CASE NOTES

JAMES SMITH INDIAN BAND v SASKATCHEWAN (MASTER OF TITLES)*

IS NATIVE TITLE CAPABLE OF SUPPORTING A TORRENS CAVEAT?

A recent Canadian case has import for Australian Aboriginals and Torres Strait Islanders claiming native title[1] over Torrens system lands.[2] *James Smith Indian Band* presented the Saskatchewan Court of Appeal with the opportunity to determine whether, for the purposes of Torrens legislation, native title represents an interest in land capable of supporting a Saskatchewan Land Titles Act caveat.[3]

It is now beyond doubt that a Torrens caveat must disclose an interest in land, and the instrument or facts upon which that interest is founded, before it may be lodged.[4] The Saskatchewan Court of Appeal, in two separate opinions concurring in result, rejected an appeal from a decision of the Saskatchewan Court of Queen's Bench[5] and held that native title does not represent an interest in land for Torrens purposes. While the decision may correspond with traditional Torrens theory in a technical sense (in so far as an interest in land is necessary to lodge a caveat; although that begs the question), it is nevertheless surprising given the very common practice of lodging caveats in respect of other interests

* (1995) 123 DLR (4th) 280. Saskatchewan Court of Appeal, 12 April 1995, Wakeling, Sherstobitoff and Lane JJA (*'James Smith Indian Band'*); affirming *James Smith Indian Band v Saskatchewan (Master of Titles)* (1994) 107 DLR (4th) 9 (Saskatchewan QB) (Gunn J).

1 Known as 'aboriginal title' in Canada. It should also be noted that the Aboriginal peoples of Canada refer to themselves as First Nations peoples. This note will use the collective noun-phrases 'Aboriginal peoples of Canada' or 'Aboriginal peoples of Saskatchewan' because they are generally used in *James Smith Indian Band.*

2 Such as the Transfer of Land Act 1958 (Vic) ss 89-91; Real Property Act 1900 (NSW) ss 74F-R.

3 Land Titles Act, RSS 1978, c L-5, ss 150, 155, 157.1, 194. The Saskatchewan Land Titles Act is a piece of Torrens legislation of which the caveating provisions are generally similar to those in most Australian Torrens legislation: see Transfer of Land Act 1958 (Vic) ss 89-91; Real Property Act 1900 (NSW) ss 74F-R. The primary difference between Australian and Canadian caveating has been described as that between the 'older' and 'modern' systems. The 'older' system is found in the Victorian and New South Wales legislation; caveats simply create a statutory injunction preventing the registration of instruments by the Registrar which may affect the caveated interest, unless the new interest in land is subject to the caveated interest, or until the caveat is otherwise discharged. The Saskatchewan legislation is an example of the 'modern' system; a caveat accords the claimed interest priority in relation to other registered instruments, while not actually establishing the validity of the interest itself: Thomas Mapp, *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens System* (1978) 147.

4 For Canadian authority, see *Iverson Heating Ltd v Canadian Imperial Bank of Commerce* (1983) 43 AR 142 (Alberta QB). See also Donald Purich, 'The Caveat: An Uncertain Instrument in an Exact System' (1982-83) 47 *Saskatchewan Law Review* 353; Mapp, above n 3. For Australian authority, see *Tierney v Loxton* (1891) 12 LR (NSW) 308; *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546; *Kerabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222; cf *Osmanoski v Rose* [1974] VR 523. Also see Robert Stein and Margaret Stone, *Torrens Title* (1991) 126-7.

5 *James Smith Indian Band v Saskatchewan (Master of Titles)* (1994) 107 DLR (4th) 9 (Gunn J).

which are not founded upon Torrens registration, such as equitable interests. It is also surprising given the very high priority which Canadian and Australian courts have recently given to native title as a *sui generis* — although newly recognised — interest in land.[6] This note suggests that *James Smith Indian Band* is an inappropriate precedent for Australian Torrens jurisdictions, given the advanced state of native title law,[7] and the nature and effect of Australian caveats.[8] No doubt there are also policy issues which will require analysis when questions concerning the caveatability of native title are brought before Australian courts; however, these are beyond the scope of this note.

The Facts and Issue

The James Smith Indian Band ('the Band') lodged caveats claiming an interest in parcels of land registered in the names of the Saskatchewan Crown and the Saskatchewan Power Corporation, based upon a beneficial and real interest arising from custom and usage. Two instruments supporting that custom and usage were relied upon. The first was Treaty No 6 (1876) between the Government of Canada and the Band, reserving to the members of the Band in perpetuity and for all time the right to pursue their vocations of hunting, fishing, trapping and gathering throughout the treaty lands. The second instrument was the 1930 Natural Resources Transfer Agreement between the Governments of Canada and Saskatchewan, conferring all legislative power over natural resources in Saskatchewan to the Government of Saskatchewan.[9] Pursuant to legislation passed to ratify the agreement, the Government of Saskatchewan agreed to carry out the terms of every contract or arrangement between the Government of Canada and the Aboriginal peoples of Saskatchewan, including the rights of hunting, trapping and fishing at all seasons of the year. Treaty No 6 (1876) falls within the ambit of the Natural Resources Transfer Agreement.

[6] In Canada see *Calder v British Columbia (Attorney-General)* [1973] SCR 313; *Guerin v R* [1984] 2 SCR 335; *R v Sparrow* [1990] 1 SCR 1075; cf *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185 (British Columbia SC); varied in part (1993) 104 DLR (4th) 470 (British Columbia CA). The British Columbia Court of Appeal has now adopted similar reasoning to that found in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*').

In Australia, see *Mabo* (1992) 175 CLR 1. It should be noted, of course, that the judgments in *Mabo* are far from conclusive; it is by no means the case that the content, nor the interaction of native title with English law interests in land are definitively settled by those judgments. However, the reasons of Brennan J (as he then was), Deane and Gaudron JJ seem to make it reasonably clear that at the very least, native title should be treated on the same footing as English law interests in land recognised within a Torrens system. This note makes no attempt to reconcile those judgments, or to analyse the issue. Suffice it to say that *Mabo* goes some way to recognising the peaceful co-existence of the two forms of land holding.

Moreover, it is surprising in that neither of the judgments in *James Smith Indian Band* denied the *sui generis* nature of native title as an interest in land.

[7] Both *Mabo* (1992) 175 CLR 1, and the Native Title Act 1993 (Cth) doubtless establish an ongoing integration of native title with state and territory Torrens legislation; indeed, this integration surpasses any similar advances made in Canadian aboriginal title law. Thus, the advanced state of Australian native title law refers to no more than this ongoing process of integration, and the absence of mutual exclusivity between Australian native title and state and territory Torrens legislation.

[8] For a discussion of the 'older' systems of caveating generally, see Mapp, above n 3, 145-50.

[9] Statutes of Saskatchewan 1930, ch 87.

The Registrar of the Prince Albert Land Registration District rejected the caveats on the basis that they did not disclose an interest in land,[10] and Gunn J (sitting in chambers) agreed.[11]

An appeal to the Saskatchewan Court of Appeal was initiated on a number of grounds,[12] although the ultimate issue decided was solely whether native title constitutes a *prima facie* interest in land capable of supporting a caveat.

The Decisions

Wakeling JA

Wakeling JA concluded that native title is a claim existing outside the ambit of Torrens legislation and therefore, whether that claim may support a caveat was irrelevant because the Saskatchewan Land Titles Act was inapplicable. Wakeling JA also noted that both parties agreed at the outset that the Registrar and Gunn J were not entitled to go behind the allegations contained in the caveat to determine if evidence existed to support the claim; however, they were entitled to rely upon existing law to determine whether the interest was one which could be caveated.[13]

Guidance, in Wakeling JA's view, may be found in an earlier Saskatchewan Court of Appeal decision involving a competition between native title caveats and privately held Torrens titles,[14] and whether those caveats could be maintained in the face of a challenge brought by the registered title-holders. Each of the parties in *Lac la Ronge* accepted that if the caveated claim could be proved, Torrens legislation could not authorise the issuance of titles to the caveated lands. In *Lac la Ronge* Sherstobitoff JA said:

> It is at this point that the band's position that it is entitled to maintain the caveats against the lands breaks down. The right to file the caveats arises from s 150 of the [Saskatchewan] *Land Titles Act*. Since the band's position is that the [Saskatchewan Land Titles] Act does not apply to the lands in question, the band cannot at the same time rely upon the [Saskatchewan Land Titles] Act for the authority to file the caveats.[15]

Sherstobitoff JA went on to say in *Lac la Ronge* that the band's claim was based upon the premise that it could not be affected by any dealings with the land authorised by the Saskatchewan Land Titles Act subsequent to the Natural Resources Transfer Agreement. The *Lac la Ronge* claim would not (indeed could not) need the protection of the Saskatchewan Land Titles Act, because that legislation could not affect Aboriginal claims.[16]

Wakeling JA extracted two principles from *Lac la Ronge*. Firstly, where a land

10 Pursuant to the Saskatchewan Land Titles Act, RSS 1978, c L-5, s 194.

11 *James Smith Indian Band v Saskatchewan (Master of Titles)* (1994) 107 DLR (4th) 9 (Gunn J).

12 *James Smith Indian Band* (1995) 123 DLR (4th) 280, 282-3.

13 Ibid 283.

14 *Lac la Ronge Indian Band v Beckman* (1990) 70 DLR (4th) 193 (Saskatchewan CA) ('*Lac la Ronge*').

15 Ibid 199-200 (Sherstobitoff JA).

16 Ibid 200.

claim relates to Aboriginal rights, Torrens legislation can have no application and a caveat alleging such an interest is not *appropriately* filed. Secondly, there is no acceptable rationale for the contention that some Aboriginal land claims are subject to Torrens legislation while others are not.[17] However, Wakeling JA did say that

> the [Aboriginal] claim is to *some form of interest in land which is based on aboriginal rights*. In such a circumstance the [Saskatchewan Land Titles] Act cannot be said to have eliminated such an interest.[18]

The remainder of Wakeling JA's judgment, with respect, is difficult to reconcile with that proposition.

Wakeling JA pointed out that the Band did not claim that the Saskatchewan Land Titles Act could be utilised in these circumstances, but simply that the claim was an interest in land. Given the material included in their factum, the Band made it clear that the caveated claim was Aboriginal in nature.[19] Moreover, and very importantly, the claim was not simply one which was based upon custom and usage, but was supported by continued custom and usage arising from contracts and treaties culminating in the Natural Resources Transfer Agreement. This claim was therefore for inalienable Aboriginal rights over lands for which Saskatchewan Land Titles Act titles had been issued; if valid, the claim could not be taken away by, nor could it fall within the ambit of, the Saskatchewan Land Titles Act.[20]

Without further explanation, Wakeling JA had no difficulty in concluding that because the claim was one having Aboriginal roots, the provisions of the Saskatchewan Land Titles Act had no application. Moreover, the lodging of a caveat, providing nothing more than informational notice to the registered owners that a claim Aboriginal in nature was being made, could provide no legal advantage.[21] Wakeling JA stated his conclusions as follows:

> The whole purpose and objective of the [Saskatchewan Land Titles] Act is to protect the registered owner from claims of which no notice has been given by registration prior to the issuance of title. The appellant contends for a right which is paramount to any of the rights and obligations that the [Saskatchewan Land Titles] Act seeks to recognize and protect. The caveators cannot then use the [Saskatchewan Land Titles] Act to protect an interest which it says is not placed at risk by the [Saskatchewan Land Titles] Act.[22]

Even if that conclusion is wrong and the caveat could be lodged, Wakeling JA said, challenging the claim under the Act as if it were an indefeasibility issue was also impossible; the Band would not accept such a result, as the claim is not

17 *James Smith Indian Band* (1995) 123 DLR (4th) 280, 283-4 (Wakeling JA). This is significant because the judgments of Wakeling JA and Sherstobitoff JA differ on this point.

18 Ibid 284 (emphasis added).

19 Ibid.

20 Ibid 285. This highlights the very different, and advanced, nature of native title law in Australia as compared to Canada: see above n 7, and see 'Analysis' section below.

21 *James Smith Indian Band* (1995) 123 DLR (4th) 280, 285.

22 Ibid.

one which is dependant upon the Saskatchewan Land Titles Act for its recognition. Wakeling JA stated his dissatisfaction with this approach because it fundamentally amounts to a desire to apply only those parts of the Saskatchewan Land Titles Act which appear to serve the Band's own purposes while denying the application of those that do not.[23] Thus:

> There is nothing to be gained by considering whether the caveat succeeds in raising an interest in land when that question is only of interest to determine whether there has been compliance with the sections of an inapplicable Act.[24]

Sherstobitoff JA (Lane JA concurring)

Sherstobitoff JA disagreed that any broad principle can be drawn from *Lac la Ronge*. That decision did not posit that a claim to an interest in land derived from native title, being *sui generis*[25] and outside the purview of Torrens registration, was incapable of being an interest in land registrable (which surely must mean caveatable) under the Saskatchewan Land Titles Act. Hence:

> One cannot and should not exclude the possibility that there may be interests in land which derive from aboriginal title which are compatible with a land registration system and may therefore be registrable under the [Saskatchewan Land Titles] Act. Accordingly, claims for registration based on interests derived from aboriginal title should be examined and decided on a case-by-case basis.[26]

Sherstobitoff JA noted that while *Lac la Ronge* included comments as to the application of Torrens legislation in relation to Crown lands held for Aboriginal peoples of Saskatchewan, they were *obiter* and did not purport to lay down any general principles. Furthermore, because the Band was not disputing the application of the Saskatchewan Land Titles Act to the lands in question, nor was it disputing the validity of the titles to the lands issued under the Act, *Lac la Ronge* had no application in *James Smith Indian Band*.[27]

Notwithstanding that conclusion, Sherstobitoff JA adopted the reasons of Gunn J[28] for denying that the caveat *prima facie* disclosed an interest in land for the purposes of the Saskatchewan Land Titles Act.

Gunn J, relying upon *R v Sparrow*,[29] found that Aboriginal rights created by treaties must not be analysed using traditional common law concepts of property,

[23] Ibid 286. Wakeling JA also cites Ontario and British Columbia authority denying the issuance of certificates of *lis pendens* because if successful in proving native title, the subsequent registration of titles or encumbrances before or after the commencement of the action would not matter; if successful in their claims, Aboriginal peoples of Canada would re-acquire their interest in the land against all the world, as it were: *Chippewas of Kettle and Stony Point v Canada (Attorney-General)* (1994) 17 OR (3d) 831 (Ontario Gen Div); *Uukw v The Queen in Right of British Columbia* (1987) 37 DLR (4th) 408 (British Columbia CA) ('*Uukw*').

[24] *James Smith Indian Band* (1995) 123 DLR (4th) 280, 286-7 (Wakeling JA).

[25] On this point see the excellent analysis by Kent McNeil, *Common Law Aboriginal Title* (1989) 193-243.

[26] *James Smith Indian Band* (1995) 123 DLR (4th) 280, 287 (Sherstobitoff JA).

[27] Ibid 287-8 (Sherstobitoff JA).

[28] Sitting in chambers in *James Smith Indian Band v Saskatchewan (Master of Titles)* (1994) 107 DLR (4th) 9 (except in so far as Gunn J's reasons conflicted with Sherstobitoff JA's).

[29] [1990] 1 SCR 1075.

but rather as *sui generis* rights. To support the point, Gunn J cited Canadian authority in which the legal nature of Aboriginal hunting and fishing rights have been examined[30] and concluded (in line with *R v Horseman*[31]) that the rights under Treaty No 6 (1876) were merged in the Natural Resources Transfer Agreement rendering those rights subordinate to any subsequent provincial game legislation.[32] Gunn J also found that the caveat must only be claimed by one group party to Treaty No 6 (1876) because if a caveat were filed by every group, it would be almost impossible to achieve effective surrender of those rights.[33]

In reaching these conclusions, Gunn J relied upon *Uukw*,[34] which established that a Torrens Register is decisive, and that there can be no interest created in relation to that system unless it is created through registration pursuant to the legislation.[35] Gunn J, with the agreement of Sherstobitoff JA in the Saskatchewan Court of Appeal, stated the proposition as follows:

> MacDonald JA [in *Uukw*] ultimately held that even if established, aboriginal title is generally inalienable, except to the Crown. Aboriginal title can have no place in a Torrens system which has the primary object of establishing and certifying the ownership of indefeasible titles and simplifying transfers thereof.[36]

Of course, this proposition was modified by Sherstobitoff JA in so far as the recognition of native title within a Torrens system is to be determined on a case-by-case basis.[37]

Analysis

It is easy enough to imagine circumstances where caveating native title can provide some benefit to Australian Aboriginals and Torres Strait Islanders. Most obvious is the situation where Commonwealth Crown land has not been the subject of a grant, yet has been registered under a state or territory Torrens system; indeed, those are the very facts of *James Smith Indian Band*. Clearly, not only while an application for a Native Title Act determination[38] is pending, but even where no application is lodged, it may be advantageous to lodge a caveat to provide informational notice to parties intending to deal with the land over

30 *R v Sundown* (1988) 64 Sask R 56 (Saskatchewan QB); *Pawis v The Queen* (1979) 102 DLR (3d) 602 (Federal Court TD); *A-G Canada v A-G Ontario* [1897] AC 199 (Privy Council).

31 [1990] 1 SCR 901; confirmed in *R v McIntyre* [1992] 4 WWR 765 (Saskatchewan CA).

32 *James Smith Indian Band v Saskatchewan (Master of Titles)* (1994) 107 DLR (4th) 9, 17-19 (Gunn J).

33 Ibid 19.

34 (1987) 37 DLR (4th) 408 (British Columbia CA).

35 The British Columbia Court of Appeal in *Uukw* (1987) 37 DLR (4th) 408, 413-14 made reference to *Heller v Registrar, Vancouver Land Registration District* (1960) 26 DLR (2d) 154 (British Columbia CA) as authority for the proposition that registration is decisive.

36 *James Smith Indian Band v Saskatchewan (Master of Titles)* (1994) 107 DLR (4th) 9, 20 (Gunn J).

37 *James Smith Indian Band* (1995) 123 DLR (4th) 280, 287 (Sherstobitoff JA).

38 Native Title Act 1993 (Cth) s 13 and Part 3.

which native title is claimed.[39] And it is easy enough to imagine variations on the theme where the Crown reserves some lesser interest in freehold or leasehold Torrens land, such as an easement, or *profit à prendre* in a *Mills v Stokman*[40] scenario, or possibly mineral interests under state or territory legislation.[41] Where the land is Torrens freehold or leasehold, subject to a Crown incorporeal hereditament, that lesser interest is registrable pursuant to state or territory Torrens legislation, but still potentially subject to overriding native title. Caveating that interest would be of some benefit to native title claimants.

Thus, at least four reasons support the proposition that the ability of Australian Aboriginals and Torres Strait Islanders to caveat is not impeached by *James Smith Indian Band* reasoning. First, the advanced state of native title law leads one to question the applicability of Wakeling JA's (and even Sherstobitoff JA's) reasoning regarding the informational notice rationale for Australian caveats; this argument gains its momentum from *Mabo*[42] and the responsive enactment of the Native Title Act 1993 (Cth). While the Native Title Act establishes a procedure for making native title claims, it by no means eliminates the importance of protecting such claims within state or territory Torrens systems. The Native Title Act does not stipulate the nature, nor the content of native title which may be found in a determination by the Native Title Registrar or the National Native Title Tribunal; indeed, *Mabo* itself makes no mention of the nature or content of native title, leaving the issue for determination on a case-by-case basis. As a result, any determination relating to non-freehold or (generally) non-leasehold land may have the effect of substituting paramount native title to that land.

Still, a determination which substitutes paramount native title over Crown lands does not render meaningless the broader matrix of interests established in equity or by Torrens legislation.[43] Australian recognition that native title may operate co-extensively with Torrens law makes that conclusion obvious, and with respect renders impermissible the reasoning of Wakeling JA that a native title claim, if successful, gives rise to nothing less than a complete invalidation of equitable or Torrens interests. It therefore seems clear that the potential for caveating to provide informational notice of either an impending Native Title Act determination, or of the outcome of that determination, takes on greater significance and is likely alive and well in Australian law.

The second reason for concluding that caveating remains available to Australian Aboriginal and Torres Strait Islander claimants is found in the Native Title Act 1993 (Cth). By providing for the notification of determinations[44] to state or

[39] Indeed, support can be found for this argument in analogous Australian Torrens provisions providing for the caveatability of adverse possession claims pending an application for the grant of a vesting order: see, eg, Transfer of Land Act 1958 (Vic) s 61.

[40] (1967) 116 CLR 61.

[41] See generally Mineral Resources Development Act 1990 (Vic).

[42] (1992) 175 CLR 1.

[43] Indeed, the definitions of 'native title' and 'determination of native title' pursuant to the Native Title Act 1993 (Cth) ss 223 and 225, make that outcome clear.

[44] Native Title Act 1993 (Cth) s 199.

territory Registrars of Title, the Native Title Act arguably covers the field and brings all Commonwealth Crown lands within the ambit of state or territory Torrens legislation. In so far as the Crown is treating all land to which native title may attach as amenable to this notification, by implication the Crown is treating itself, and its lands, as being bound by, and within the operation of, state or territory Torrens legislation.

If that is so, another possibility arises where caveats may be utilised by native title claimants; once lodged, the land to which a Native Title Act determination relates is caveatable for the purpose of providing informational notice. In other words, the land is brought within the ambit of state or territory Torrens systems by virtue of applications for determination. Thus, because neither the nature nor the content of native title is clear, and because the effect of a notification directed to a state or territory Registrar of Titles is not clear,[45] a caveat may be necessary to protect the eventual interest established by a Native Title Act determination. Although contentious, and by no means clear conclusions drawn from the operation of the Native Title Act, these are potential arguments. It is suggested that if the Commonwealth is dissatisfied with such an outcome, the most obvious method of alleviating ambiguities is to legislate[46] (perhaps with complementary state legislation).

A more fundamental rationale raises the third reason for recognising the potential caveatability of native title; in contrast to a mere equity,[47] native title is explicitly recognised as a *sui generis* interest in land.[48] To support a caveat, Torrens systems require a caveator to demonstrate an interest in land.[49] If native title is indeed an *interest in land* there is simply no good reason, in law or in

[45] While it may appear that state and territory legislation such as Land Titles Validation Act 1993 (Vic) provide answers to these questions, the intent of that legislation is simply to provide a mechanism by which claims can be made for compensation where past Crown grants have been validated by the operation of the legislation. It does not define customary title analogous in substance to some state legislation (eg Land (Titles and Traditional Usage) Act 1993 (WA) which purported to reduce the content of native title to a mere ceremonial right in the nature of a personal licence: s 7(1)(b) — since declared inoperative by the High Court (*Western Australia v Commonwealth* (1995) 128 ALR 1)), nor does the Victorian Act provide for the procedure to be followed by the Victorian Registrar of Titles when notified of a native title determination by the Native Title Registrar or the National Native Title Tribunal. Indeed, to note a Native Title Act determination on the Register may actually exceed the Registrar's jurisdiction pursuant to the Transfer of Land Act 1958 (Vic), there being no provision for 'notification.'

[46] This raises a constitutional issue whether the Commonwealth may properly legislate for the purpose of amending state legislation. While cases such as *Commonwealth v Tasmania* (1983) 158 CLR 1 indicate that the Commonwealth can legislate in relation to a matter in pursuance of the external affairs power (Commonwealth Constitution s 51(xxix)) and treaty implementation, with the effect of covering that legislative field, it is by no means clear that such legislating may have as its purpose the amendment of state legislation such as the Transfer of Land Act 1958 (Vic).

[47] Mere equities have been held not to give rise to equitable interests in land capable of supporting a caveat: *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] 1 VR 672; for Australian authority on the distinction between mere equities and equitable interests, see *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265 ('*Latec Investments*'). See also Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (1991) 112-17; Roderick Meagher, William Gummow and John Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1992) 115-29.

[48] *Mabo* (1992) 175 CLR 1. See also McNeil, above n 25, 303-4.

[49] Transfer of Land Act 1958 (Vic) s 89.

logic why that interest should not be given protection as such, both at general law and under a Torrens system. Furthermore, at least in Australia, the limited content definition of native title post-*Mabo*, along with the recognition that native title is clearly only subordinate to Crown grants of freehold since settlement (and possibly Crown grants of leasehold) adds weight to this argument. If Australian native title does not give rise to the complete overthrow of the superimposed English system of land law (and its equitable and Torrens derivatives), the reasoning of Wakeling JA is, with respect, fallacious. If *Mabo* and the Native Title Act recognise native title as an interest in land, at least as secure as any incorporeal hereditament, there is no reason for its not being capable of supporting a caveat.

A further argument can be raised in this regard. The Saskatchewan Court of Appeal's reasoning does not apply to the 'older' Australian system of caveating.[50] While the Court of Appeal speaks of 'protection' it is submitted that this is not an accurate way to describe Australian Torrens caveats. Rather, with the exception of some interesting aberrations, an Australian caveat is only sufficient to provide notice to the Registrar, the caveator, the registered proprietor, and potential transferees of the existence of some unregistrable claim to an interest in the land, usually an equitable one.[51] Thus, Wakeling JA's reasoning that the function of a caveat is to accord priority to native title, which it cannot do when the claimants are arguing that a successful suit for a native title declaration will necessarily eradicate all aspects of the very Torrens system within which they seek to caveat, simply cannot be supported in Australia. Because the validity of equity and the Torrens system has been established by *Mabo* and the Native Title Act, the outcome of a determination cannot give rise to the total annihilation of pre-existing Australian land law. Therefore, the 'older' Australian caveat can provide an informational notice of native title within the pre-established equitable and Torrens range of interests in a parcel of land. It clearly does not (and cannot), however, provide for the establishment nor the priority of native title. Any priority which that title may have is wholly dependant upon *Mabo* and the Native Title Act.

Indeed, from an Australian perspective the reasoning of Sherstobitoff JA on this point seems most compelling. If Native Title Act determinations take place on a case-by-case basis, so too should the determination of whether the claim discloses an interest in land capable of supporting a caveat.

However, with respect, one flaw does exist in the reasoning of Sherstobitoff JA; the establishment of a caveatable interest would require a determination of the native title claim, which itself is contrary to standard removal application practice. The merits of caveats are not usually assessed during that process. Rather, inquiry is directed simply to whether a *prima facie* claim to an interest in land can be made out. The two approaches are analytically dissimilar. On the one hand, inquiry on the merits require what is otherwise a full determination under

[50] Mapp, above n 3, 147.

[51] *Kerabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222; *Jacobs v Platt Nominees Pty Ltd* [1990] VR 146; cf *Osmanoski v Rose* [1974] VR 523.

legislation such as the Native Title Act, while a *prima facie* interest can be disclosed as a matter of law merely by facially examining that which is claimed, without assessing the merits.[52] On Sherstobitoff JA's reasoning, it can only be at the conclusion of a determination under legislation similar to the Native Title Act that a decision can be taken as to the nature of the interest (in land or otherwise) and whether it is capable of supporting a caveat. It is submitted that that is unacceptable, and smacks of the High Court's circularity of reasoning regarding mere equities in *Latec Investments*.[53] If that is to be avoided, it is submitted that the better approach is to treat *sui generis* native title as an interest in land capable of supporting a caveat *ab initio*,[54] with the knowledge that the outcome of the Native Title Act determination could affect the caveated interest. In which case one would simply have to say 'so be it'. Therefore, a caveat is available, and necessary, as a means of simply providing informational notice to registered proprietors, and parties intending to deal with the land, of either the existence of a pending Native Title Act determination, or following that determination the existence of some form of native title in a parcel of Torrens land.

The fourth reason is the most compelling argument for finding that native title can support an Australian caveat. The flaw which the Saskatchewan Court of Appeal finds in concluding that native title can be recognised within a Torrens system is that it exists independently of, and antecedent to, the existence of Torrens legislation (and English land law for that matter). Accordingly, a native title claimant cannot argue that a caveat may be lodged to protect that interest when the outcome of a claim may be to abolish, or at least seriously erode, the integrity of a Torrens system. Moreover, the Saskatchewan Court of Appeal suggests that if a native title claim is successful it renders any subsequent registered interest in the land irrelevant; even interests founded upon registration would not exist in the face of absolute native title. In Australia, that argument for refusing the ability of Aboriginal and Torres Strait Islanders to *simply caveat native title* cannot be supported (and it may be questioned whether, as a matter of policy, it should be in Canada). The answer lies partly in the earlier discussion that *Mabo* and the Native Title Act make it quite clear that a native title determination cannot abolish Torrens systems of land law, notwithstanding the broadest possible conception of native title.

And in Australia the answer to this concern also lies in the analogy to be drawn between native title and the recognition of equitable interests within Torrens systems. It was established early by the High Court (and the Supreme

52 Mapp, above n 3, 157-8.

53 Meagher, Gummow and Lehane, above n 47, 125.

54 Or, at the very least, provide for an expedited procedure to establish native title. However, this is clearly not a desirable route, as it would still create an inevitable gap between recognising that a claim may lie and the ability to give notice following the outcome of a Native Title Act 1993 (Cth) determination. Moreover, the very words of Wakeling JA in *James Smith Indian Band* (1995) 123 DLR (4th) 280, 283 may put to rest the opportunity of a court to go behind a caveat in determining whether native title exists. On the other hand, Wakeling JA's analysis would still allow a court to reason by analogy to establish whether the caveat discloses an interest in land: a court is 'entitled to rely on knowledge of the existing law to determine whether the interest alleged in the caveat does constitute a claim which can be caveated.'

Court of Canada) that equitable interests — while *sui generis* and existing outside and prior to the establishment of a Torrens system — are recognised by and can exist within a Torrens system.[55] Whether the reasoning of Griffith CJ or Isaacs J is accepted, the point to be made is that Torrens legislation may still recognise interests which exist at the periphery, and which are not dependent upon registration for recognition, such as those created in equity. Perhaps Isaacs J puts it best:

> Consequently, ... [Torrens legislation] in denying effect to an instrument until registration, does not touch whatever rights are behind it. Parties may have a right to have such an instrument executed and registered; and that right, according to accepted rules of equity, is an estate or interest in the land. Until that instrument is executed, [Torrens legislation] cannot affect the matter, and if the instrument is executed it is plain its inefficacy until registered — that is, until statutory completion as an instrument of title — cannot cut down or merge the pre-existing right which led to its execution.[56]

The same logic can (and should) easily be applied to native title; indeed, Wakeling JA himself adopts similar reasoning.[57] While native title may never give rise to a registrable Torrens interest, the fact that it has been recognised as a *sui generis* interest in land, existing at the time of English settlement, and which can continue to exist given the appropriate circumstances, gives way to a *Barry v Heider* (*Church v Hill* in Canada) rationale for its recognition in a Torrens system. The mere existence of Torrens legislation does not in any way cut down or merge the pre-existing rights which led to the existence of native title. And more importantly, if that is the case, Torrens systems continue to exist, and can recognise native title as an interest in land. For that reason, with respect, Wakeling JA and Gunn J seem to be wrong, as is MacDonald in *Uukw*.[58] *Mabo* ultimately lends support to this proposition that native title is to be treated on an equal footing with equitable and Torrens interests.[59]

The fact that a successful native title claim may, at most, weaken the integrity of equitable and Torrens interests in land cannot deny the existence of an appropriately caveated interest in that land; indeed it strengthens it. It has already been pointed out that a Native Title Act determination is not likely to, and in fact cannot result in the total eradication of Torrens interests in land. Accordingly, if caveats can provide their limited protection to equitable interests in land, they can just as easily be used to provide that same limited protection to native title before, during, or after a Native Title Act determination.[60] The reasoning of Wakeling JA that Torrens legislation is inapplicable to native title is therefore,

55 *Barry v Heider* (1914) 19 CLR 197. Canadian authority is found in *Church v Hill* [1923] SCR 642.

56 *Barry v Heider* (1914) 19 CLR 197, 216 (Isaacs J).

57 *James Smith Indian Band* (1995) 123 DLR (4th) 280, 284 (Wakeling JA). See also above n 18 and accompanying text.

58 See above text accompanying n 35.

59 Although the judgments in that case (as discussed above n 7) are not conclusive on the point. But given the peaceful co-existence of other such rights in land, this is not an entirely fanciful suggestion: Alfred Simpson, *A History of the Land Law* (2nd ed, 1986) 47.

60 See also above n 39.

with respect, wrong in Australian law. Native title is a *sui generis* interest in land which can clearly be recognised as an interest in land for Australian Torrens purposes.

Conclusion

Perhaps *James Smith Indian Band* simply makes obvious the lagging state of the Canadian law on native title. While Canada pipped Australia at the post in recognising native title as a part of its domestic law,[61] since that time Australia has gone beyond that mere recognition to place native title squarely within the hierarchy of equitable and Torrens interests in land.[62] By doing so Australian law makes it possible for the recognition of native title as an interest in land capable of supporting a Torrens system caveat. While such a result may be unacceptable to those Australian Aboriginals and Torres Strait Islanders (and Aboriginal peoples of Canada) who continue to claim that native title *should* be paramount to all English law interests in land, as an interlocutory measure, it is defensible.

That being the case, one observation is offered for both Canadian and Australian Torrens jurisdictions; all Torrens legislation will soon need legislative overhaul to take account of the recognition of native title within the hierarchy of interests in land. If those amendments do not simply make it clear that native title is *ab initio* an interest in Torrens land, they must at the very least provide methods of allowing for the investigation of native title claims underlying caveats. The former is preferable, but the latter would at least allow the intent behind Sherstobitoff JA's judgment to be realised; to allow determinations of the caveatability of native title to proceed on a case-by-case basis. Either approach would clear away any confusion created by the reasoning in *James Smith Indian Band* for Australian Torrens jurisdictions.

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61 *Calder v British Columbia (Attorney-General)* [1973] SCR 313; *Guerin v R* [1984] 2 SCR 335.

62 *Mabo* (1992) 175 CLR 1; Native Title Act 1993 (Cth); and as an example of complementary state legislation see Land Titles Validation Act 1993 (Vic).

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