by saying that the lands "had not been validly surrendered in accordance with formal protocol." They do not mention the *Royal Proclamation* as the source of this requirement.

[13] *Supra* note 2 at 737.

[14] *Supra* note 3 at 101-102.

[15] (1774), 1 Cowp. 208, 98 E.R. 848.

[16] *Calder v. Attorney General of British Columbia* (1973), 34 D.L.R. (3d.) 145 S.C.C. at 203 *per* Hall J. (dissenting); *Easterbrook v. The King* [1931] S.C.R. 210 at 217-18 *per* Newcombe J.; *R. v. Secretary of State for Foreign & Commonwealth Affairs* [1982] 2 All E.R. 118 (Eng. C.A.) at 124-5 *per* Lord Denning.

[17] *Supra* note 16; see *supra* note 3 at 112-13.

failure to comply with the surrender provisions of the *Royal Proclamation* rendered invalid any transfer of the lands in question (the "Lands") and thereby invoked the application of the *nemo dat* principle and excluded the application of the *bona fide* purchaser for value doctrine.[18] Since the Court did not apply the surrender provisions of the *Royal Proclamation* but rather the "established protocol" which, as far as I am aware is a novel source of law lacking the force of statute,[19] it failed in my respectful submission to follow the *Easterbrook* case which was binding on it. I note that, like the Ontario Court of Appeal, Messrs. Perell and Cowan do not mention *Easterbrook* at all, even though it throws into serious question the correctness of the Court of Appeal's decision.

III. *The Fusion Fallacy*

Messrs. Perell and Cowan claim that I have misrepresented what the Court said on the topic of the "fusion" of law and equity.[20] I stand by what I wrote in my earlier article. The key issue is whether, to use the words of Messrs. Perell and Cowan, the Court argued that "fusion of the law had absolutely occurred". They say it did not and quote from the judgment to indicate the Court's "precision" on this point.[21] In my respectful submission, the Court was far from precise in what it said. However, in a key passage,[22] the Court agreed with statements from one of its former decisions[23] and from the House of Lords[24] that "the fusion of law and equity is now real and total" and "the merger of law and equity is complete." If one uses the common understandings of "fusion" and "merger" as meaning two things combining to become one and of "complete" and "total" as being equivalent to "finished", I fail to see how it can be denied that the Court argued that the fusion of law and equity had absolutely occurred. What is the difference between "absolutely occurred" and "complete" and "total"? I would also refer to the Court's

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[18] *Supra* note 3 at 112-3.

[19] The definitions of "protocol" in D.A. Dukelow and B. Nuse, *The Dictionary of Canadian Law,* 2nd. Ed., (Scarborough: Carswell, 1995) at 975 are as follows: "1. The rules concerning ceremonies observed in the official relations between nations and their representatives. 2. The minutes of a deliberative gathering of representatives of different countries. 3. The original drafts or copy of any document." A protocol may be equivalent to a constitutional convention. If so, it would best be regarded as a non-legal rule since it will not be enforced by a court: P.W. Hogg, *Constitutional Law of Canada* (Scarborough: Carswell, loose-leaf ed.) at 1.10.

[20] *Supra* note 2 at 737-39.

[21] *Ibid.* at 738.

[22] That I quoted fully at 103-104 of my article but which Messrs. Perell and Cowan only partially quote at 739, missing the essential words.

[23] *LeMesurier v. Andrus* (1986), 54 O.R. (2d.) 1 (Ont. C.A.) *per* Grange J.A.

[24] *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904 H.L. at 924- 5 *per* Lord Diplock.

statement quoted in my article[25] (but ignored by Messrs. Perell and Cowan) that "[r]ights of equitable origin are every bit as legally enforceable as rights of a common law origin".[26]

Of most significance is what the Court actually did in applying the equitable principles of laches and acquiescence to the common law claim for damages in trespass[27] and applying the equitable doctrine of *bona fide* purchaser to an interest that was not equitable.[28] In my respectful submission, the attempt by Messrs. Perell and Cowan to restate the Court's judgment in order to disprove my argument is not persuasive. The Court said what it said and did what it did.

Part IV. *Provincial Land Legislation*

In their attempt to provide a link that is missing in the logic of the Court's application of the *bona fide* purchaser doctrine to defeat a non-equitable interest,[29] Messrs. Perell and Cowan explain how, under Ontario land legislation, the doctrine now applies to defeat unregistered legal as well as equitable interests. They say my "criticism about the application of the *nemo dat* and *bona fide* purchaser principles fails because of [my] failure to appreciate the effect of land registration systems."[30] However, with respect, it is their criticism of my argument that appears to fail. Basic constitutional principles relating to the powers of a province with respect to "Lands reserved for the Indians" would seem to limit the application of Ontario land legislation to the Lands. Messrs. Perell and Cowan fail to explain how their argument is consistent with such constitutional principles and a finding of the Motions Judge squarely on point.

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[25] *Supra* note 3 at 110.

[26] *Supra* note 2 at para. 285.

[27] See *supra* note 3 at 114-15, 120 and *infra* note 28. It is highly significant that, like the Court, Messrs. Perell and Cowan ignore the claim for damages for trespass in their discussion of remedies and deal only with the Court's "undoubted discretionary remedial authority to grant or refuse a declaration and a vesting order": see *supra* note 2 at 730-733, 739. Their silence effectively concedes the validity of my main argument that the Court had fallen into the trap of the fusion fallacy and wrongly applied principles of equity to defeat a common law claim for damages for trespass: *supra* note 3 at 99-100, 104, 113-116, 117, 120.

[28] *Ibid.* at 115-17. The statement by Messrs. Perell and Cowan (*supra* note 2 at 731) that the Court "strictly speaking, did not apply equitable real property rules to the Chippewas claim" cannot be reconciled with the following quotations from the judgment: "on these facts, we can see no reason why the equitable defences of laches and acquiescence should not *apply* " (*supra* note 2 at para. 302 [emphasis added] and "[W]e can see no reason why the good faith purchaser for value defence should not be *applied* to preclude the Chippewas from asserting their claims against the landowners" (*supra* note 2 at para. 309 [emphasis added]).

[29] See *supra* note 3 at 116-17.

The following propositions reveal the apparent flaw in the argument of Messrs. Perell and Cowan on the provincial land legislation, as well as the significant problems raised by that argument.

1. *The Lands were both Aboriginal title lands and reserve lands under a treaty*

The Motions Judge noted "[t]he four reserves are not granted [by Treaty 29 of 1827] to the Indians by the Crown. They are withheld by the Indians from the surrender, thus remaining Indian land quite independently of the treaty itself."[31] The Court of Appeal agreed that, prior to the Treaty, the Chippewas had "pre-existing land rights".[32] The Treaty expressly reserved the Lands for the "exclusive use and possession" of the Band and constituted "the Crown's explicit recognition of the Indian title in the land"[33] and the Crown's promise to protect the Band's use of the Lands so set aside as reserves for them. In the words of the Court of Appeal, "[t]hose four reserves were protected not only by the Chippewas' pre-existing land rights as acknowledged by the Crown, but also by the solemn promise of the Crown in Treaty 29."[34] The Motions Judge said the Treaty added "an iron clad bottom line legal protection against dispossession and extinguishment of title."[35]

2. *There has been no loss of Aboriginal title or reserve status resulting from the litigation*

The Motions Judge noted that "[b]ecause the disputed lands were never surrendered, the [Band's] title remains to this day valid unless extinguished by the 1853 patent or by the operation of some statute or rule of law or equity."[36] In a ruling that was not disturbed by the Court of Appeal, he held that the patent and legislation in question had not extinguished the Band's title or treaty rights. However, he went on to purport to expressly do so by the operation of the *bona fide* purchaser doctrine after an equitable limitation period of 60 years.[37]

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[30] *Supra* note 2 at 733.

[31] (1999), 40 R.P.R. (3d) 49 at para 33.

[32] *Supra* note 2 at para. 80.

[33] *Supra* note 31 at para. 33.

[34] *Supra* note 2 at para. 80.

[35] *Supra* note 31 at paras. 558, 561. In *Simon v. The Queen* [1985] 2 S.C.R. 387, it was said at 401-402 that treaty rights provide an extra layer of security to Aboriginal rights.

[36] *Ibid.* at para. 396.

[37] *Ibid.* at para. 769, see *infra* text accompanying notes 42 and 76 for the requirements of valid extinguishment.

The Court of Appeal reversed the Motions Judge on the limitation period and did not purport, at least expressly, to extinguish the Band's Aboriginal and treaty rights in the Lands, although it did refuse a remedy for its vindication[38]. It said: "On the facts of this case, we do not accept the submission that holding the Chippewas bound by the rules that govern the availability of equitable remedies constitutes an unauthorized extinguishment of aboriginal title."[39] The meaning of this important statement is not free from doubt, but the Court appears to confirm that the Band's Aboriginal title remains unextinguished. This interpretation is consistent with its earlier acceptance of "the proposition that aboriginal title could be lost only by surrender to the Crown"[40] and its finding that "[h]ere, there was no surrender at all".[41] Obviously, there were no "clear and plain" words of extinguishment as required by applicable Supreme Court of Canada decisions.[42] In any event, section 35 (1) of the *Constitution Act 1982*[43] has prevented any extinguishment of existing Aboriginal and treaty rights since it came into effect.[44]

3. *The Province could not have, and has not, extinguished the Aboriginal and treaty rights of the Chippewas including their right to the Lands set aside for them as reserves under the Treaty*

The *Delgamuukw*[45] decision of the Supreme Court of Canada is authority for this proposition, as acknowledged by Messrs. Perell and Cowan.[46]

4. *Neither could Provincial land legislation apply ex proprio vigore to the Lands*

In accordance with the decision of the Supreme Court of Canada in *Delgamuukw*,[47] the Lands are "Lands reserved for the Indians" within

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[38] *Supra* note 2 at para. 275. On the ability of a court to extinguish Aboriginal title, see *Ngati Apa and Others v. Attorney General and Others* (19 June, 2003), CA 173/01 (N.Z.C.A.) at para. 185 per Tipping J.: "[I]n view of the nature of Maori customary title, underpinned as it is by the Treaty of Waitangi and now by Te Ture Whenua Maori Act 1993, no court in New Zealand can properly extinguish Maori customary title."

[39] *Ibid.* at para. 291.

[40] *Ibid.* at para. 199.

[41] *Ibid.* at para. 219.

[42] *R. v. Sparrow* [1990] 1 S.C.R. 1075 at 1099; *Delgamuukw v. The Queen* [1997] 3 S.C.R. 1010 at para. 180.

[43] *Constitution Act 1982* being Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11.

[44] *R. v. Van der Peet* [1996] 2 S.C.R. 507 at para. 28; *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911 at para. 11.

[45] *Supra* note 42 at paras. 173-76.

[46] *Supra* note 2 at 736.

[47] *Supra* note 42 at paras. 172-78.

section 91 (24) of the *Constitution Act 1867*[48] because they are Aboriginal title lands. They are, therefore, within federal legislative power rather than that of the Province. Messrs. Perell and Cowan appear to completely overlook this principle of constitutional law and the judgment of the Motions Judge who dealt with this principle in some detail.[49] As he stated, "[t]he provinces have no constitutional power to make laws in relation to Indians and lands reserved for the Indians. That is a domain of authority reserved exclusively to Parliament under section 91 (24) of the *Constitution Act*."[50]

5. *Provincial land legislation such as that relied upon by Messrs. Perell and Cowan would appear to have no application to the Lands*

This proposition follows from the previous proposition. The following passage from the judgment of the Motions Judge would seem to be fatal to the new argument being put forward by Messrs. Perell and Cowan:

> To conclude, these authorities establish that Ontario legislation, because of constitutional restrictions on provincial power, cannot of their own force extinguish Indian title. The Ontario statutes discussed above including all Ontario limitations statutes from 1874 to the present, the current Conveyancing and Law of Property Act, Mortgages Act, Registry Act and their predecessors would, if applied to the disputed lands, extinguish any existing Indian title. These Ontario statutes therefore cannot have any direct application to the disputed lands. It is however necessary to go further and consider whether they may affect the disputed lands indirectly through their referential incorporation in a federal statute.[51]

He went on to hold that there was no referential incorporation.[52] The Court of Appeal did not disturb this finding and did not discuss the application of provincial laws apart from limitation statutes, which it held did not apply.[53] It would appear to follow from this proposition that any attempt to extend the *bona fide* purchaser doctrine to non-equitable interests through the application of provincial land legislation must fail in the case of the Lands. However, the application of provincial land legislation to Aboriginal title and reserve lands is very complex[54] and

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[48] 30 & 31 Vict. c.3, (U.K.).

[49] *Supra* note 31 at paras. 476-81.

[50] *Ibid.* at para. 476.

[51] *Ibid.* at para. 481 [emphasis added], see also para. 689: "Ontario real property statutes such as the *Registry Act, the Mortgages Act* and the *Conveyancing and Law of Property Act* do not constitutionally apply to these lands."

[52] *Ibid.* at paras. 482-606.

[53] *Supra* note 2 at paras. 243-75.

[54] See *Kitkatla Band v. British Columbia* [2002] 210 D.L.R. (4th) 577 (S.C.C.); P.W Hogg, *supra* note 19 at 27.2; James I. Reynolds, "Acting For The 'Purchasers' in A

there is insufficient space here to consider all the relevant issues. If there is a way of explaining the application of provincial land legislation to the Lands, Messrs. Perell and Cowan do not do so in their article.

The consequences of the non-application of provincial land legislation are potentially very serious for those currently living on the Lands. The exclusion of the Lands from such legislation raises uncertainty as to the legal effects of transactions affecting them.[55] As Messrs. Perell and Cowan say, "the old common law rules and equitable rules would apply outside of a Registry or Land Title System".[56] To the extent that other provincial laws purport to regulate the use of the Lands, they would also be *ultra vires* the Province. This would include municipal laws such as those relating to zoning and land development.[57]

6. *Federal laws including the Indian Act*[58] *are applicable to the Lands*

The Lands were originally set apart as a portion of the reserve lands of the Band by Treaty 29 and, as indicated above, nothing appears to have occurred to cause them to cease to be reserve lands. Title does not appear to be in the name of Her Majesty in right of Canada so they may not be "reserves" within the usual definition of section 2(1) of the *Indian Act*. However, section 36 of the *Act* provides that "[w]here lands have been set apart for the use and benefit of a band and legal title thereto is not vested in Her Majesty,[59] this Act applies as though the lands were a reserve within the meaning of this Act."[60] It was held by the Supreme Court of Canada in *Isaac v. Davey*[61] that this provision applied to a situation in which a band itself had title under a patent. In the case of the Chippewas

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Conveyance of Reserve Lands" in Continuing Legal Education Society of British Columbia; "Understanding *Indian Act* Conveyancing", 14 April 2000 (updated to July 2002) online: http://www.cle.bc.ca/cle/practice+desk/practice+articles/collection/02-app-actingforpurchaser.htm.

55 This uncertainty compounds the existing uncertainty arising out of the continued existence of Aboriginal title with respect to the Lands (see *supra* text accompanying notes 31-44). Assuming that, notwithstanding the failure to obtain a surrender as required by the *Royal Proclamation*, the landholders have some interest in the Lands (perhaps some "peculiar equity"; *Brown v. West* (1846) 1 C.N.L.C. 30 at 34-35, Upper Canada Ex. Council), it is still necessary to reconcile that interest with Aboriginal title which has been defined by the Supreme Court of Canada as encompassing "the right to exclusive use and occupation of the land": *Delgamuukw, supra* note 42 at para. 117.

56 *Supra* note 2 at 735.

57 *Surrey (District) v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.).

58 R.S.C. 1985 c. I-5.

59 For present purposes, I will assume that this is a reference to the federal Crown: *Mitchell v. Peguis Indian Band* [1990] 2 S.C.R. 85. If it includes the provincial Crown, the definition of reserves in section 2(1) would apply.

60 *Supra* note 58.

61 (1977) 77 D.L.R. (3d) 481 at 486.

of Sarnia, Treaty 29 clearly set the Lands apart for the use and benefit of the Band (for "their own exclusive use and enjoyment") so that section 36 of the *Indian Act* makes the *Act* apply as though they were reserves within the *Act*,

Because the Lands have reserve status under the *Indian Act* the following provisions of the *Act* are relevant:

(a) sections 30 - 31 dealing with trespass;
(b) section 37 prohibiting any sale, conveyance or lease without a valid surrender under the Act;
(c) section 81 giving by-law powers to the Council of the Band subject to disallowance by the Minister of Indian Affairs under section 82(2);
(d) section 83 giving the Band Council power to pass taxation by-laws subject to the approval of the Minister of Indian Affairs.[62]

These provisions have two major implications when applied to the Lands:

(1) They confirm the uncertain status of the interests of the landholders in the Lands. The Court of Appeal, like the Motions Judge, found that there was no surrender at all, let alone one within the meaning of the Indian Act, section 37 (and equivalent provisions going back to at least section 25 of the Indian Act of 1876)[63] potentially invalidates all transactions affecting the Lands. As Gonthier J. of the Supreme Court of Canada has observed, "there is no such thing as freehold title on a reserve."[64]
(2) The Indian Act by-law making provisions are clearly too rudimentary to regulate the type of development on the Lands described by the Court of Appeal.[65] There is also the possibility of double property taxation.

As a practical matter, the decision of the Court of Appeal would appear to have left a serious regulatory vacuum and a great deal of uncertainty as to the title of the landholders.

7.*Assuming that the Province may validly infringe Aboriginal and treaty rights,*[66] *it may only do so if it can satisfy the Sparrow*[67] *test of*

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[62] *Supra* note 58.

[63] S.C. 1876 (39 Vict.), c. 18.

[64] *Musqueam Indian Band v. Glass* [2000] 2 S.C.R. 633 at para. 35; see also *Osoyoos Indian Band v. Oliver (Town)* [2001] 3 S.C.R. 746 at para. 143 *per* Gonthier J.

[65] *Supra* note 2 at para. 45.

[66] See *Haida Nation v. British Columbia (Minister of Forests), ("Haida Nation II")*, (2002), 5 B.C.L.R. (4th) 33 (B.C.C.A.) at paras. 77-79 *per* Lambert J.A. leave to appeal to Supreme Court of Canada granted March 20, 2003, S.C.C. Bulletin of Proceedings March 21, 2003 at 441.

[67] *Supra* note 42.

justification as applied to Aboriginal title by the Supreme Court of Canada in Delgamuukw[68]

In a series of cases noted in my article, commencing with the *Sparrow* case, the Supreme Court of Canada has set out and applied a test for valid infringement of Aboriginal and treaty rights.[69] As applied in *Delgamuukw* to Aboriginal title, it is necessary for the infringing law to be "in furtherance of a legislative objective that is compelling and substantial."[70] It must also be "consistent with the special fiduciary relationship between the Crown and aboriginal peoples."[71] This second part of the test always requires meaningful consultation[72] and, "ordinarily", the payment of fair compensation.[73] The test also applies to infringement of treaty rights.[74] The Motions Judge acknowledged the requirement to apply the test[75] although it is respectfully submitted that he wrongly applied it as part of his purported extinguishment of the Aboriginal and treaty rights of the Chippewas.[76] The Court of Appeal did not directly address the justification test and certainly did not apply it.

It is submitted that if the Province of Ontario wishes to infringe upon the Aboriginal and treaty rights of the Chippewas in some manner perhaps involving provincial land legislation (assuming that it can constitutionally do so)[77] in order to resolve the above regulatory vacuum and uncertainty, it may only do so by satisfying the test of justification. This will require meaningful consultation and accommodation of the interests of the Chippewas.[78] As a practical matter and, as repeatedly urged by the Supreme Court of Canada,[79] a negotiated settlement would be a better course of action.

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[68] *Ibid.*

[69] *Supra* note 3 at 103.

[70] *Supra* note 42 at para. 161.

[71] *Ibid.* at para. 162.

[72] *Ibid.* at para. 168.

[73] *Ibid.* at para. 169.

[74] *R. v. Badger* [1996] 1 S.C.R. 771 at paras. 74-82 *per* Cory J.; *R. v. Sundown* [1999] 1 S.C.R. 393 at para. 38; *R. v. Marshall* [1999] 3 S.C.R. 456 at para. 48 *per* Binnie J.

[75] *Supra* note 31 at para. 745.

[76] See *supra* note 44.

[77] See *supra* note 66.

[78] See *Haida Nation II*, *supra* note 66 at para. 81 for what is required to satisfy the test and the damages payable if the infringement is not justified. Third parties in knowing receipt of an interest granted in breach of the fiduciary duty owed by the Crown to Aboriginal peoples may also be liable to pay "compensatory and possibly aggravated and punitive damages": *ibid.* at paras. 74 to 77 *per* Lambert J.A. See generally P.M. Perell, "Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty" (1999), 21 Adv. Q. 94.

[79] *Delgamuukw*, supra note 42 at para. 186. *R. v. Marshall, [1999]* 3 S.C.R. 533 at para. 22.

Part V. Conclusion

In my respectful submission, Messrs. Perell and Cowan have failed in their task of filling in the gap in the logic of the Ontario Court of Appeal's decision in the *Chippewas of Sarnia* case and so enabling the *bona fide* purchaser doctrine to be extended to defeat a non-equitable interest. Their resort to provincial land legislation as the missing link appears to fly in the face of the division of powers under the Canadian Constitution and the express and undisturbed ruling of the Motions Judge on this very point. The gap in the Court's logic still remains.

However, the efforts of Messrs. Perell and Cowan have not been in vain. Their contribution has served to redirect the focus of the discussion of the case from the technical rules of property law — which was the focus of my previous article — to the question of what laws apply to the Lands and, therefore, the respective rights of the parties. In my view, the result of that inquiry further underlines the most unsatisfactory nature of the decision. In my respectful opinion, it shows the practical results of the application by courts of what Prof. Birks, one of the Commonwealth's leading jurists, has termed "discretionary remedialism"[80] rather than the necessary detailed analysis of the relative rights of the parties and how they may be fairly reconciled as the Band requested.[81] The Court's decision to "withhold a remedy to protect or vindicate aboriginal title"[82] does not deal with the rights of the parties, the existence of Aboriginal title or the implications of the resulting jurisdictional issues discussed above.[83] It may only postpone the problems to another day, with additional costs to all the parties. To take one important example, since the exercise of the discretion to withhold a remedy was based, in part, on the lack of knowledge of the current landholders as to the Aboriginal title of the Chippewas, would it prevent the Chippewas from seeking a remedy with respect to subsequent landholders who will likely have knowledge of that title through the publicity arising out of the litigation?[84]

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[80] P. Birks, "Rights, Wrongs and Remedies" (2000) 20 Oxford J. of Legal Studies 1 at 22-23. He goes so far as to say that this "model of the law in which the dominant taxonomy is a taxanomy of remedies, to be applied in the court's discretion in an instance-specific manner according to criteria of appropriateness" ultimately threatens the stability of our society and would destroy the very legitimacy of the law's authority in a plural society: *ibid.*

[81] The Band made suggestions to the Court on how their claim could be reconciled with the interests of the landholders: *supra* note 2 at 117 at note 111.

[82] *Supra* note 4 at para. 275.

[83] Nor will the outstanding claim by the Chippewas against the Crown for breach of fiduciary duty, whatever its outcome.

[84] The traditional statement of the doctrine of *bona fide* purchaser without notice extends to a person claiming through a purchaser without knowledge of a prior equitable claim even if that person took with knowledge: *Wilkes v. Spooner* [1911] 2 K.B. 473 (Eng. C.A.). However, since the Court was not applying that doctrine as traditionally

The unprotected and unvindicated Aboriginal title of the Chippewas still exists like a cloud over the Lands[85] and, until dealt with in a manner consistent with the fiduciary duty applying to the Crown and those taking an interest from the Crown[86] with knowledge of a breach, it will create uncertainty for all involved. It cannot be ignored as if that will make it go away. As Southin J.A. has pointed out, sooner or later, the question of the impact of Aboriginal title on other interests in land must be decided.[87] It is unfortunate that, by refusing leave to appeal in the *Chippewas* case, the Supreme Court of Canada has delayed an answer on this question as well as that regarding the relationship of law and equity.

understood, it is not clear that the Court would withhold its protection to Aboriginal title *vis-a-vis* purchasers with knowledge, actual or constructive, of that title.

[85] See *Skeetchestn Indian Band v. British Columbia* [2001] 1 C.N.L.R. 310 (B.C.C.A.) at para. 6 *per* Southin J.A.

[86] *Supra* note 78.

[87] *Supra* note 85 at para. 5.