INTRODUCTION
So far in 2013, the Supreme Court of Canada has decided two Aboriginal law decisions: Manitoba Métis Federation Inc. v Canada (Attorney General) ("MMF")\(^1\), and Behn v Moulton Contracting Ltd. ("Behn")\(^2\). This coming fall it will hear an appeal of William v British Columbia ("William").\(^3\) These three cases address many of the landmark elements of Aboriginal law: Aboriginal title, the duty to consult and accommodate, Métis issues, fiduciary duty, and Honour of the Crown.

HONOUR OF THE CROWN BACKGROUND
The "Honour of the Crown" has become a key concept in Aboriginal law and is always engaged in the Crown's dealings with Aboriginal peoples. The Supreme Court has stated that the concept

\(^1\) 2013 SCC 14.
\(^2\) 2013 SCC 26.
\(^3\) 2012 BCCA 285; Supreme Court of Canada docket 34986; tentative hearing date November 7, 2013.
of the "Honour of the Crown" must be generously understood in order to achieve reconciliation of the sovereignty of the Crown with Aboriginal societies.

The Honour of the Crown gives rise to different duties in different circumstances. For instance, in cases where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown may give rise to a fiduciary duty, as it did in the seminal case Guerin v The Queen,⁴ which became the foundational case for modern Aboriginal Law.

The Honour of the Crown is also the source of the Duty to Consult and Accommodate, which has become in itself a key principle of Aboriginal Law, with a large and growing body of case law, as discussed below.

**MMF**

A key aspect of MMF was to use, for the first time, the Honour of the Crown as a free-standing cause of action in itself.

**Factual Background**

The Métis constituted the majority of inhabitants of Red River prior to the creation of the province of Manitoba. They were descended from unions of European traders and Aboriginal women, and had developed a distinct culture and society of their own. The buffalo hunt (undertaken communally and in a highly organized fashion) was a key feature of their economy, which also included farm plots for individual families, organized into parishes fronting the Red River.

When Canada was arranging with England and the Hudson’s Bay Company to acquire Rupert's Land, no consultation took place with the Red River Métis, or, for that matter, with any other inhabitants of Rupert's Land. The Red River Métis resisted Canadian assertions of sovereignty, turned away Canada's appointed Lieutenant Governor, and formed a provisional government led by Louis Riel. This led to negotiations with Canada, and to the *Manitoba Act* (1870), which contained significant guarantees of Métis rights. On this basis, the province of Manitoba was created.

The MMF case was about whether one of the provisions of the *Manitoba Act* had been fulfilled properly.

**Fiduciary Duty**

In MMF, the Court rejected a claim that the Crown had a fiduciary duty to fulfil provisions of the *Manitoba Act* which benefitted the Red River Métis. The Court analyzed two branches of argument about this: one about a fiduciary duty being created by the Crown having assumed discretionary control over specific Aboriginal interests, and an independent argument that a fiduciary duty had been created by a specific Crown undertaking – one made by the terms of the *Manitoba Act* itself.

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It should be observed that there is apparent disconnect between how Courts analyze fiduciary duties of the Crown to Aboriginal people, and how they analyze fiduciary duties more generally. The general law of fiduciary duty is dominated by a typology of fiduciary duties being per se (presumed to exist in particular defined relationships, the paradigmatic one of which is trustee-beneficiary) or ad-hoc (rooted in the specific facts of the case). The most recent leading case for general fiduciary duties is Alberta v Elder Advocates of Alberta,5 which stated the test for an ad-hoc fiduciary duty to be:

(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary’s control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary’s exercise of discretion or control.6

It is my view that the standard distinction of per se and ad hoc fiduciary duties is less than it seems. A particular per se category only became such by means of a number of cases with similar facts being categorized together for convenience, leading to a presumption of a fiduciary relationship in such a context, which eventually became crystallized into a per se category.7

Another important aspect to note is that the content of fiduciary duty is variable, and depends on the specific facts of the relationship. In my view this is a more contextual way of expressing what is sometimes stated as that a relationship may be fiduciary in some, but not all aspects.8 This way of framing it avoids the perplexity of saying that a per se relationship is innately or inherent fiduciary,9 but that not all aspects of the relationship are fiduciary.

It might be clearer, once a relationship had been recognized as fiduciary, to then define the scope of the fiduciary duty. Even for per se relationships, this might still involve looking back to the ad hoc test. Although the test is met presumptively, ignoring an analysis of the reasons behind why per se relationships are fiduciary obscures the underlying theory, which could be of assistance in being more precise about the scope of the duty.10

By now, the Crown-Aboriginal relationship is usually taken as per se fiduciary in the sense that there is little dispute about there being a fiduciary relationship at all. However, the content of the fiduciary duty is often disputed. To establish the content of the duty, the whole factual matrix must be examined. What this entails is looking at different factual sources for the required (but possibly implicit) undertaking that fiduciary duty requires, and considering the precise scope of this undertaking.

Thus, when MMF analyzed two means by which a Crown-Aboriginal relationship may arise (by the Crown assuming discretionaty control over specific Aboriginal interests, and a by a specific

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6 ibid, para 36.
8 This is a well-established principle. See Rotman at p 73.
10 Rotman pp 67-68 and 72-73.
Crown undertaking), it is clearer to think of this as analyzing different factual sources for the undertaking required to ground a fiduciary duty.

MMF rejected the first argument about the Crown having assumed discretionary control over a specific Aboriginal interest, since it decided the land interest of the Métis was created by the *Manitoba Act*, and was therefore not a pre-existing interest over which the Crown assumed control. That is, it was satisfied that the Red River Métis had never had Aboriginal title. This was based on specific trial findings about Métis land ownership being individual, not communal, and being transferable, unlike the characteristics of Aboriginal title. However, it is somewhat troubling to come to this conclusion since the *Manitoba Act* itself is explicit that its intent was to extinguish Métis Aboriginal title, which would not have been an issue if Métis title had not existed.

MMF also rejected the second branch of argument about the Crown having specifically undertaken a duty to the Red River Métis. For this the Court relied on wording in the *Manitoba Act* which conferred discretion on the Crown, and the Court thought this discretion was incompatible with a fiduciary duty. This is somewhat troubling. It is the very existence of discretion that creates the vulnerability which is a required element of a fiduciary relationship. Perhaps it was because the undertaking was sourced in legislation (in fact constitutional legislation) that caused the Court to defer to the Crown’s discretion.

**Honour of the Crown**

Although the Court ruled that Crown had no fiduciary duty to the Red River Métis, it did rule that the Crown had a duty, based in the Honour of the Crown, to diligently implement a section of the *Manitoba Act*. It appears that this amounts to recognizing breaching the Honour of the Crown as a free-standing cause of action.

The Court noted that not all interactions between the Crown and Aboriginal people engage the Honour of the Crown. By analogy, this is consistent with the general principle that that a relationship may be fiduciary in some, but not all aspects.

However, the Court did think that an explicit obligation to an Aboriginal group in a Constitutional document (the *Manitoba Act*) did engage the Honour of the Crown.

The Court thought that the Crown’s Honour in this context required a broad purposive interpretation of the section of the *Manitoba Act* and diligence in fulfilling its terms. For this it relied on cases about treaties, noting the close analogy of such an obligation to a treaty promise. (The terms of the *Manitoba Act* had in fact been negotiated with delegates of the Red River Métis.) The Court thought that this was a narrow duty, and that not every mistake or negligent act in implementing such an obligation would dishonour the Crown. However, a persistent pattern of negligence would be dishonourable.

The Court found such a persistent pattern in the delay of the implementation of the Métis children’s land grant provision (s. 31 of the *Manitoba Act*). The Court did not find that other issues raised by the Red River Métis dishonoured the Crown: making the land grants alienable, issuing scrip (a sort of land voucher) in lieu of land in some cases, or using a random allocation of land so that a family’s land would not be contiguous. The Métis had argued that all of these
factors had resulted in depriving them of a land base, since they contributed to the likelihood that Métis land would be sold to others rather than retained as a land base.

The Court thought the delay (10 years) was a breach of diligence since the purpose of the land grants was to give the Métis a head start in advance of settlers and the grants were not completed while a head start would still have been possible. In dissent, Rothstein and Moldaver JJ pointed out that in their view the delay was not extraordinary in the context: before land grants could be made, there had to be a census, land surveys, consultation with the Métis, and all this would take a substantial amount of time, especially in the context of having to set up a provincial administration from scratch.

The Court found that the land grants being alienable was not a breach of duty since the Métis had a history of land transactions and many of them would have objected to such restrictions. The Court thought that issuing scrip in lieu of land not a breach of diligence per se, although delay in combination with this was, having the result that land prices increased and scrip could not buy as much land as intended. However, by the time scrip was issued the entire 1.4 million acres contemplated by the Manitoba Act had been granted to the Métis, so the scrip was in addition to the Manitoba Act entitlement. The Court also found that random allotment of lands (so a family’s lands would not be contiguous) was not a breach since Métis opinion on this point was divided and it would have been difficult to imagine how to allocate fairly land otherwise than by lottery.

The Manitoba Métis Federation was seeking only declarations in this action. The Court found, in the entire context, that neither limitations statutes nor laches barred the Court from making declarations of this type.

In the result, the Court stated that Manitoba Métis Federation was entitled to a declaration that the federal Crown failed to implement s. 31 of the Manitoba Act in accordance with the honour of the Crown.

DUTY TO CONSULT BACKGROUND

The duty to consult and accommodate Aboriginal people when decisions are made that may affect their rights, interests or way of life has become a key principle of Aboriginal law, which has resulted in a large and growing body of law.

It has long been established that if a Crown action or legislation results in a prima facie infringement of a treaty or Aboriginal right, the Crown must “justify” that infringement if the action or legislation is to stand and be applicable. Part of the “justification” analysis includes an inquiry into whether the Aboriginal people in question were properly consulted.

The Crown also has a duty to consult with and accommodate Aboriginal people in respect of decisions that may affect lands to which they are asserting rights, even if those rights have not yet been “proven”. The duty to consult and accommodate Aboriginal people is in fact independent of their substantive Aboriginal or Treaty rights. The duty is both procedural (the Crown must follow the appropriate consultation procedures), and substantive (the Crown must

11 Haida Nation v BC (Minister of Forests), [2004] 3 SCR 511 (“Haida Nation”).
12 Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), [2005] 3 SCR 388.
make a decision which accommodates Aboriginal concerns, balancing them fairly with other societal interests).

The duty to consult and accommodate arises when the Crown knows or ought to know that Aboriginal rights or title may exist, and is considering action that may adversely affect such rights or title. To be meaningful, consultation and accommodation has to take place at the level of strategic resource use planning, not just at an implementation level. The Courts have also made clear that the threshold for triggering a duty to consult and accommodate is quite low, and that any impact on Aboriginal interests need not be obvious.

The duty applies to both Federal and Provincial governments. The duty to consult and accommodate arises out of the reconciliation of Crown sovereignty with Aboriginal prior occupation, and therefore, according to the Court, there is no obligation on parties other than the government to consult and accommodate. The Crown may, however, delegate procedural aspects of consultation to corporations, as is done in environmental assessments.

Even in the absence of such delegation, as a practical matter, resource development corporations or other third parties may find it wise, from a business perspective, to consult with and accommodate Aboriginal people. Such “third parties” have a vested interest in the consultation and accommodation being done properly, since if it is not, the approvals on which their projects depend may be quashed on judicial review. Further, practically speaking, it is sometimes only such “third parties” who may have the depth of knowledge required to provide the information needed in the consultation process, or who can negotiate any changes to the project that might be required for accommodation of the Aboriginal interest. Many project proponents now recognize this and negotiate directly with Aboriginal people who might be affected, sometimes even before approaching the Crown for the approvals they need. Having a First Nation “on side” would indeed facilitate the approval process, since the need for further consultation and accommodation would be minimized.

In sketching out the content of the duty of consultation, the Court ruled that there was a spectrum of consultation activities that might be required, ranging from discussing decisions to be made to securing the consent of the relevant Aboriginal group.\(^{13}\)

At one end of the spectrum of consultation and accommodation are cases where the “claim to title is weak, the Aboriginal right limited or the potential for infringement minor”. In such cases, the duty would amount to a requirement to “give notice, disclose information, and discuss any issues raised in response to the notice”. Even at this level, however, the discussions have to be undertaken “in good faith, and with the intention of substantially addressing” Aboriginal concerns.

At the high end of the spectrum, where the claims were relatively strong, and the potential adverse effects of the decision in question were relatively serious, formal participation in the decision-making process and the provision of written reasons might be required. For serious impacts on proven rights, consent of the Aboriginal group might be required.

\(^{13}\) Haida Nation.
There is now a large and rapidly growing body of jurisprudence on the duty to consult and accommodate.

**BEHN**

The facts of *Behn* were that the BC Ministry of Forests ("MOF") issued a timber sale licence to Moulton Contracting Ltd. ("Moulton") The land covered by the licence included George Behn's traline. The MOF informed Behn of this, and he objected to the licence, asked that it be cancelled, and asked for consultation. MOF did not do this, and meanwhile Moulton moved its equipment on site. Thereupon Behn erected a camp which blocked access to the area.

Moulton then sued Behn in tort. Behn filed a defence that alleged the timber licence was invalid, for lack of consultation, and because it amounted to an unjustified infringement of his treaty harvesting rights. Moulton countered with a motion to strike out these portions of Behn's defence. It was an appeal of this motion to strike that reached the Supreme Court of Canada.

The Court first dealt with the consultation issue. The Court reasoned that the duty of consult existed to protect the collective rights of Aboriginal peoples, and was therefore owed to the group holding the right, in this case the Fort Nelson First Nation. Without any authorization from the First Nation to represent it in this matter, the Court reasoned, Behn could not assert a right to be consulted personally.

On the matter of a rights infringement, the Court noted that the treaty rights in question were collective. However, such rights may also have individual aspects. Therefore it was possible that Behn had standing to raise a rights infringement issue.

The Court decided the case, however, on the doctrine of abuse of process, which it noted is a broad, flexible and discretionary doctrine. The Court was of the view that it would be an abuse of process to allow Behn to raise consultation or rights infringement issues in his defence. The Court, however, gave only very brief reasons why it thought the abuse of process doctrine applied in this way. It seems to have been swayed by the costs incurred by Moulton, and by the notion that it should not be seen as condoning self-help remedies. The Court thought that Behn should have launched an application for judicial review and brought an injunction application instead of doing what he did.

With respect, these reasons, especially without further elaboration than was provided, do not seem very convincing. In late June 2006, MOF informed Behn of the licence it had issued. In August, Behn wrote MOF objecting to this licence. When MOF did not act on his objection, in early October 2006, Behn set up the camp blocking access. To expect Behn, in a little over three months, to make an objection to the timber licence, to conclude that his objection was not being acted on by MOF, to launch an application for judicial review, and to bring an injunction motion, imputes a very high level of sophistication and available resources to an individual Aboriginal trapper and his family in a remote corner of BC.

The Court also made a point of not condoning self-help remedies. This is puzzling. Although there are limits to the appropriate use of self-help, the law does not uniformly frown on self-help. Someone in peaceable possession of real property is justified in using force to prevent trespass if
one uses no more force than necessary. Is peacefully blocking an access road to prevent clear-cutting of one’s trapline really that different?

Nor is the situation different in a civil context involving a Crown decision. For example, in *Hewat v Ontario*, Hewat had been appointed a vice-chair of the Ontario Labour Relations Board for a fixed term of office. A newly elected government decided to remove him from office, prior to the expiry of his term, by Order-in-Council. The Ontario Court of Appeal found this Order-in-Council removing him from office to be void. By the time the matter was resolved, however, the Court recognized that re-instatement would be impractical. However, the Court seems to suggest that if such a situation re-occurs, the tribunal member purportedly dismissed would be entitled to ignore the Order-in-Council dismissing him or her, and to treat it as a nullity. Is treating a timber licence as void based on lack of consultation and infringement of treaty rights fundamentally different from that?

Nor, I suggest, does the involvement of the “third party” Moulton fundamentally alter the situation. The Court clearly viewed Moulton as an innocent party taken by surprise and having incurred costs. This might have been true in a narrow sense. But can a logging company in BC today really be surprised that Aboriginal consultation is required? Might it have been prudent for Moulton to ask MOF if consultation had been done? Behn in fact had made his objections known to MOF before Moulton moved its equipment on site. If Moulton had asked MOF before moving its equipment, Moulton would not have been caught by “surprise”.

Recall, moreover, that the issue was not, in the final analysis, whether Behn was justified in blocking access, only whether or not he was entitled to argue in his defense that his action was justified. It would seem that in *Behn*, there were conflicting rights in issue – Moulton’s right to log under its licence, and Behn’s treaty harvesting rights. Neither side was acknowledging the validity of the other side’s rights. Each side was taking actions that interfered with the other’s rights – Moulton by moving equipment onto Behn’s trapping line, Behn by blocking the road peacefully. Harvesting rights are just as much a part of the Rule of Law as logging rights. Why should the matter not be resolved by examining the rights on both sides and reconciling them to the extent possible? The words of the Ontario Court of Appeal in another blockade case (in the context of setting aside a sentence for contempt of Court) seem appropriate:

Where a requested injunction is intended to create “a protest-free zone” for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations: ... The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it...

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14 *Criminal Code*, s. 41(1).
15 37 OR (3d) 161 (CA).
16 See *Frontenac Ventures Inc. v Ardoch Algonquin First Nation* (2008), 91 OR (3d) 1 at para 48 (CA), leave to appeal denied 2008 CanLII 63483 (SCC).
However, this was the kind of enquiry that the Supreme Court of Canada thought was inappropriate on the facts of Behm. Perhaps there are compelling reasons why the Court drew the line about abuse of process where it did in Behm. However, by dealing with the matter so summarily, and without addressing some of these nuances, the Court has raised more questions than it answered.

**ABORIGINAL TITLE BACKGROUND**

There are two competing geographic pictures of what Aboriginal title looks like. On the one hand there is the picture of a land at the “assertion of sovereignty” by Europeans that sees Aboriginal nations (or local sub-groups of nations) occupying chunks of contiguous territory about which they move, usually in a seasonal round, to best harvest resources. There may be overlaps at the edges of territories, and at times disputes over territories, but vacant portions of territory were rare (see figure 1). On the other hand is a picture of an essentially vacant land, with occasional village sites or hunting camps which meet a standard of regular and intensive use. The land in between such pinpoints of Aboriginal title is at best “hunting territory”, subject to harvesting rights (if that), but not to Aboriginal title (see figure 2).

These are vastly different pictures. The first is consistent with viewing Aboriginal nations on a level with European nations. The second is based on ideas of Aboriginal peoples being “nomadic” and can be seen as in the same family as the theory of *terra nullius*. This second theory is sometimes called the “postage stamp” theory of Aboriginal title.

Until recently, Courts have avoided opting exclusively for either of these theories. The leading case on Aboriginal title, *Delgamuukw v British Columbia*,¹⁷ specified how Aboriginal title must be proved. An Aboriginal group must show that it exclusively occupied the land prior to the assertion of British sovereignty, and that their title has not been extinguished. Both physical occupation of the land and the content of Aboriginal land law can be used to prove occupancy. The degree of occupation required will vary with the context – regular use of specific territories for traditional harvesting can be sufficient occupation in some contexts. The Court also suggested that a nomadic group which “varied ‘the location of their settlements with the season and changing circumstances’” might be unable to establish Aboriginal title.

It is not necessary to show, on top of exclusive occupancy, that use of a particular tract of land was of central significance to the culture of the relevant Aboriginal people. While this is a theoretical requirement for Aboriginal rights (and therefore for Aboriginal title), in the Court’s view, exclusive occupation necessarily implied central significance to the culture.

The Supreme Court of Canada elaborated on the Aboriginal title test in *R. v. Marshall; R. v. Bernard (“Marshall and Bernard”)¹⁸*. The Court specified that “exclusive occupation” meant the effective control of land so that the Aboriginal group could have excluded others had it chosen to do so. This requires showing an “intention and capacity” to control access to the land.

*Marshall and Bernard* took a narrow view of the “regularity” of occupation that is required to prove Aboriginal title. The Court suggested that the regular seasonal use of particular tracts of

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¹⁷ [1997] 3 SCR 1010.
¹⁸ [2005] 2 SCR 220.
land would “typically” give rise to Aboriginal rights, but not Aboriginal title. For this it relied on a line of Aboriginal rights cases, in which Aboriginal rights, but not title, had been in issue. The Court also took this view despite having noted, citing some English cases, that the degree of possession sufficient to ground Common Law title depended on all the circumstances, and that, depending on the nature of the land and how it was commonly enjoyed, it could be sufficient to prove that one hunted on the land, and that one could chose to use the land only intermittently and sporadically without losing title. It is hard to reconcile these doctrines with what the Court ruled in Marshall and Bernard. It is also difficult to imagine that one would not be able prove prescriptive Common Law title to a cottage property even if one only used it in the summer months.

LeBel J (writing for himself and Fish J), parted with the majority’s reasoning in Marshall and Bernard, pointing out that the majority’s reasoning on this point might prove fundamentally incompatible with a “nomadic” or “semi-nomadic” lifestyle. Thus to ignore the Aboriginal relationship to the land amounts to adopting the view that Canada was not occupied prior to the assertion of British sovereignty, and as LeBel J goes on to note, this is “clearly unacceptable and incongruent with the Crown’s recognition that Aboriginal peoples were in possession of the land when the Crown asserted sovereignty”.

This division in the Supreme Court of Canada illustrates the debate of warring theories of territory. However, we should remember that, even on the theory of the majority in Marshall and Bernard, it depends on the evidence whether or not “nomadic or semi-nomadic” people can establish Aboriginal title.

It should be noted that if Aboriginal title is established, it is possible that federal or provincial laws may infringe Aboriginal title, and this may be permitted legally if a justification test is passed.19 The Court made it clear that general economic development of a region is a sufficient purpose to justify infringing Aboriginal title. Even in this case, however, there must be some accommodation of the Aboriginal interest – at least good faith consultation is required, and often a greater involvement, sometimes even the consent, of the relevant Aboriginal group; the allocation of resources must “reflect” the prior Aboriginal interest; and compensation for infringements of Aboriginal title will normally be required.

**WILLIAM**

In William v British Columbia (“William”),20 the BC Court of Appeal dealt head-on with these warring theories of Aboriginal title. The Supreme Court of Canada will hear the appeal of this decision in the fall of 2013.

In William, the Court ruled that proving Aboriginal title required showing regular and intensive land use, applied in a site-specific way. The examples given show that the size of site the Court was talking about, even when accepting that such sites could have been those used for hunting and fishing, was closer to square meters than to square kilometers (salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or buffalo jumps). That is, William adopted the “postage stamp” theory, although it rejected that

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19 Delgamuukw v British Columbia.
20 2012 BCCA 285.
term as prejudicial, and referred to it as the “site-specific” theory. Given the examples used, “micro-site specific” might be a more accurate description.

*William* came to this conclusion about micro-site-specificity based on a detailed reading of case law, and on the concept of reconciliation. With regard to reconciliation, the Court used it as an interpretive principle in elaborating on the test for Aboriginal title. The Court thought that broad territorial claims to title were antithetical to reconciliation, which required respect for First Nations rights without unnecessarily limiting the sovereignty of the Crown or the aspirations of non-Aboriginal Canadians.

The Court thought the approach best suited to reconciliation would be a test for Aboriginal title that was micro-site specific, reasoning that Aboriginal use of the land between such micro-sites could be protected by recognizing Aboriginal harvesting rights.

*William* set a higher threshold for proof of Aboriginal title than has the Supreme Court of Canada to date, by reading “definite” tracts of land as meaning micro-sites, and by requiring a high level of regularity and intensity of use. *Marshall and Bernard*, for example, explicitly left open the possibility of a “nomadic” group establishing Aboriginal title, and left open the possibility of Aboriginal title over larger areas of land than just village sites (e.g. hunting territories). By rooting the interpretation of the Aboriginal title test in the abstract concept of reconciliation, *William* seems to preclude, as a matter of law, results which the Supreme Court of Canada has said will depend on the facts.

In addition, the *William* approach seems to reinforce a skewed concept of “nomadic”. Already in the jurisprudence is an adoption of the concept of “nomadic” to describe the seasonal round of activities. While this is one meaning of the word, it also can mean aimless wandering. Anthropologists now quite consistently reject aimless wandering as applicable to any peoples. Few, if any, Aboriginal people actually wandered around aimlessly as the concept “nomadic” can suggest. *Marshall and Bernard* had asked the question whether or not whether nomadic and semi-nomadic peoples can ever claim title to Aboriginal land, and answered that it depends on the evidence. *William* has added to this that it depends on the evidence, considered micro-site by micro-site.

*William* also viewed exclusivity as a factor to be applied on top of the intensity of use. That is, first one tests for regular and intensive use, and for those micro-sites which meet this threshold, there is an additional test of exclusivity of use. However, so far, the Supreme Court of Canada has viewed exclusivity as a degree of occupation, not as a test to be added on top of intensity of use. *Marshall and Bernard*, for example, states that exclusive possession is typically established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources. That is, exclusivity can be inferred from intensity of use, rather than being an additional test.

What this leaves open is that if one can prove directly that an Aboriginal group had historically actually excluded others, one should not also have to prove the intensity and regularity of some other kind of land use. Showing that an Aboriginal group had excluded others proves exclusive occupation directly, without the need to infer it from regular and intensive land use. If a group is able and willing to go to war to protect their lands, what better evidence could there be of the group’s connection to the land being of central significance to their distinctive culture? By not
even considering exclusivity unless land use activities are of sufficient intensity and regularity, *William* seems to have precluded this argument.

As mentioned above, *William*’s development of the test for Aboriginal title is animated by its concept of “reconciliation”. “Reconciliation”, as an established purpose of section 35 of the *Constitution Act, 1982*, has many applications in the field of Aboriginal law. But *William* used this concept as a way to limit Aboriginal rights because their full recognition might cause hardship to non-Aboriginal people. It could be suggested that the appropriate place for this analysis is in the justification of an infringement, not in the definition or proof of rights themselves.

It may be that Canadian Courts will not recognize Aboriginal rights without some check on the effects of this on the rest of society. That is what the concept of justified infringement is about. But this should not reach into the definition of the right itself. For example, it is not open for someone to steal a car, start using it as a taxi in order to earn a living, and then say, when the true owner shows up, that the owner’s rights must be attenuated in the name of reconciliation with the thief’s interests because it would be a hardship to the thief otherwise. Why should this argument work when it comes to the Crown appropriating Aboriginal lands?

Secondly, if we were to keep the analysis of reconciliation in the justification stage, it would allow more flexibility than merely defining the underlying right in a curtailed way. For example, if the result of recognizing Aboriginal title were truly to shut down the resource economy of a province, one could expect a Court would quickly find preventing this to be a purpose capable of justifying an infringement. But that is unlikely to be the result of recognizing Aboriginal title. Aboriginal rights should not be viewed as a black hole from which no benefits to anyone but Aboriginal people emerge. Many Aboriginal people would likely be interested in resource development as well, although probably in more sustainable ways, and would likely want to employ some non-Aboriginal people in such ventures. It is quite possible that the practical result of recognizing Aboriginal title would not be shutting down the economy, but would be the continuation of the economy, the continued employment of many persons now employed in it, with some different environmental management practices and with First Nations rather than large resource companies benefitting from the profits of it. It is not so clear that preventing this is a purpose capable of justifying an infringement of Aboriginal title. In addition, compensation for infringements is part of the justification analysis. If the right is attenuated, so will be the compensation required, removing this flexibility from the concept of reconciliation.

These are all matters for the Supreme Court of Canada to address when it considers *William*. 
Map 6. Approximate Locations of Band Territories and Major Villages, 1620–1840. (Courtesy of Michigan State University)

Aboriginal Peoples circa 1740

Abstract:
This map shows the distribution of Aboriginal peoples early in the eighteenth century after a hundred years of Aboriginal-European contact at the time of the French Regime. Ethnohistoric societies are outlined on the map by the major linguistic family to which they belong. Ethnohistoric societies are Aboriginal peoples that were named by name and located to Europeans early in the eighteenth century. A linguistic family code identifies each ethnohistoric society on the map and is used to reference specific information for each ethnohistoric society.

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http://atlas.nrcan.gc.ca/site/english/maps/historical/aboriginalpeoples/circa1740/interactive... 12/10/2012