
Aboriginal Title and Indigenous Peoples



Law and Society Series

W. Wesley Pue, General Editor

The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and seek to bridge scholarship emerging from interdisciplinary engagement of law with disciplines such as politics, social theory, history, political economy, and gender studies.

A list of the titles in this series appears at the end of this book.

Edited by Louis A. Knafla and Haijo Westra

Aboriginal Title and Indigenous
Peoples: Canada, Australia,
and New Zealand



UBCPress · Vancouver · Toronto

© UBC Press 2010

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without prior written permission of the publisher, or, in Canada, in the case of photocopying or other reprographic copying, a licence from Access Copyright (Canadian Copyright Licensing Agency), www.accesscopyright.ca.

20 19 18 17 16 15 14 13 12 11 10 5 4 3 2 1

Printed in Canada on FSC-certified ancient-forest-free paper (100% post-consumer recycled) that is processed chlorine- and acid-free.

Library and Archives Canada Cataloguing in Publication

Aboriginal title and indigenous peoples : Canada, Australia, and New Zealand / edited by Louis A. Knafla and Haijo Westra.

(Law and society, ISSN 1496-4953)

Includes bibliographical references and index.

ISBN 978-0-7748-1560-4

1. Aboriginal title – Canada. 2. Native title (Australia). 3. Maori (New Zealand people) – Land tenure. 4. Native peoples – Legal status, laws, etc. – Canada. 5. Indigenous peoples – Legal status, laws, etc. – Australia. 6. Maori (New Zealand people) – Legal status, laws, etc. I. Knafla, Louis A., 1935- II. Westra, Haijo Jan, 1947- III. Series: Law and society series (Vancouver, B.C.)

KE7739.L3A265 2010

346.7104'3208997

C2010-900142-7

KF8224.L2A265 2010

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Aid to Scholarly Publications Programme, using funds provided by the Social Sciences and Humanities Research Council of Canada.

UBC Press
The University of British Columbia
2029 West Mall
Vancouver, BC V6T 1Z2
www.ubcpress.ca

Contents

INTRODUCTION

“This Is Our Land”: Aboriginal Title at Customary and Common Law
in Comparative Contexts / 1

Louis A. Knafla

Part 1: Sovereignty, Extinguishment, and Expropriation of Aboriginal Title

- 1** From the US Indian Claims Commission Cases to *Delgamuukw*:
Facts, Theories, and Evidence in North American Land Claims / 37
Arthur Ray
- 2** Social Theory, Expert Evidence, and the *Yorta Yorta* Rights Appeal
Decision / 53
Bruce Rigsby
- 3** Law’s Infidelity to Its Past: The Failure to Recognize Indigenous
Jurisdiction in Australia and Canada / 85
David Yarrow
- 4** The Defence of Native Title and Dominion in Sixteenth-Century
Mexico Compared with *Delgamuukw* / 100
Haijo Westra
- 5** Beyond Aboriginal Title in Yukon: First Nations Land Registries / 108
Brian Ballantyne

Part 2: Native Land, Litigation, and Indigenous Rights

- 6** The “Race” for Recognition: Toward a Policy of Recognition of
Aboriginal Peoples in Canada / 125
Paul L.A.H. Chartrand

- 7** The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison / 146
Kent McNeil
- 8** Common Law, Statutory Law, and the Political Economy of the Recognition of Indigenous Australian Rights in Land / 171
Nicolas Peterson
- 9** Claiming Native Title in the Foreshore and Seabed / 185
Jacinta Ruru
- 10** Waterpower Developments and Native Water Rights Struggles in the North American West in the Early Twentieth Century: A View from Three Stoney Nakoda Cases / 202
Kenichi Matsui
- CONCLUSION
Power and Principle: State-Indigenous Relations across Time and Space / 214
Peter W. Hutchins
- Acknowledgments / 229
- Selected Bibliography / 230
- Contributors / 249
- General Index / 253
- Index of Cases / 262
- Index of Statutes, Treaties, and Agreements / 265

Aboriginal Title and Indigenous Peoples

INTRODUCTION

“This Is Our Land”: Aboriginal Title at Customary and Common Law in Comparative Contexts

Louis A. Knafla

The history of Aboriginal (Native) title is one of the most significant topics of legal-historical scholarship. The commonality of the chapters that comprise this book is that they explore the issues of Aboriginal title in relatively similar time frames and under comparable common law regimes.¹ Conflict over land between indigenous peoples and colonizers took place in the second half of the nineteenth century in all three regions: the western half of Canada, Australia, and New Zealand. Although each region developed differently, the issues remained the same to the end of the twentieth century and beyond as Aboriginals faced mass immigration and institutional and ideological intolerance. These issues included how the land was settled, what use could be made of it by whom, what rights Aboriginals had at customary and common law, how their voices were made known by word and action, how their title was expropriated and extinguished, who spoke for whom in this process, and the consequences of the legal disputes and settlements that emerged. From the 1760s on, an era of confrontation over Native rights and title has been in play in all three countries. Promoting special relationships, shared power, and self-determination, Aboriginals have become proactive in regaining their status as distinct peoples. Although they have gained citizenship since the 1970s, their political rights are still fragile and subordinate to the crown.

As noted Aboriginal rights lawyer Peter Hutchins has explained, in Canada Native-state conflicts over rights and interests in land are fought in the courts, where history and state power often come into conflict and where there is a notion that the crown can do no wrong.² The role of the crown, however, has not been consistent. It has acted both as protector and as destroyer of Aboriginal rights; it has treated with some indigenous peoples and not with others; and it has used natural and international law, as well as common law, to serve its political interests of the moment.³ Prime Minister Pierre Trudeau stated in 1969 that there was neither Aboriginal title nor rights; indigenous or non-indigenous, we are all Canadians.⁴ In the *Calder*

case, which Hutchins suggests was the beginning of our “Thirty Years War” in 1973, the Supreme Court of Canada (SCC) held that Aboriginal peoples have rights, but half of the judges stated that they had been extinguished.⁵ Later, in the 1990s, the crown recognized that not all of those rights had been extinguished and that it had an obligation to negotiate Aboriginal land claims in good faith.⁶ Negotiations, however, have been troublesome, and litigation has been hugely time consuming and expensive. Problems of recognizing national and provincial borders, interpreting old proclamations and treaties, and accepting oral history as proof have complicated the litigation process. The congested and costly cases that have ensued, with long lists of witnesses and expert witnesses, have placed the burden of change in the hands of courts not wholly adept at dealing with such issues.

The chapters in this book contribute to the analysis, dialogue, and understanding of Aboriginal title in these three British regimes within a comparative context that has been developed in major studies of the past decade,⁷ in the volumes of essays on indigenous peoples’ rights edited by Paul Have-
mann in 1999⁸ and by Benjamin Richardson, Shin Imai, and Kent McNeil in 2009,⁹ and in the major detailed history of Aboriginal sovereignty and status in British settler colonies by Paul McHugh in 2004.¹⁰ This introductory chapter simply prepares the reader for the issues that are discussed by the authors in the following chapters and introduces the major themes that each author brings to the study of Aboriginal title in Australia, Canada, and New Zealand, with reference to those issues in the United States.

This introduction is organized as follows. First, it defines the history of Aboriginal title at customary and common law, from pre- to postcontact eras, including major cases in all three countries. Second, it summarizes the major themes in each of the chapters, which are divided into two parts: “Sovereignty, Extinguishment, and Expropriation of Aboriginal Title” and “Aboriginal Land, Litigation, and Indigenous Rights.” Third, it brings those themes together in their comparative contexts and concludes with the voices of the indigenous peoples who are at the centre of the battleground in these legal contests and whose lives have the most to gain or lose from the outcomes.

Australia

The term “*terra nullius*” (“land without owners”), at the centre of concepts of imperial sovereignty that denied Native title in the nineteenth century, was not actually part of Australian legal discourse until the twentieth century, but that in fact was how the continent was treated.¹¹ Some would argue that this treatment was part of a historical accident. When Captain James Cook sailed up the east coast of Australia in 1770 with Sir Joseph Banks, Banks thought that the few Aborigines he saw had no economic enterprise and that most of the continent was uninhabited. But when Cook considered a settlement at Nootka Sound on the west coast of what is now British

Columbia in 1790, he saw commercial possibilities and said that he must have agreements with the Natives.¹²

The *Mabo* and *Delgamuukw* cases have set the framework for litigating Aboriginal title in Australia, Canada, and New Zealand.¹³ In *Mabo v. Queensland (No. 2)*, decided in the High Court of Australia (HCA) in 1992 after a decade of litigation, Eddie Koiki Mabo was a Torres Strait Islander who fought for the premise that the Meriam people in the Murray Islands had a system of land ownership before European colonization.¹⁴ European settlers saw Melanesian fishers and gardeners as hunters rather than occupiers. Although Queensland enacted legislation that purported to extinguish the land rights of Torres Strait Islanders, that legislation was held invalid in *Mabo (No. 1)* in 1988 because it conflicted with the *Racial Discrimination Act* (1975) as well as Australia's ratification of the *United Nations Convention on the Elimination of Racial Discrimination*.¹⁵ Although Mabo died just before the court's verdict, no compensation was awarded. The order of the court by Chief Justice Brennan (who gave one of five opinions) was that the Meriam people are entitled to possession, occupation, and use against the whole world – which established a new template for Aboriginal land rights.

According to Henry Reynolds, the noted scholar who discussed the history of the islanders with Eddie Mabo from the late 1970s on, the decision was a legal revolution.¹⁶ It was tempered, however, by the court's opinion that, although the Meriam people had the authority to possess and use the islands, Queensland had the right to extinguish their title as long as the state adhered to the laws of the Australian Commonwealth.¹⁷ It is interesting to note that the *Mabo* case was influenced by Canada's *Calder* case of 1973. Lawyers from the two countries exchanged views and arguments. Justice Blackburn cited the Court of Appeal decision in the *Calder* case in denying title in *Milirrpum v. Nabalco Pty. Ltd.*,¹⁸ but the HCA cited the SCC in overruling Blackburn's judgment as "wholly wrong" in *Mabo (No. 2)*. Conversely, when the SCC decided the *Delgamuukw* case on appeal, it cited *Mabo (No. 2)*.¹⁹

In the nineteenth century, as Aborigines continued to be denied rights to real property in Australia, British colonial officials such as James Stephen were able to secure their right to testify in criminal cases as British subjects even if they had to disallow state legislation to the contrary.²⁰ This small window of opportunity – recognizing Aborigines as "persons," as British subjects and not indigenous peoples with their own sovereignty and full equality – lasted only a few decades throughout the British Empire from the 1820s to the 1850s.²¹ But even here the evangelical Aborigines Protection Society was unable to see Aborigines as indigenous peoples. Thus, settlers, under the cloak of law and order in the second half of the century, decimated the Aborigines and enclosed the survivors in "stations" across the continent under the guise of "protection."²² Between 1897 and 1910, the various states brought in protection legislation in the belief that Aborigines would soon

die. By the late 1930s, it was clear that they would not, and thus a policy of assimilation was adopted that became state policy until the political resistance of the late 1960s.

The state's legal recognition of Aboriginal title in Australia, post-*Mabo*, depends on proving traditional laws and customs. This proof, however, as Kent McNeil explains, is onerous: one must prove use, laws, and customs continuously, and customs have to be translated into rights in law. There is also no room for expanding those rights for commercial purposes (as in mining or the discovery of oil and gas) or for self-government. The *Mabo* decision was followed by the *Native Title Act* of 1993 that validated previous land grants and authorized the states to do the same. It also established a National Native Title Tribunal to mediate application by Aborigines to recognize their title and an Indigenous Land Fund to provide compensation where their title had been extinguished. The crown, however, remains supreme as it can over-rule decisions of the tribunal.²³

In *Wik Peoples v. Queensland* (1996), the HCA held that Aboriginal title was not necessarily extinguished by pastoral leases.²⁴ Afterward, the federal government's Ten Point Plan of 1998 provided for the coexistence of Native title and pastoral leases with processes for settling Native title claims in the states.²⁵ But in *Western Australia v. Ward and Others* (2002), the High Court held that the *Native Title Act* mandated partial and permanent extinguishments of Aboriginal title.²⁶ Given over 500 communities and 170 language groups (Aborigines comprise some 2 percent of the population),²⁷ Native title law remains central to Australia's recent legal history.²⁸

Many other issues involving Aboriginal title, however, have remained unresolved. Some of these issues have been litigated in cases after *Mabo* and *Wik*. For example, in *Fejo v. Northern Territory* in 1998, the High Court held that Native title had been extinguished totally and forever by grants of freehold title.²⁹ In *Yanner v. Eaton* (HCA 1999), the right of Aborigines to control their resources, as in hunting, was upheld as part of their property rights even though it was regulated by the state.³⁰ In *Commonwealth v. Yarmirr* (HCA 2001), called the "*Mabo* of the seas," Native title rights to the seabed out to twelve nautical miles was confirmed but not to the extent of exclusive possession and use, which would conflict with the sovereignty of the state.³¹ In *Western Australia v. Ward* (HCA 2002), the process for adjudicating interests in land that extinguish partially or fully Native title under the *Native Title Act* was clarified.³² Holding that indigenous and non-indigenous interests could coexist, and pleading for negotiated settlements to resolve such issues, the court also reversed earlier rights won by the Miriuwung Gajerrong and allowed the extinguishment of title rights considered "inconsistent" with traditional rights created by crown grant.³³ Unlike in Canada and New Zealand, Aboriginal customs in Australia were superseded in part by the expansion of public commercial rights.³⁴

This situation set the stage that year for the *Yorta Yorta* decision, which has been thoroughly explored by Bruce Rigsby, in which the HCA held that an interruption or discrepancy in the history of an Aboriginal group's law or custom could be fatal to its title. The extent to which a group had the continuity necessary for a successful claim was addressed by the Federal Court of Australia (FCA) in *De Rose v. South Australia (No. 2)* in 2005, in which a short absence coupled with intimidation did not extinguish non-exclusive rights.³⁵ This case was influenced by *Neowarra v. Western Australia* (FCA 2003-4), in which the court upheld a mixture of exclusive and coexisting rights of several indigenous groups over 7,226 square kilometres from a wide range of anthropological, archaeological, genealogical, and historical evidence supporting the existence of a normative system for a broadly constructed group.³⁶

Following *Mabo*, the government of Australia created an Aboriginal land fund to enable Aborigines to buy back their land, funded Native litigation, and created land use agreements between Aborigines and settlers. As Nicolas Peterson explains in this volume, the courts have become more useful as forums where Aborigines can tell their stories and influence government policies through the public arena. The *Mabo* case brought the courts into the mainstream of developing Native title law by recognizing that Native title had always existed when identified by a group who could prove their uninterrupted use of the land through laws and customs. Numerous cases after *Mabo* explored those parameters. But the *Native Title Act* of 1993, which allowed the Commonwealth to enact legislation affecting Native title, brought statutory law into conflict with common law just as it had in early modern England before the rise of parliamentary sovereignty. The act and its amendments gave legislative validation to the dispossession of Aborigines and restricted the meaning and value of their title. The results, however, have been mixed. As Lisa Strelein has found, from 2002 to 2005 more than fifteen court decisions in Australia have confirmed Aboriginal title.³⁷ This situation bears testimony for the need to resolve outstanding claims.

Canada

The pre-Confederation treaties in Canada were mainly "pacts,"³⁸ emanating from a century of relatively symbiotic relations and recognizing Native customs of peaceful coexistence. Confederation brought First Nations under the control of the dominion.³⁹ The second generation of treaty-making in the 1870s was due largely to conflict, in particular the Riel Resistance of 1870. The resistance led to the *Manitoba Act* and Métis scrip policy. Natives took the initiative for negotiating the treaties. Framed in narrow terms, with much that was said left unwritten, the eleven numbered treaties of 1871-1921 were first for peace and settlement in western regions and later for resource development in the north.⁴⁰ They were honoured by a policy of

neglect that complemented John A. Macdonald's "National Policy." Most Natives, however, did not know that title to their lands was being expropriated.⁴¹ After the *Constitution Act* of 1867, they were reduced to subjects and wards of the state. In *St Catherine's Milling and Lumber Co. v. The Queen* (1888), the Judicial Committee of the Privy Council (JCPC) held that Aboriginal title came only at the pleasure of the crown and indeed could be taken away at any time.⁴²

By the end of the nineteenth century, all Native affairs were under settler-state control in the guise of protection and assimilation.⁴³ Settler demands for land, coupled with the rise of nationalism, compromised Aboriginal rights across British North America and Australasia as settler-states sought to turn communal and collective rights into individual ones pertaining to subjects of federal states. As First Nations in Canada were reduced to "bands," and limited to reserves, their title became dependent on federal legislation. The comprehensive *Indian Act* of 1876 – as amended from time to time – excluded the Inuit, Métis, and non-status Indians, criminalized many Aboriginal customs, eroded reserve lands, and precluded self-government. In 1927, an amendment even prohibited raising money and paying legal counsel to pursue Aboriginal land claims.⁴⁴ The repeal of this restriction in the 1951 revised act enabled suits for Native title, resulting in *Calder v. Attorney-General of British Columbia*, which concluded in 1973 with the SCC holding that Aboriginal title existed in Canadian law whether or not it had ever been granted. As McNeil has argued, Canadian courts avoided specifying the precise origins of Aboriginal title, agreeing on its existence based on historical occupation and possession.⁴⁵ This right was enshrined in section 35(1) of the *Constitution Act* of 1982 as a territorial right of exclusive collective control⁴⁶ and advanced in the 1996 report of the Royal Commission on Aboriginal Rights that recommended a new royal proclamation promoting treaties with Aboriginals as First Nations, legislation to facilitate land claims settlements, and recognition of their governments.⁴⁷

The *Calder* case allows the courts to consider First Nations as political groups with their own legal systems and the right to seek remedies from the crown for failure to perform its obligations. It led to the Quebec agreement with the Cree for the development of the James Bay hydro complex in 1974 and formed the genesis of the dominion's comprehensive claims policy.⁴⁸

In British Columbia, there was no attempt by the Colonial Office to control First Nations. Governor James Douglas recognized Aboriginal title in the 1850s. But later governors and commissioners happily removed Natives from their land, a situation that was not improved in the terms of union.⁴⁹ After entering the dominion in 1873, Natives in British Columbia were brought under state control as in the rest of North America and Australasia. In *Delgamuukw v. British Columbia*, the SCC held that practices precede customs

and traditions, that British sovereignty was limited by Aboriginal title, and that this title was in a special class and vested in the community. The appellant, Delgamuukw, known as Earl Muldoe, was joined by members and representatives of the Gitksan and Wet'suwet'en "houses." They represented some 7,000 Natives over portions of 58,000 square kilometres in the Hazelton area from before c. 2000 BC who were appealing the Supreme Court of British Columbia's (SCBC) denial of their Aboriginal title.

The decision, given on 11 December 1997, concluded a decade of litigation by accepting much of the oral history of the Gitksan and Wet'suwet'en people that was corroborated by expert witnesses.⁵⁰ These witnesses were crucial to the court, and for legal context Chief Justice Antonio Lamer made repeated references to McNeil's *Common Law Aboriginal Title*. The role of experts, such as some of those who have written chapters for this book, was acidly noted by opponents of the decision: the court "was swayed by the sophistry of the Royal Commission on Aboriginal Peoples and its coterie of like-minded academics."⁵¹

The SCC reviewed the legal history of the region from the Royal Proclamation of 1763 to the *Constitution Act* of 1982, superior court cases from *Calder v. Attorney-General of British Columbia* (1973) that explored the nature and scope of the constitutional protection for common law Aboriginal title, and the original and interim cases before the BC courts. Thus, SCBC Justice Allan MacEachen's view in 1991 that Aboriginal rights exist at the pleasure of the crown, and can be extinguished whenever the crown wishes, was struck down in a case that cost \$25,000,000 – a small sum today.⁵² The special oral histories that the court gave credence to for proving uninterrupted usage were the *adaawk* and *kungax* stories to which MacEachen gave no independent weight. Chief Justice Lamer wrote that Aboriginal title is not limited to traditional uses, although there is an inherent limit that prevents land from being used in ways that are incompatible with its original usages, which predate the British crown's declaration of sovereignty in the *Oregon Boundary Treaty* of 1846. Those rights, however, may be infringed by provincial and federal governments when justified by general economic development, protection of the environment, infrastructure, and settlement. Such infringements, however, must receive compensation because of the economic element contained in Aboriginal title.

The *Delgamuukw* decision left indigenous groups in Canada in a similar situation as those in Australia. Justice Lamer, by holding that Aboriginal title was present in both English common law and Native custom, placed the onus of proof on Natives who never assented to the view that the underlying title to their land resides in the crown. The proof of Aboriginal title had to be made in British terms, had to be reconciled with an alien crown sovereignty, and even then was subject to the economic and social needs of the state.⁵³

Faced with the “inconvenient truths” of a foreign legal system and sovereign power that litigate and legislate on their behalf, first peoples in both countries must become more aggressive and vigilant to assert their customary rights. There has been progress, however, as witnessed in the successful litigation of the Haida Nation, where the SCC in a unanimous decision on 18 December 2004 held that the crown must recognize the potential existence of Aboriginal title to the lands and waters of Haida Gwaii, must not make unilateral decisions on land transfers, and must consult on Aboriginal rights even if title has not been proved.⁵⁴ On the same day, the SCC upheld similarly on appeal for the Taku River Tlingit First Nation, where the duty to consult was met.⁵⁵ In both cases, the governments of Canada and various provinces had intervener status on behalf of British Columbia.

The situation of Aboriginal title in Canada today, however, is still problematic as First Nations struggle both to secure it and to benefit from its alleged attributes. With some forty politically autonomous and eleven language groups, they comprise – including Indians, Inuit, and Métis – approximately 3 percent of the population.⁵⁶ On the western shores of British Columbia, for example, south of where *Delgamuukw* arose, the Musqueam Nation, at the mouth of the Fraser River, has gained land holdings in Vancouver from land claims settlements that make it one of the wealthiest Aboriginal groups in the country, yet its people are among the poorest Natives in the province and locked in internal conflict. South of Vancouver, the treaty signed by the Tsawwassen Nation that was ratified by Parliament in June 2008 will allow the provincial government to construct a megaport as part of the Pacific agenda for Asian trade. The port is opposed by “resident” Natives of that nation and by the president of the BC Indian Chiefs, and annual cash payments to band members – most of whom live outside the reserve across North America – will result in the majority of the proceeds being sent out from the reserve. The plan has also led to suits filed by municipalities, which claim that their land has been expropriated without their consent.⁵⁷ Thus, for some participants, the benefits of economic development rights and political self-government appear to be illusionary. Although court decisions have broadened the concept of Aboriginal rights that has spurred land claims agreements, the problems that gave rise to those suits continue. But as Peter Hutchins has observed, it may be through court supervised mediation that Native claims in Canada may find the most amicable forum for resolution.

New Zealand

New Zealand was founded as a colony under the *Treaty of Waitangi* in 1840, and the Māori ceded suzerainty (*kawanatanga*) to the British crown, while their chiefs retained local authority. The British interpreted their authority as sovereignty, which was not how the Māori understood it. English law was

applied selectively in the middle decades of that century, allowing local custom to prevail. This discretion was upheld in *R. v. Symonds* (1847) and confirmed by the *Constitution Act* of 1852 that followed British colonial practice in the Australian and Canadian colonies. The act provided for crown sovereignty in the face of *de facto* tribal authority and allowed the crown to extinguish Aboriginal title.⁵⁸ The wars of the 1860s, however, necessitated some resolution of Māori land claims. A Land Court was created in 1865 to individualize their land holdings with a moral obligation to protect their rights, but the *Native Land Act* of 1873 furthered the process of fragmenting them.⁵⁹ Finally, in the *Wi Parata* case of 1877, the Supreme Court considered Aboriginals incapable of making treaties. The JCPC disapproved of the decision, which disapproval the New Zealand courts ignored.⁶⁰ As a result, the *Native Land Act* of 1909 stated that customary title existed only at the pleasure of the crown.

Since then, the Māori have the Waitangi Tribunal to act on their behalf in ruling on treaty rights – protected ostensibly by the Māori Land Court. When enhanced powers were given to the tribunal in 1975, and the High Court held in *Te Weehi v. Regional Fisheries Officer* (1986) that customary rights below the high-water mark were not extinguished, the *Calder* case was considered influential.⁶¹ Citing US, Australian, and especially Canadian cases, President Robin Cooke, later Lord Cooke of Thorndon, held in the Court of Appeal for *Te Runanga o Muriwhenua* that the rights of the Māori are not “less respected than the rights of Aboriginal peoples ... in North America.”⁶² Since then, the courts have focused more on recognizing the laws of separate societies under New Zealand common law, leaving the exercise of customary rights to face-to-face negotiations.⁶³ Thus, although the Waitangi Tribunal became a permanent commission under the *Te Ture Whenua Māori Act* of 1993, the government has tried to bring closure to the era of Aboriginal claims.⁶⁴ Customary entitlements are customary rights that now must be negotiated along the lines of comprehensive settlements in Canada, although more recently the New Zealand Parliament has extinguished some Māori rights to the foreshore and seabed.⁶⁵

The Māori are a significant people in New Zealand, being with the Pākehā one of the two founding Aboriginal cultures, traditional and modern, in New Zealand. Māori is one of the two official languages, and the people comprise thirty-six to forty-three tribal groups and almost 13 percent of the country’s population.⁶⁶

Since New Zealand was one of the last temperate coastlands colonized by the British in the 1840s, the recent experiences of imperial authority as seen in Westminster were more persuasive in recognizing Aboriginal rights in New Zealand than in British Columbia. Both the *Mabo* and the *Delgamuukw* decisions on Aboriginal title to land factored in New Zealand’s Court of Appeal decision on Aboriginal title to the seabed. The Māori, like numerous

indigenous groups in Australia and Canada, depend on the sea for their material and spiritual welfare. But the courts until 2003 held that Aboriginal title to the seabed had been extinguished by the assertion of crown sovereignty in 1840. Thus, when the Court of Appeal in *Ngati Apa v. Attorney-General* (2003) allowed the Hapu group to prove their customary ownership of the foreshore and seabed (going back to an earlier precedent set in 1847), Chief Justice Dame Sian Elias cited recent Australian and Canadian decisions. If there were customary indigenous property interests at the outset, then those interests are part of New Zealand's common law, and "there is no room for a contrary presumption derived from English common law."⁶⁷

Ngati Apa forced the New Zealand government to renounce the court's decision and set in motion a classic English legal battle between common and statute law: the courts versus the legislature. The legislation in 2004 that curtailed Māori title has had a significant effect.⁶⁸ When, in the Northern Territory of Australia, Aboriginal title to the sea was restricted in *Commonwealth v. Yarmirr* (2001), this decision was endorsed in Queensland in the *Lardil* case of 2004, which did not reference *Ngati Apa*.⁶⁹ Therefore, this partial extinguishment of Aboriginal title to the sea in Australia and New Zealand raises an issue that may well be a critical one in Canada, where numerous indigenous groups such as the Haida have similar material and spiritual connections with the sea. Amid growing demands to exploit the seabed for minerals, oil, and gas, Aboriginal title claims to the sea may lead to similar battles where title to fisheries has been in dispute.⁷⁰

The United States

Since Aboriginal (Indian) title in the United States is referred to frequently in the following chapters, a short introduction to its history will provide context for the reader. Indian title was based on prior occupation. Many land transfers from Indian nations to settler governments from the early seventeenth century on were legal transfers. At first, these transfers were beneficial to Indians, but then other lands were appropriated. The commerce clause of the US Constitution considered Indian tribes as "other" sovereigns, but they were never defined. The Cherokee Nation and the Iroquois Confederacy were promised statehood in the late eighteenth century, and the *Northwest Ordinance* of 1787 spoke of honouring the lands of first peoples. After the 1780s, their lands were taken indiscriminately by settlers. An important point, often lost, is that Chief Justice John Marshall's "discovery doctrine" in *Johnson v. McIntosh* (1823) unintentionally allowed settlers in the southern states to use that doctrine to claim lands of indigenous peoples, a device that they continued to use even after Marshall reversed himself in *Worcester v. Georgia* (1832).⁷¹ Marshall had rejected British policy for the "residual sovereignty" of the founding fathers of the Constitution.

The *General Allotment Act* of 1887 (the *Dawes Severalty Act*) changed the landscape for Indians. Designed to extinguish tribal sovereignty, and erase the reservation boundaries by allotting communal land to families and promoting assimilation, it led to large divestitures of indigenous land and increased poverty and was repealed in 1934. The thirst for land in manifest destiny drove Indians west in diminishing numbers and with deleterious effects.⁷² Thus, treaties were framed in broad terms to destroy their culture, force their adoption of settler culture, and transform them into Christian “yeoman farmers.” The plains Indians, equestrians with a good supply of firearms, emboldened their opposition to making the red man white, and the resulting Indian wars devastated them.⁷³

A turning point did not come until the *Indian Reorganization Act* of 1934 (*IRA*), which empowered first peoples by endorsing self-government. Although the goals of the *IRA* were curtailed with the Hoover Commission report of 1949, which recommended full assimilation, President Lyndon Johnson reversed this policy in 1968 to sponsor indigenous self-determination as “First Americans.”⁷⁴ Later legislation enabled terminated treaties to be restored and allotments reversed. In 2000, Indian tribes were granted rights of self-government, but Congress retained the right to expropriate their lands without compensation unless their title is recognized.⁷⁵ Recent decisions of the US Supreme Court (USSC) have made dependency on the federal government “more devastating than colonialism.”⁷⁶

Since land rights are connected to sovereignty, Indian tribes are drawn into the legislative sphere. Thus, when an Alabama case arose in 1951 after the first expiration of an Indian Land Claims Commission five-year statute of 1946, the tribes went to Congress, which passed an act to extend the statute that enabled Indians to prove in court possession of sovereignty and title that had not been extinguished before 1845. They ended up with 2.4 million acres.⁷⁷ However, given that the USSC holds that Natives comprise “quasi-sovereign” domestic dependent nation-states, what is needed, according to Rebecca Tsosie, is for Natives to assert control over their own stories and present themselves to the courts as sovereign peoples.⁷⁸ A prime example is William Lewis Paul of Fort Simpson, British Columbia, who, while the Nisga’a were fighting for their title, fought for the *Tee-Hit-Ton Indians v. United States* in the USSC, which held that Indian title in Alaska had not been extinguished by the *Alaska Purchase Treaty* of 1867.⁷⁹

There are two remaining problems, however. The first problem is jurisdiction. Of the 560 Native tribes and villages in the fifty states, some are not recognized federally or by the state, some have “Indian” identity but no legal standing, and there are no consistent models of self-government. The second problem is process. Although the interests of Indians are recognized, the means of promoting those interests are slow, burdensome, legalistic,

and underfunded.⁸⁰ Indians in the United States are in a very contested space.⁸¹

Common Law and Aboriginal Custom

Aboriginal title was discussed formally by European canon lawyers in the sixteenth century. In the great debate between Bartolomé de Las Casas and Juan Ginés de Sepúlveda at Valladolid in 1550-51, the latter won the debate for the Spanish policy of conquest over Native sovereignty. As a result, over a million Aborigines were slain on the Caribbean Islands, and by the end of the nineteenth century over 94 percent of all Aborigines in the Americas had died as a result of war or disease.⁸² Many English writers in the seventeenth century saw indigenous societies of the Americas as civilizations having economic systems, political organization, and military power.⁸³ As local inhabitants, Aborigines also had status at English law. In England, though one could sue at Westminster Hall in the central courts of both common law (Common Pleas, Exchequer, and King's Bench) and equity (Chancery and Admiralty), it was in the customary and statutory local courts in towns, ports, boroughs, and counties where most litigation took place.⁸⁴ This amalgam of legal traditions was a separate sphere, called customary or municipal law, and was understood by the phrase "the custom [or course] of the common law."⁸⁵ Comprising sublegal cultures, customary law gave a quintessential pluralistic basis to English law⁸⁶ and was not dissimilar from the local law practised in the colonial courts of England's colonies. Colonial judges in the communities knew of Sir Edward Coke and William Blackstone and may have read some of their works. But in court, they often recited, as did their English contemporaries, from personal copies of Richard Burns's *Justice of the Peace*, in which municipal law and its formularies were prevalent.⁸⁷

European states enforced their will on indigenous peoples on the basis of the international law of conquest.⁸⁸ The classic argument was posed in the early seventeenth century by the author of modern international law, Hugo Grotius, in his "just war" theory. According to Grotius, a conquest replaced the former political state with that of the conqueror, making previous rights extinct. Monarchs must have absolute power, and the rights of the conqueror must be unlimited.⁸⁹ This concept was a reiteration of the Spanish concept of a "holy war" derived from the medieval Crusades and used to justify the conquest of Mexico in the sixteenth century. Conquest, colonization, and confiscation were based on natural and divine law.⁹⁰ Later a revisionist argument was made by Samuel Pufendorf, who held that, though states must accept the results of war, they were not bound by "unjust wars."⁹¹ His position was based on the earlier writings of Francisco de Vitoria, who argued that Amerindians had princes, rights, and duties that could not be abrogated

without careful scrutiny.⁹² Pufendorf's position was expanded in the Enlightenment by Jean-Jacques Rousseau, who argued in his *Social Contract* that unjust treaties or wars did not settle questions of rightful possession. Wars were between states.⁹³

The major writer of the Enlightenment on this question was Emmerich de Vattel. Agreeing with Rousseau on the limitations of conquest, he went on to discuss how positive law did not distinguish between just and unjust wars. The laws of war protected the rights of individuals as well as the rights of states, and he accepted the law of prescription (title held uninterrupted for a long time) as well as that of conquest. Since international law demanded stability, the results of wars had to be observed. Thus, the victors had to enter into treaties with those who were defeated, and the terms of treaties were indisputable facts that had the force of law.⁹⁴ This practice led to a Eurocentric positivist school of international law in the nineteenth century, justifying the dispossession of all indigenous peoples.⁹⁵

According to Sidney Harring, "in tribal society, culture, law and politics are an indivisible part of the whole life of a people."⁹⁶ As European society's relationship with tribal society was colonial and imperial, Europeans influenced the institutions of indigenous peoples. Tribal law became more centralized, moving from the level of the community to that of the tribe or tribal nation. Sovereignty became critical for their own protection and for their negotiations with neo-European bodies. As Harring explains, their legal culture became deeply entwined with tribal sovereignty, and notions of law and legality became more deeply engrained in their culture.⁹⁷

The key to British acceptance of indigenous law was proof of its continuity over time: the peoples' identities, territorial foundations, and judicial precedents. In the imperial (presettlement) period, local municipal laws were accepted as an early concept of legal pluralism. Coke said that England and its possessions were governed by their municipal (internal) laws.⁹⁸ The legal rules governing their interactions were derived from the "law in dominions," later called the law of empire or imperial law.⁹⁹ Since most of the law's principles were from custom and judicial precedent, not statutes or prerogative law, it was an "imperial common law."¹⁰⁰ In countries uninhabited by Europeans, settlers had their municipal laws by "birthright," parallel to the local customs of indigenous peoples.¹⁰¹ This arrangement led to the common law doctrine of Aboriginal rights.¹⁰² But in inhabited countries taken by conquest, the Eurocentric school of legal thought applied, and local law was in force only until altered or abrogated by the crown.¹⁰³

The first test of indigenous law in what would become the Canadian colonies was Rupert's Land, an immense territory drained by waters flowing into Hudson Bay that was granted to the Hudson's Bay Company (HBC) by a royal charter of 1670. According to the charter, the law of this land was

the law of England insofar as it applied to those people who did not live under the authority of other previously established nations in the region.¹⁰⁴ In practice, the company accepted the rule of Aboriginal law for the domestic concerns of Native people.¹⁰⁵ In fact, the economic and diplomatic protocols established by the HBC and First Nations were carried over into the numbered treaties of western Canada. Such usage was confirmed much later when the Court of Queen's Bench of Quebec upheld Native customs as they applied to actions of HBC employees.¹⁰⁶ This usage was also upheld later by the Supreme Court of the North-West Territories.¹⁰⁷

Meanwhile, in the United States, the conquest theory prevailed and was found in Chief Justice Marshall's judgment that Indian title could be extinguished by conquest.¹⁰⁸ Marshall, citing *Vitoria* and buttressed by the European concept of discovery that was diminishing the sovereignty and land rights of Indian nations, held that Indian tribes had minimal sovereignty as "domestic dependent nations" that had been incorporated into the United States and thus allowed the federal government to extinguish their title.¹⁰⁹ This view became legal orthodoxy in the famous Cherokee Nation's cases of 1831-32.¹¹⁰ "Civilizing" the "barbarians" was a European doctrine that became part of the American concept of "manifest destiny" in subsequent decades that stretched across the Great Plains to the California and Oregon Trails.¹¹¹ The extension of federal power over Amerindian culture, law, and land, and congressional allowance of acts to override treaties, marked the republic's "new colonialism" in the second half of the nineteenth century.¹¹²

What, then, is indigenous law or Aboriginal jurisprudence? It is often based on knowledge derived from Aboriginals' Creator or "Life-Giver," found only in their original language, and handed down through the generations by oral tradition. Derived from the family and the community, indigenous law states that there is no sovereign or political state but "a normative vision, a product of shared thoughts and consciousness, of a community's beliefs and imagination."¹¹³ First peoples are bound by covenants with the Creator for their land and its uses and have a harmonious relationship with their environment, which, with its life forms, is seen as interrelated sacred spirits comprising the essence of all life. Thus, "laws" are coincidental, expressed in circles by those who can remember and perform them in speech and music. Sound, sight, smell, and touch are the candles of illumination of the law.¹¹⁴ And those candles still flicker in areas of indigenous communal life such as marriage, adoption, wrongdoing, trespass, hunting, and fishing.

Aboriginal customary law has many similarities with English common law. Both originated with laws made by "folk" lawmakers, communal courts as lawgivers, oral testimony, and judges telling stories of the past as guidelines for their decisions.¹¹⁵ In both Australia and Canada, if not in New Zealand, several contemporary common law judges have concluded that

their recognition of Aboriginal customs and laws is a “golden thread” that runs through their history of Euro-Aboriginal relations. Ambiguous as this may be,¹¹⁶ Lord Ellesmere’s declaration in *Calvin’s Case* (1608) that all local laws and customs of peoples who came under English sovereignty were recognized as part of the common law when that sovereignty was claimed has not been reversed.¹¹⁷ This view represents the extent to which “law ways” (the hearing and resolution of disputes) in modern civil and common law societies denote the legal pluralism that accepts diverse legal institutions.¹¹⁸ It also reflects a revival of indigenous legal traditions in the courtrooms of postcolonial societies.¹¹⁹ This is the kind of juridical context that allowed Justice Brennan in *Mabo (No. 2)*, and Chief Justice Lamer in *Van der Peet*, to hold that Aboriginal title did not require executive or legislative recognition as long as it existed prior to contact.

Sovereignty, Extinction, and Expropriation of Native Title

Arthur Ray’s chapter in this volume, “From the US Indian Claims Commission Cases to *Delgamuukw*: Facts, Theories, and Evidence in North American Land Claims,” posits the view that establishment of the Indian Claims Commission (ICC) by the US Congress in 1946 marked the beginning of the modern Aboriginal and treaty rights claims era. The commission acted as a catalyst for the development of a multi-sourced and interdisciplinary approach to Native history in North America that became known as “ethnohistory.” From the early 1950s on, the development of ethnohistory has been strongly influenced by research undertaken for land claims purposes, where land tenure systems, politics, and economics rather than “primitive cultures” were critical factors. In turn, this applied field has had an impact on the development of case law and adjudication procedures. Ray, who studied under one of the prominent historical geographers, shows how research undertaken for early ICC land claims shaped the subsequent development of ethnohistory and, as a result, strongly influenced the evidence and interpretations that experts presented in the *Delgamuukw* trial in Canada over thirty years later – a case in which Ray was a critical expert witness.

Prior to the ICC era, anthropologists assumed that indigenous cultures were static until European contact. The federal research funding provided by the ICC enabled detailed local research to identify and define tribal boundaries and to explore how they had changed over the postcontact era. In Canada, where claims research began a quarter century after the ICC, research in the United States had a fundamental influence as many tribes in Canada had close contact with those south of the border. Thus, a historical approach took root in Canada in the early 1970s, the results of which can be seen in the trials of Aboriginal title claims from *Calder* in 1973 to *Baker Lake* in 1980 and *Delgamuukw* in 1987-97. The ethnohistorical research model explores features of Native life that are unique to each group. Such

studies demonstrate that the issues and problems faced in court today are similar to what they were sixty years ago. As Ray has observed, researchers “hold fundamentally different views about the impact that contact had on the core features of Aboriginal societies and cultures,” bringing a debate of continuity versus change in the early contact era to the study of Native peoples across western Canada.

Bruce Rigsby’s chapter, “Social Theory, Expert Evidence, and the *Yorta Yorta* Rights Appeal Decision,” spans a wide range of topics and issues. Rigsby provides a short history of the recognition of Aboriginal land rights in Australia, the evidential parameters for title litigation established in the High Court of Australia’s 2002 *Yorta Yorta* appeal decision, the crucial terms and concepts that anthropologists and lawyers must understand to analyze Aboriginal property rights ethnographically, and an assessment of which of those terms and concepts have been settled, simply acknowledged, or contested. *Yorta Yorta*, heard from 1994 to 2002, rehearsed the unrest of the nineteenth and twentieth centuries over Aboriginal lands in southern Australia and elaborated the evidential requirements mandated by the *Native Title Act* of 1993 (amended in 1998). This decision, which held that the *Yorta Yorta* had “lost its character as a traditional community,” disappointed many people, who saw more potential in the *Mabo (No. 2)* decision for the recognition of Aboriginal title rights and interests. Rigsby discusses the new evidential requirements and places them in the context of the history of anthropological and sociological theory in common law countries.

Critical to this discussion, Rigsby argues, are crucial terms such as “social norms,” “rights in general,” and “rights in particular.” Their proper understanding and use affect the standards and quality of Native title research and expert witnessing. Thus, social, philosophical, and legal theories are essential in deciding rights, and their enforcement, in interests in land. Equally essential is the study of people’s behaviour and action. Proposing a rights-based approach to Native title, Rigsby says that there is too much emphasis on “the spiritual aspect of Aboriginal traditional ownership of land to the disregard and perhaps devaluation of its social and material functions.” Thus, there is an irony in appreciating that the classical method of participant observation in anthropology offers strong evidence yet may not be practised freely in the highly charged social and political situations of land claims. Since Australia never accepted the doctrine of communal title until the legislation of the 1970s and 1990s, claims litigation has hinged on statutory interpretation without the courts’ acceptance of the common law precedents that have held sway in other Commonwealth countries. This situation leaves Australia in the midst of a “history” war in which Aboriginal groups in settled areas try to recover rights that have been extinguished due to their “historical” but not “traditional” status as Aborigines, and expert

witnesses, legal counsel, and judges seem to be relatively uninformed on the traditions, norms, and rights that lay at the centre of Aboriginal title.

David Yarrow's chapter, "Law's Infidelity to Its Past: The Failure to Recognize Indigenous Jurisdiction in Australia and Canada," suggests that, though Aboriginal rights have been recognized in land, they have not been accommodated with jurisdiction. Since English law recognizes public and private property, and as indigenous property is a form of communal custom that was accepted as part of public law into nineteenth-century Britain, it is not surprising that in the United States Aboriginals gained status as "domestic dependent nations" with the recognition of having limited jurisdiction of their affairs. However, in colonial Canada and Australia, though there were early hints of recognizing legal diversity, by the mid-nineteenth century Aboriginal jurisdiction took a back seat to perceived indigenous life in a "state of nature" and an unsuitability to operate any institutions of justice. Presenting deprecating portrayals of indigenous social organization, and intent on separating title from possession, the courts had little knowledge of Aboriginal law in denying its jurisdiction.

Although contemporary Native title jurisprudence in Australia and Canada has departed significantly from colonial norms and premises in their treatment of indigenous property interests, the same cannot be said for the recognition of indigenous jurisdiction. In Australia, Yarrow argues, the court in *Mabo* left the door open for indigenous jurisdiction. This door was quickly closed in *Walker v. New South Wales* in 1994. In Canada, though *Delgamuukw* did not address Native jurisdiction on Aboriginal land, in *R. v. Pamajewon* the SCC denied it. More interesting was *Campbell v. British Columbia* in 2000, where the BC Supreme Court held that the *Nisga'a Final Agreement* included the limited power of jurisdiction and self-government. The long civil law tradition in Quebec has demonstrated, although with some difficulties, that legal systems can coexist. What is needed, Yarrow concludes, is the legal education of lawyers and judges on the indigenous legal norms in Australia and Canada.

As Yarrow notes, "the terms 'Aboriginal title' and 'Native title' are highly evocative" and "immediately presumed to be related," yet, as in public (government) and private (citizens) law, the boundaries are demarcated conceptually but not always clearly. In the eighteenth and nineteenth centuries, colonial legal and judicial authorities did not see indigenous legal systems within the context of English local institutions, where there was a wide diversity of local custom and administration and little separation of public and private law. The conquering Normans accepted the folk rights of the people whom they conquered as the municipal law of the realm as long as they met the test of continuity.¹²⁰ Although there was conflicting case law in both Australia and Canada, by the mid-nineteenth century indigenous

jurisdiction and legal pluralism were displaced by British sovereignty. Thus, both *Mabo* and *Delgamuukw* should be placed within the context of this legal-historical background to reveal the persistence of colonial understandings of the nature of indigenous jurisdiction. History has shown that common law can exist side by side with indigenous law, and our courts and societies must learn to respect indigenous legal norms.

Haijo Westra's chapter, "The Defence of Native Title and Dominion in Sixteenth-Century Mexico Compared with *Delgamuukw*," examines a little-known and only recently rediscovered neo-Latin treatise, *De dominio infidelium et justo bello*, by the Spanish Augustinian and first professor of the University of Mexico, Alonso de la Vera Cruz. This work, from a series of lectures given at the university in 1533-34, provides a defence of Native sovereignty and ownership of the land by a close observer only decades after the conquest. Alonso applied the principles of natural and international law – the *jus gentium* – to defend the Native community's dominion against the conquistadores. Basically, their lands had been unjustly acquired, and the Natives were owed full restitution; sovereignty resided in the Native community. The passage of time and the length of illegal occupation do not alleviate the original injustice: rightful property is inalienable.

Alonso's arguments on behalf of the *populus novi mundi* were repeated in the early seventeenth century when Jesuits in the colony of Maryland were given land by Natives for a mission that was seized by Lord Baltimore in 1641. The Jesuits argued, as European civilians had before them, not only that the indigenous people were the true lords and owners but also that they held title in both private and public law. Earlier Roger Williams had argued against the charter of the Massachusetts Bay Company, holding that the crown did not have title to Native land and had confiscated it without compensation. A comparison with the common law principles in *Delgamuukw* demonstrates that the concepts of full and just dominion and the inalienability of rightful ownership are essential to Aboriginal title and self-government. As argued by Yarrow, title (jurisdiction) and self-government are as inseparable in the twenty-first century as Alonso argued them to be in the sixteenth century. The crown must protect Natives as it does all its peoples. Westra argues that the recognition of First Nations' sovereignty would be our way of restitution. Hence, common law principles are not necessarily incompatible with those of natural law.

Brian Ballantyne's chapter, "Beyond Aboriginal Title in the Yukon: First Nations Land Registries," assesses the evidence that has been derived from visiting nine First Nations in the Yukon and three Inuit communities in Nunavut in 2002-4 and eight territorial and federal administrations. These visits, in conjunction with the collection and examination of documentary and oral evidence, have revealed that land claims agreements are a necessary

but not stand-alone condition to ensure that Native title has some meaning in northern Canada. The study of the resulting land registries, which are presented here, demonstrates that negotiated agreements must include capacity building among local communities as well as the development of mechanisms – such as rudimentary yet appropriate systems of registering rights in land – that allow First Nations and the Inuit to benefit from such rights. For Aboriginals in the Yukon, land is not a commodity but the heritage of their community. As with the Māori in New Zealand, land is inseparable from the water that nourishes it.

Given the decision in the *Powley* case in 2003, that Métis have the legal right to hunt as a historical Aboriginal people, Ballantyne states that mechanisms have been created to register rights in land throughout the country. In the Yukon, there were no treaties until the *Umbrella Final Agreement* of 1993, in which First Nations were given the right to establish a system to record their land interests. This means that First Nations would lose their original title if they registered under the *Yukon Land Title Act*. Since land title registration is growing expeditiously in the region, there is a necessity to create an Aboriginal central registry. The problems of accomplishing this are many, including which principles should be followed, having entire or partial interests, which interests take precedence, who determines and handles the liabilities, and appropriation of the duties and obligations of the crown, Aboriginals, and settlers. Concluding with a prototype, Ballantyne observes that, “without rights in land, registration is not simply unnecessary but impossible.”

Native Land, Litigation, and Indigenous Rights

Paul Chartrand’s chapter, “The ‘Race’ for Recognition: Toward a Policy of Recognition of Aboriginal Peoples in Canada,” holds that Canada, built on the lands of historical First Nations, has long had an “Indian policy” that has dismantled them, causing the disintegration of their social and political institutions. First peoples lobbied for changes in a process of national constitutional reform that led to a constitutional amendment in section 35 of the *Constitution Act* of 1982. This provision recognizes and affirms the rights of “the Aboriginal peoples of Canada” and expressly includes the Indian, Inuit, and Métis peoples. Although all these peoples are now “recognized,” Chartrand argues for a “re-cognition” in negotiated legislation that makes Aboriginal and treaty rights effective to all members of these groups, for whom the common denominator was belonging to a collective rights-bearing community. This recognition is especially important in a country where there is a large increase in persons reporting Aboriginal identity and where the “third generation” of collective human rights has been enshrined in the *UN Declaration on the Rights of Indigenous Peoples* of September 2007.

Who are these peoples? For Natives (“Indians”), blood was not mixed or unmixed; identity came from the community. This identity was recognized clearly by early British explorers, who accepted Aboriginals as a distinct society, original peoples who later saw their historical nations dismantled by colonial governments and many of their brethren disenfranchised from their historical communities. In Canada, after treaties, the federal government ignored the implications of legal recognition, while in the United States Natives were recognized legally as “domestic dependent nations” with sovereign authority to govern themselves at least in principle. Since there has been no “rational legislated policy” in Canada, many Natives were left out of the membership code in the *Indian Act*, according to which daughters who marry outside their reserve lose their status, Métis are excluded, and bands can make their own codes that produce “bandless” Natives. Chartrand assesses the problems of recognition of Natives, Inuit, and Métis, emphasizing their historical “descendant communities,” and the types of rights to which various groups and subgroups should be entitled. A member of the Royal Commission on Aboriginal Peoples, 1991-95, he emphasizes the need to end “the rhetoric of race” and “make clear the distinction between citizenship and Aboriginal rights” for these three distinct Canadian indigenous peoples. Comparatively, while the problem is still elusive in the United States and Australia, it is better informed in New Zealand, where the Māori have a legislated “belonging” to their collective rights and the ability to identify themselves formally or informally without reference to their bloodlines.

Kent McNeil’s chapter, “The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison,” states that there can be no doubt that the content of indigenous land rights is heavily influenced, if not determined, by the source of those rights. This has been confirmed by the significant decisions on such land rights delivered by the SCC and the HCA over the past twenty years. The chapter critically assesses the divergent approaches to indigenous land rights taken by the two courts of final appeal. It suggests that the Australian approach after the *Native Title Act* of 1993, which requires proof of uninterrupted continuity, imposes an overly onerous burden of proof on indigenous peoples, places judges in the difficult position of having to decide which rights arise from systems of law that are outside their cultural experience, and produces unjust results. The Canadian approach of exclusive occupation, though deficient in some ways, is preferable because it is broader, makes it easier to prove Aboriginal title as a proprietary interest, and does not limit its content to traditional land uses.

Three sources of indigenous land rights are examined in this chapter: indigenous legal systems (the doctrine of continuity), evidence of exclusive occupation (the doctrine of common law title), and (more recently from the SCC) traditional rights that are integral to the distinctive culture of the

group. These sources are examined with regard to their efficacy and limitations in light of the case law that has evolved in each country: from Justice Brennan in *Mabo v. Queensland (No. 2)* to subsequent restrictive decisions in *Yorta Yorta*, *Commonwealth v. Yarmirr* (2001), and *Western Australia v. Ward* (2002) in Australia, and from Chief Justice Lamer in *Delgamuukw* and subsequent decisions in cases such as *R. v. Powley* (2003) in Canada. McNeil concludes with a comparative analysis of those sources of land rights in the two countries. He contends that, whatever approach to rights gains precedence, those rights should not be frozen in time but be “dynamic in that they could be changed through the exercise of the decision-making authority vested in the community” through the exercise of self-government.

Nicolas Peterson’s chapter, “Common Law, Statutory Law, and the Political Economy of the Recognition of Indigenous Australian Rights in Land,” explains that the Australian Commonwealth recognizes Aboriginal rights only within a narrow range. Aboriginal rights were disregarded until 1966, when statutory land rights started to be granted. However, since 1992, there has been the possibility of holding land under “original” Native title where those rights have been “continuously activated” since British sovereignty in 1788 and not extinguished by legislation. Although Aboriginal land title was won by Aboriginals in Alaska due to the initiative of commercial interests to bring on stream the Prudhoe Bay oil pipeline in 1971, and won by Aboriginals in Quebec to enable construction of the James Bay hydroelectric project in 1975, a similar attempt to win land title provoked by a bauxite mine in the Australian Northern Territories failed in the *Milirrpum* case of 1971 even though Aborigines constituted 27 percent of the population.

The major problem for indigenous people in Australia is that the land claims of the 72 percent who live in urban, settled areas, many of whom are of mixed descent, are “historical” claims for people who have moved, or been moved, from their original lands. These claims are not as readily accepted by the public as those of Aborigines who live in remote areas. Examining the *Mabo*, *Wik*, and *Yorta Yorta* decisions, Peterson suggests that few of these groups will have their Aboriginal title recognized. The adversarial process, coupled with the dozens of Aboriginal witnesses disadvantaged in cross-examination, is not a promising one for recognition of their rights. But given the possibility for negotiated indigenous land use agreements made possible by the *Native Title Act*, the Indigenous Land Commission, and the government’s social justice package, there are opportunities for redress. Thus, the current emphasis on mediation and negotiation has at least brought progress in land use agreements, even though the results have been in “shreds and patches.” With some 511 applications for the recognition of Native title in process, there still may be many cases coming to the Federal Court in the future.

Jacinta Ruru's chapter, "Claiming Native Title in the Foreshore and Seabed," focuses on New Zealand and the groundbreaking 2003 Court of Appeal decision in *Ngati Apa*. It indicated, to the horror of the government and the public majority, that Māori should be allowed the opportunity to prove customary ownership of the foreshore and seabed. Described as a "tsunami," the decision polarized the country. The government, in its attempt to find a win-win solution, announced and implemented legislation to ensure that the Māori would never hold exclusive title to the foreshore and seabed. Facing an inevitable redefinition of Aboriginal title, this decision of the Court of Appeal, the government's reaction to it, and the aftermath in the legislature and the courts are analyzed in this chapter within a comparative *Delgamuukw* and *Mabo* context.

The Māori believe that all things, material and immaterial, are interrelated, and they embrace a culture that ensures a natural balance. Dependent on the resources of the sea, both economically and spiritually, they regard land and water as indivisible. The British colonists viewed the seabed and foreshore as public ownership, and a series of court cases and government actions, which are examined from 1840 to 2003, went back and forth on the question of Māori title. Although the high court held for the Hapu people in 2003, the government vowed to turn back the clock regardless of opposition from a UN committee on racial discrimination and the Waitangi Tribunal. In a close reading of these recent events, Ruru assesses *The Foreshore and Seabed Act of 2004* and the extent to which it has changed the landscape of Māori rights and interests. Given the difficulty of proving uninterrupted usage since 1840, and as in Australia protecting only usufructuary rights, these actions have used legal fictions and presumptions to limit Aboriginal rights to traditional precolonial uses, thus closing the door to a sustainable society and economy in the twenty-first century.

Kenichi Matsui's chapter, "Waterpower Developments and Native Water Rights Struggles in the North American West in the Early Twentieth Century: A View from Three Stoney Nakoda Cases," examines the effect of hydroelectric dams on Native communities in late-nineteenth-century and twentieth-century North America in light of recent scholarship that largely has centred on Indian land rights and cultural damages and paid scant attention to Aboriginal water rights issues. Matsui, focusing on the construction of three hydroelectric dams on the Stoney Reserve in southwestern Alberta from 1907 to 1930, and how they influenced later construction of dams in western Canada, argues that Aboriginal water rights became highly contentious political and economic issues among federal and provincial officials, entrepreneurs, and indigenous peoples. Comparing these developments with those in British Columbia and the western United States, we can then examine how Native leaders refined their bargaining strategy and gained political recognition of their rights to water, waterpower, and waterbeds.

The Stoney Nakoda were able to negotiate their way through the land-mines of federal and provincial jurisdictions for the Horseshoe Falls, Kananaskis Falls, and Ghost River dam and hydroelectric sites. They drew from experiences in the western American states and in British Columbia, where the provincial government had opposed such Native water rights beyond supply for domestic and irrigation purposes. On the Canadian Prairies, Native water rights were not specified in either dominion or territorial legislation, while in the United States the Supreme Court had recognized Native water rights in the Montana *Winters* case of 1908. There was no federal or state legislation that recognized Native water rights in the United States either, and there were few other Native water rights cases in the American west. The Department of Indian Affairs (DIA) tried to negotiate for the Stoney Nakoda for hydroelectric dams on the Bow River from 1903 on, but they were resolute over price and terms. Finally, after much stiff bargaining, they agreed with the newly formed Calgary Power Company to construct the three dams over the period of 1907-30, reserving their rights to waterpower and the riverbed. After the *Natural Resources Transfer Agreements* of 1930, the western provinces attempted to gain control of Native water rights under provincial jurisdiction. But Matsui demonstrates how the Stoney Nakoda gained the recognition of their rights to the water, waterpower, and waterbed in Alberta in the absence of federal legislation, thereby gaining “recognition” of their control of interests in water as well as land. Readers should note the relationship of land and water to Native title interests in both Canada and New Zealand. Given the current problem of water resources in Australia, it is becoming an issue there as well.

Conclusions

Contemporary Aboriginal problems were born in the early colonial era, from the Royal Proclamation of 1763 and the War of 1812 onwards. Among the ideas that clashed in this conflict in British North America were two very different notions about the status of indigenous peoples and Aboriginal title in the ordering of international relations. The makers of the United States opposed the military might of the British Empire and Tecumseh’s Indian Confederacy in order to push aside imperial and Aboriginal obstacles to western expansion. Providing land for settlers was also a prime mover of colonial rulers in Australia and New Zealand. In so doing, these leaders set patterns and precedents for a range of issues that is again becoming prominent in modern global geopolitics as countries address the status to be afforded to indigenous peoples around the world.

In the colonial arena, however, both the Roman and the common law of property were used to extinguish indigenous title in a discriminatory manner. Through the decolonization process, the Roman law concept of *uti possidetis, ita possideatis* (as you possess, thus you may possess) and the

common law concept of customary law (protection of communal property rights) took hold, providing collective rights to title that were derived from use and occupation *sui generis* (particular to itself). This view was held throughout the early colonial period. In the late eighteenth century, Friedrich Karl von Savigny held, with reference to nomadic people, that absence did not bar title to land.¹²¹

Bringing the past into the future, it was, after all, the British authors of the Royal Proclamation of 1763 who recognized indigenous groups as “nations” and acknowledged the duty of the crown to negotiate with them, nation to nation, to determine the nature of Native rights.¹²² A major problem is that although custom was always a strong element of the common law in England, a pluralistic concept of law did not ride in all the ships that sailed across the Pacific or Atlantic Ocean in the early years of colonization. When those colonists came to North America, unlike Australia, they needed Native allies against continental European imperial rivals. Thus, they needed to accommodate indigenous people, as the HBC did in the 1680s-90s. In this light, the Royal Proclamation anticipated troubles with British colonists, as perhaps did the later *Treaty of Waitangi*. As Yarrow has suggested, the common law that left the shores of England landed in other worlds “as a starched white sheet.”¹²³ Thus, it remains curious to this day how Australian settlers and legal officials were able to claim the land as uninhabited when there were over half a million Aborigines in peaceful possession of their lands.¹²⁴

The British began using treaties to dissolve “tribalism” and gain sovereignty over First Nations from the mid-nineteenth century. Treaties signed with First Nations in the Pacific islands and Africa in the second half of the century acknowledged clearly that the British government recognized Aboriginal sovereignty and was willing to negotiate and conclude treaties of cession, whether the Aboriginal group was considered to hold its possession either *de facto* or *de jure*. The legal theory was that, even in a *de facto* state, Aboriginal customary law and governance had a continuity that gave it the force of a sovereign authority.¹²⁵ Although in practice this theory was not always coherent, deference was nonetheless given to the contractual ability of Aborigines. After all, the earliest practitioners of law were indigenous peoples, and many of the more than 500 treaties made with Europeans followed indigenous law.¹²⁶ By the end of the nineteenth century, physical control of Aborigines succeeded jurisdiction with more aggressive intervention, creating an “Empire of Uniformity.”¹²⁷

Since World War II, international law has had an increasing influence in settler-state authority over Aboriginal peoples. Recognition and accommodation of Aboriginal rights to land and self-government in international forums have encouraged Aborigines, especially in the past decade, to articulate a conception of their unique collective rights and to negotiate them as state to state, people to people. Rejecting the terms “primitive” and “tribal” that

have been accorded to them, they have tried to escape those conceptual academic classifications.¹²⁸ As international law remains entrenched in a Western approach to proprietary rights, a growing recognition of collective ownership in sustaining the social, cultural, and spiritual aspects of indigenous life may lead to a wider acceptance of Aboriginal title in postcolonial states.¹²⁹ In Central America, this recognition was confirmed by the Inter-American Court of Human Rights when it held for the Awas Tingni Nation's title to customary lands and resources against the state of Nicaragua in 2001.¹³⁰ This growing recognition can be seen in the rise of truth commissions and in the creation of a Truth and Reconciliation Commission at the Fifth World Park Congress in 2003 to investigate and resolve cases of Aboriginal dispossession in national parks.¹³¹

Under the UN *Declaration on the Rights of Indigenous Peoples* in June 2006 (the result of the 2004 Decade of the World's Indigenous Peoples),¹³² first peoples are attributed to have the rights of self-determination and self-government, control or ownership of ancestral lands, and freedom of culture without assimilation. Since the principle of an internationally accepted criterion of self-government has been rejected by the United States and several other countries, including Canada,¹³³ the concept of Native title has considerable roadblocks in front of it. An example is South Africa, where the Constitutional Court refuted the reasoning in *Mabo (No. 2)* and held that the customary law of its indigenous peoples was actually part of the law of the state.¹³⁴ The ruling of that court, however, is simply symbolic, as the Richtersveld community must file claims with the Land Claims Court or negotiate with the government to attain its rights.¹³⁵ More recently, in Botswana, most of the Bushmen of the vast Kalahari Desert – the oldest indigenous group in Sub-Saharan Africa who date back c. 30,000 years – were “relocated” from 1985 on, pushed out with “signs” that were not in their own language. When the remaining 1,000 were evicted in 2002, a group of 200 led by Chief Maiteela Segwaba sued in 2004 for the occupation of their ancestral lands. Heard by a judicial panel of three in the remote desert enclave of New Xade, they won on 13 December in a two-to-one vote, and on 18 December 2006 the government declared that it would abide by the decision.¹³⁶

In Canada, the federal government instituted a comprehensive claims policy in 1981 – *In All Fairness: A Native Claims Policy* – that, with subsequent modifications, guides all treaty negotiations with First Nations.¹³⁷ Designed to obtain consensual extinguishments of Aboriginal title from First Nations, this policy holds that there are inherent Aboriginal rights, but not actual title to the land and its resources, and gives provincial governments a veto over distribution of land, resources, and revenues. It acknowledges, however, that title held continuously since time immemorial cannot be extinguished without consent, and it allows for municipal self-government.¹³⁸

The SCC established in *Delgamuukw* some basic principles and standards for identifying Aboriginal title, a process for reconciliation, and negotiations for its resolution. But some federal officials still maintain that declarations of title must be established in the courts. This stipulation makes treaty making difficult because it is the non-Aboriginal governments who define the parameters of negotiations, and their economic and political interests – tied to assimilation in a global marketplace – are at odds with Aboriginal needs for recognition, regaining rights and lands lost, and self-government. The progress to date has been due largely to the political agency of First Nations, but their efforts have been hampered by having to deal with multiple levels of government.¹³⁹

The problems of litigating Aboriginal title are many. A major one concerns the words *Aboriginal* and *Native*. Whom do they represent? As Chartrand has explained, the term “mixed bloods” is racist and unhelpful. Historically, there was no difference between “mixed” and “unmixed” bloods. What defined “blood” was the community and its links to place and time. Native stories depict material objects as containing the spirits of their people. The Haida, for example, believe that the trees in the old-growth forests contain the spirits of their ancestors, and thus cannot be cut down, and that they as original people have descended from creatures of the sea and therefore have rights to the seabed.¹⁴⁰ If the purpose of the state is to protect people, their lands, and their interests, then why do groups such as the Métis have to go back hundreds of years to prove their ancestral rights when those rights were part of their community?¹⁴¹ There are no common law rules to resolve this problem. Only recently have Canadian courts hinted at including Aboriginal custom in the common law, a fundamental issue that also concerns Australia, New Zealand, and the United States.¹⁴²

Another problem is the voice of indigenous peoples. A major contribution of *Delgamuukw* for future cases was the pronouncement that Native voices can be accepted as evidence. As Ray explains, whether it is accepted as “proof” is still problematic. In the recent *Powley* case, the elders gave evidence before the court, but the judges cited the documentary evidence in holding for the Métis land claims.¹⁴³ Whether judges can move past this point is a question that only time will tell. As in Australia, much oral evidence is given now in Canada, but often it is not recognized by the bench. The situation is similar in New Zealand with the Waitangi Tribunal, despite more openness to oral evidence. An essential problem here, as both Ray and Rigsby have raised, is that judges, unlike anthropologists, are not trained in how to read people and often view Native oral history as precarious. But leaving aside the question of how judges handle it, we should note that the challenging process of gathering and testing evidence of Native custom has enabled Aboriginals to acquire, document, and publicize their history in ways that would never

have been possible otherwise. Critical to this process is the preservation of indigenous languages.¹⁴⁴

There is also the role of expert witnesses to document the past of first peoples. In some cases, these witnesses themselves become a battleground, as in the *Samson Cree* case, in which twenty experts were examined and cross-examined. The Gitksan had anthropologists live with them for three years so that they could document accurately the social economy of the tribe. But their evidence was not admissible in court because they had worked with the Gitksan. The court deemed that expert witnesses, in that case, must be “outsiders.”¹⁴⁵ This leaves the fate of many cases in the hands of such expert witnesses – anthropologists, archaeologists, linguists, historians, and lawyers – who must produce a body of evidence that fills the gaps and silences in the white man’s written record.¹⁴⁶

A further problem is cost. Up to and including *Calder*, most cases concerning Native title were short, heard within a week. But since then, the crown no longer concedes Native evidence and contests as many facts and issues as it can even if not critical to the case. Given the adversarial nature of “black letter” common law, in which artificial positions are framed that often do not reflect reality, arguments are made and allegedly proven that completely validate one position and invalidate another. This result of “winners” and “losers” obtained at great cost is not conducive to the resolution of issues that lie deep in the human psyche. Appointing experts to chart the way forward has been equally costly. Although Canadian taxpayers paid \$56 million for a royal commission that recommended face-to-face negotiations, dual citizenship, and abandonment of extinguishment, their governments must face up to those recommendations “before any just future can begin to be built.”¹⁴⁷ In addition, there is the massive problem of Aboriginal compensation, as either part of negotiating rights and title or resolving them in court.¹⁴⁸

Although Aboriginal title doctrine has become part of the common law, legislatures strive to provide for the recognition and protection of that title in ways that are not always beneficial. Recognizing changing customs is not an easy practice at common law, where “custom” (and the strength of custom) were viewed originally as unchanging. In Australia, however, Justice Merkel has done just that in holding for the FCA the principle “that *traditional* laws and customs are not fixed and unchanging.”¹⁴⁹ Indeed, customary law at common law assumes change over time and resides at the heart of the common and civil law systems. Westra, for example, brings us back to the sixteenth and seventeenth centuries for European views of customary rights and how they might pertain to Aboriginals, views that are deeply rooted in the past. It was Thomas Aquinas who argued that custom was central to the theology of law and provided the basis for a “just” legal system.

Law that does not stem from the customs of the populace alienates those to whom it belongs.¹⁵⁰ It was this concept of custom that attracted Coke and early modern lawyers in search of a legal concept that would predate the crown's exercise of sovereignty in Parliament. Although common lawyers searched for an "ancient constitution," their arguments for ancient custom as the bedrock of common law won the day in Britain and the colonies, especially in western Canada.¹⁵¹

In general, competing sovereignties of Native versus crown, and settlements of Aboriginal title made in the context of the interests of the crown, prejudice Aboriginal title jurisprudence.¹⁵² What is badly needed, as John Borrows writes so eloquently, is the judiciary's acceptance of indigenous laws and their stories and its willingness to receive and apply them to Aboriginal issues litigated before the courts.¹⁵³ In Canada, for example, from *St. Catherines Milling* in 1888 to *Sparrow* in 1990 and beyond, Aboriginal law continues to be an inferior source to legal rights that emanate from the crown,¹⁵⁴ even though the courts have accepted that Aboriginal rights are *sui generis*, arising from ancient customs and serving as the fountain of Aboriginal law.¹⁵⁵ As Ray argues, indigenous people would be better served by a forum other than law courts. This forum would allow, as Hutchins and Rigsby have argued, more input from social scientists to frame the issues for lawgivers to adjudicate.¹⁵⁶

Natives themselves, however, are not necessarily pleased with these public "white" activities. As Edward George of the Peigan has explained, many Natives wish to be left alone to deal with the immediate problems of alcohol, drugs, violence, and unemployment and to care for their families. Questions of "title" are theoretical and not practical. Since the 1980s, they have become greatly overrepresented in jails and prisons. In his view, established society (those with power) has little interest in them here or anywhere else. They are at the mercy of a four-corner blanket, a quilt patched with corporations, contracts, legislation, and policies of assimilation.¹⁵⁷

Alongside this pessimism among first peoples is pessimism among a number of academic commentators. Some of them argue that demands for Aboriginal rights and title obscure deeper problems within indigenous societies. The litigation process strengthens the role of their leaders, which leads to greater authoritarian rule in their societies. Aboriginal practices have included aspects of brutality – from the law of blood feud to fighting and domestic violence – that should be abandoned; state-sponsored solutions to Aboriginal problems should be abandoned too so that indigenous people (especially the younger generation) can choose their own lifestyles.¹⁵⁸ These problems and possible solutions are difficult to resolve, however, when Aboriginals have little power to control their lives, must work both within and against the state, and live in a space where there are no governing structures to accommodate diverse forms of rights and governance.¹⁵⁹ Although it is too

simple to critique judicial decisions that have brought advances to Aboriginal title across the common law world in recent decades, we must not forget the invigorating debates that those cases have brought to the tables of government as well as to the public mind.¹⁶⁰ In the end, society itself must set the parameters for lawgivers and lawmakers.

Interestingly, the early modern concept of custom would have accommodated the case for Aboriginal rights and title and would have given heart to contemporary Native leaders such as Chief Crowchild of the Tsuu T'ina Nation. As he stated, "why do we ever have to buy back our own land?"¹⁶¹ As Hutchins has put it, the process of cession, release, and surrender of land by indigenous peoples "is a juridical oxymoron."¹⁶² Living in a pluralistic society, all parties must resolve the land question so that indigenous communities can be empowered to handle the problems that they face in a modern, industrial world. Perhaps recent events, such as the formal apology by Prime Minister Kevin Rudd of Australia to the stolen generations of Aboriginal and Torres Strait Islanders for being removed from their families and communities, and Prime Minister Stephen Harper's apology to former students of Native residential schools for their forceful removal from their homes, will herald a more optimistic future of Aboriginal-settler relations.¹⁶³

Notes

- 1 Since Aboriginal peoples have different nomenclatures in English that stem from outsiders, I am using the term generically, and the name of Aborigines for those in Australia, Natives and First Nations for Canada, Māori for New Zealand, and Indians for the United States, with the term "indigenous" for all original peoples.
- 2 Peter W. Hutchins, "The Thirty Years War: A Practitioners' Guide to Aboriginal Litigation since Calder," paper presented at the conference on *Delgamuukw, Mabo, and Ysleta*, University of Calgary, 18 September 2003.
- 3 For a defence of prior Native against non-Native sovereignty, see Macklem, "Distributing Sovereignty," 1316-23, 1345-50.
- 4 The Trudeau quotations are in Foster, Raven, and Webber, eds., *Let Right Be Done*, at 46 and 247, with discussions at 3-6, 47-49, 57, 101, 219, and 222.
- 5 *Calder v. A.G.B.C.* (1973), 34 D.L.R. (3rd) 145 (S.C.C.).
- 6 The crown in right of Canada acknowledged this in the mid-1970s when it created its comprehensive claims policy, but British Columbia did not acknowledge it until the early 1990s. I wish to thank Kent McNeil for this comment.
- 7 See, for example, the collection of essays on cases and legislation for Australia, Canada, New Zealand, and South Africa in Keon-Cohen, ed., *Native Title in the New Millennium*; the outline discussion of Native rights and title in those countries and the United States in Dorsett and Godden, *Guide to Overseas Precedents*; and the documentary collection of Odawi, *Sovereignty, Colonialism, and the Indigenous Nations*.
- 8 Havemann, ed., *Indigenous Peoples' Rights*.
- 9 Richardson et al., eds., *Indigenous Peoples and the Law*.
- 10 McHugh, *Aboriginal Societies and the Common Law*.
- 11 Connor, *Invention of Terra Nullius*.
- 12 Nettheim, "The Influence of Canadian and International Law," 177-79.
- 13 The name *Delgamuukw* is spelled without the apostrophe throughout the chapter and the book for consistency.
- 14 For the history of Australian law with regard to Aborigines, and of the court cases that preceded *Mabo*, see Russell, *Recognizing Aboriginal Title*, chaps. 5-7.

- 15 *Mabo v. Queensland (No. 1)* (1988), 166 C.L.R. 186.
- 16 Reynolds, *The Law of the Land*, 2nd ed., postscript.
- 17 *Mabo v. Queensland (No. 2)*, [1992] 175 C.L.R. 1. For the decision and commentary, see Butt, Eagleson, and Lane, *Mabo, Wik, and Native Title*.
- 18 *Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.R. 141.
- 19 Nettheim, "Influence of Canadian and International Law," 183-84.
- 20 Smandych, "Contemplating the Testimony of 'Others,'" 282-83.
- 21 This theme runs through the essays in Daunton and Halpern, eds., *Empire and Others*.
- 22 See, for example, the in-depth studies of Attwood and Foster, eds., *Frontier Conflict*; Foster, Hosking, and Nettelbeck, *Fatal Collisions*; and Nettelbeck and Foster, *In the Name of the Law*.
- 23 Bartlett, "Native Title in Australia," 420-27.
- 24 *Wik Peoples v. Queensland*, [1996] 187 C.L.R. 1.
- 25 See the discussion in Brennan, *The Wik Debate*, 80-90.
- 26 Stoeckel, "Case Note," 155.
- 27 Havemann, *Indigenous Peoples' Rights*, 6.
- 28 See, in addition to the works above, the commentaries on agreements, cases, legislation, and institutions in Perry and Lloyd, *Australian Native Title Law*.
- 29 *Fejo v. Northern Territory*, [1998] 195 C.L.R. 96.
- 30 *Yanner v. Eaton*, [1999] 201 C.L.R. 351.
- 31 *Commonwealth v. Yarmirr*, [2001] 208 C.L.R. 1.
- 32 *Western Australia v. Ward*, [2002] 213 C.L.R. 1.
- 33 Toussaint, ed., *Crossing Boundaries*, chs. 14-17.
- 34 See the discussion in Nettheim, "Influence of Canadian and International Law," 190-95.
- 35 *De Rose v. South Australia (No. 2)*, [2005] 145 F.C.R. 290. See also *Bodney v. Bennell*, [2008] F.C.A.F.C. 63, for a different view. I thank Kent McNeil for this reference.
- 36 *Neowarra v. Western Australia*, [2003] F.C.A. 1402, [2004] F.C.A. 1092.
- 37 Strelein, *Compromised Jurisprudence*, 118, 164n29.
- 38 This is a theme in Miller, *Skyscrapers Hide the Heavens*, 25-110 passim.
- 39 *The Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs*, c. 6, provided for the election of all chiefs, with local bylaws subject to crown approval. These measures were consolidated in the *Indian Act* of 1876, which brought in "resident" government agents to control most affairs. See Bartlett, *The Indian Act of Canada*.
- 40 Miller, *Skyscrapers Hide the Heavens*, 148-73, 204-24, 396-402. Miller suggests that after the 1870s the dominion lacked interest in the enterprise. See Miller, *Compact, Contract, Covenant*, 34-35.
- 41 Foster, "Indian Administration from the Royal Proclamation of 1763 to Constitutionally Entrenched Aboriginal Rights," in Havemann, *Indigenous Peoples' Rights*, 354-61.
- 42 In David Elliott, ed., *Law and Aboriginal Peoples in Canada*, Vol. 3, 10.
- 43 See, in general, McHugh, *Aboriginal Societies and the Common Law*, 173-78.
- 44 For this and its subsequent revisions, see Bartlett, *Indian Act of Canada*. The act was part of federal policy to take Native peoples out of their Aboriginal status; see Miller, *Compact, Contract, Covenant*, 36.
- 45 McNeil, "Meaning in Aboriginal Title." In *R. v. Guerin*, [1984] 2 S.C.R. 335, it was called an "independent legal right."
- 46 See Otis, "Territoriality," 147-48.
- 47 Foster, "Indian Administration," 364-66.
- 48 Gérard V. La Forest, "Reminiscences of Aboriginal Rights," 58.
- 49 The "charge" of "Indians" was assumed by the dominion government with "a policy as liberal as that hitherto pursued by the British Columbia Government." Term 13 of the *British Columbia Terms of Union*, at <http://www.solon.org/>.
- 50 Persky, ed., *Delgamuukw*.
- 51 *Ibid.*, Melvin Smith quoted at 5.
- 52 *Buffalo v. The Queen* cost over \$100 million prior to appeal and as of May 2008 is ongoing for a claim of over \$1.4 billion. <http://www.samsoncree.org>. See the decision in *Ermineskin Indian Band and Nation v. Canada*, [2009] S.C.C. 9.

- 53 Borrows, "Because It Does Not Make Sense," in Kirkby and Coleborne, *Law, History, Colonialism*, 198-204.
- 54 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.
- 55 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.
- 56 Havemann, *Indigenous Peoples' Rights*, 6.
- 57 See the "Ministry of Aboriginal Relations and Reconciliation" (2007), at <http://www.gov.bc.ca/arr/>, and subsequent news stories in the *Vancouver Province*.
- 58 See, in general, McHugh, *Aboriginal Societies and the Common Law*, 166-73, 185-89.
- 59 Kirkby and Coleborne, eds., *Law, History, Colonialism*, 84-88.
- 60 See, for this period, Parsonson, "The Fate of Maori Land Rights," in Kirkby and Coleborne, eds., *Law, History, Colonialism*, 173-89.
- 61 See Erueti and Charters, eds., *Māori Property Rights*; and Williams, "Customary Rights and Crown Claims," 162-65.
- 62 Williams, "Customary Rights and Crown Claims," quotation at 165. He also spoke highly of Canadian decisions in the *Te Runanga* case of 1993.
- 63 This is the conclusion of Godlewski and Webber, "The *Calder* Decision."
- 64 This is the thesis of McHugh, "From Sovereignty Talk to Settlement."
- 65 See Erueti and Charters, *Māori Property Rights*.
- 66 Havemann, *Indigenous Peoples' Rights*, 6.
- 67 *Attorney-General v. Ngati Apa and Others*, [2003] 3 N.Z.L.R. 643 (C.A.) para. 86.
- 68 *The Foreshore and Seabed Act 2004* (N.Z.), 2004/93. The *Māori Commercial Aquaculture Claims Settlement Act* of 2004 provided for a limited growth (20 percent of new space) of its marine farming industry without the risk of litigation under treaty grievances.
- 69 *Lardil Peoples v. State of Queensland*, [2004] F.C.A. 298. I thank Kent McNeil for this reference.
- 70 See, for example, Harris, *Fish, Law, and Colonialism*.
- 71 Robertson, *Conquest by Law*, 95-116. For a useful survey, see Pevar, *Rights of Indians and Tribes*, 3-14.
- 72 Banner, *How the Indians Lost Their Land*.
- 73 Jill St. Germain, *Indian Treaty-Making Policy*, 158-65, quotation at 162.
- 74 Pevar, *Rights of Indians and Tribes*, 12.
- 75 *Tee-Hit-Ton Indians v. United States*, [1955] 348 U.S. 272 and 965, 75 S.C.R. 313 and 521.
- 76 Howard, *Indigenous Peoples and the State*, 65.
- 77 Rebecca Tsosie, "Native Claims in the United States: Reparative Justice or Extinguishment of Liability?," paper presented at the *Delgamuukw, Mabo, and Ysleta* conference, University of Calgary, 19 September 2003. The act ran for thirty years.
- 78 Tsosie, "Introduction: Symposium on Cultural Sovereignty," 14.
- 79 Haycox, "Then Fight for It," 85-93.
- 80 Miller, *Forgotten Tribes*, 256-61.
- 81 Wilkins and Lomawaima, eds., *Uneven Ground*, 5-9.
- 82 Howard, *Indigenous Peoples and the State*, 39-40.
- 83 This is a theme in Kupperman, *Indians and English*.
- 84 Over 90 percent took place in London. The role of the central courts declined further from the mid-seventeenth century to the mid-eighteenth century; this is the thesis of Christopher W. Brooks, *Lawyers, Litigation, and English Society since 1450* (London: Hambledon Press, 1998).
- 85 Louis A. Knafla, "Common Law and Custom in Tudor England: Or, 'The Best State of a Commonwealth,'" in *Law, Literature, and the Settlement of Regimes*, ed. Gordon J. Schochet (Washington, DC: Folger Shakespeare Library, 1990), 171-86 at 176-80. The clearest contemporary explanation was made by Sir John Davies, *Le primer report des cases in les courts del roy* (Dublin: J. Franckton, 1615), sigs. iii-v.
- 86 Coke's view of common law as *jus scriptum* (written law), published in his *Reports for Calvin's Case*, was not the majority view as expressed by Chancellor Ellesmere, who published a separate report of the case with a much wider interpretation. Louis A. Knafla, *Law and*

- Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge, UK: Cambridge University Press, 1977), 216-24.
- 87 Richard Burn, *The Justice of the Peace and Parish Officer*, 30th ed. (London: Sweet, Maxwell, and Son, 1869). For the role of the justice of the peace in the legal system of the Canadian North-West, see David Carey, ed., *Carey's Manitoba Reports* (Calgary: Carswell, 1918), i-ix.
- 88 See, in general, the thoughtful work of Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996).
- 89 Hugo Grotius, *De jure belli ac pacis* [1625], trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925), Book 3, ch. 6.
- 90 Robert A. Williams Jr., "The Medieval Discourse of Crusade," in *Native American Law and Colonialism, before 1776 to 1903*, ed. John R. Wunder (New York: Garland Publishing, 1996), 77-122. Grotius assumed a world of independent states, a natural society of territorial nations that had the right to conquer non-territorial ones.
- 91 Samuel Pufendorf, *De jure naturae et gentium* [1688], trans. C.H. Oldfather and W.A. Oldfather (Oxford: Clarendon Press, 1934), Book 3, ch. 8, s. 1.
- 92 Francisco de Vitoria, *De Indis et de jure belli relectiones* [1540], trans. J.P. Bate (Washington, DC: Carnegie Institution of Washington, 1917), Book 1, ch. 9. Vitoria acknowledged the right of conquest but only if Natives resisted "benign influences."
- 93 Jean-Jacques Rousseau, *The Social Contract and Discourses* [1762], trans. G.D.H. Cole (London: Dent, 1973), Book 1, Chapter 3.
- 94 Vattel, *The Law of Nations* [1758], Book 3, Chapter 13.
- 95 See, in general, Tully, "Aboriginal Property," 153-80.
- 96 Harring, "Crazy Snake and the Creek Struggle for Sovereignty," 365.
- 97 *Ibid.*, 365-80. See, more generally, Harring, "There Seemed to Be No Recognized Law."
- 98 *Calvin's Case*, 7 *Coke's Reports*, 1a at 19b.
- 99 *Campbell v. Hall*, 20 *State Trials*, 239 at 264.
- 100 Nigol, "Private Law."
- 101 Blackstone, *Commentaries on the Laws of England*, 1: 106-7.
- 102 See Lester, *Inuit Territorial Rights*; Slattery, *Ancestral Lands, Alien Laws*, 10-15; and Walters, "Mohegan Indians v. Connecticut (1705-1773)," 785-92.
- 103 *Calvin's Case*, 17v.
- 104 A copy of the original charter is in Oliver, ed., *The Canadian North-West*, vol. 1, 135-53.
- 105 Nigol, "Private Law."
- 106 *Connolly v. Woolrich* (1867), *Lower Canada Jurist*, 11 (1866), 197-265, by Monk J; and the appeal in *La revue legale* (1869), 253-400. These reports contain a mine of valuable historical documentary evidence.
- 107 *R. v. Nan-E-Quis-A-Ka* (1889), 1 T.L.R. 211 (C.A.), by Wetmore J.
- 108 *Johnson and Graham's Lessee v. McIntosh* (1832), 21 U.S. [8 *Wheaton*] 543.
- 109 See Vine Deloria Jr. and Clifford M. Lytle, "American Indians in Historical Perspective," in Wunder, *Native American Law*, 128-30.
- 110 Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," in Wunder, *Native American Law*, 136-67.
- 111 See Parkman, *The California and Oregon Trail*; and, more generally, Howard, *The Lessons of History*.
- 112 Wunder, *Native American Law*, Preface.
- 113 Henderson, *First Nations Jurisprudence*, 122.
- 114 *Ibid.* For an illuminating and wide-ranging discussion, see Havemann, *Indigenous Peoples' Rights*, 116-67.
- 115 See Borrows, *Recovering Canada*, for a fuller discussion.
- 116 Walters, "Towards a 'Taxonomy' for the Common Law," 125-27.
- 117 Knafla, *Law and Politics*, 202-53 at 237.
- 118 Knafla and Binnie, eds., *Law, Society, and the State*, 10-13.
- 119 See Lajoie, "Introduction: Which Way out of Colonialism?," 3-10.
- 120 Knafla, "Introduction: Laws and Societies," 6-18.

- 121 For background to my phraseology here and Von Savigny's discussion of the theme, see Von Savigny, *Treatise on Possession*, 35-40, 83-84.
- 122 Borrows, "Wampum at Niagara," in Asch, *Aboriginal and Treaty Rights in Canada*, 155-72.
- 123 Yarrow, Chapter 3 this volume.
- 124 A useful survey of the evolution of English explorers, settlers, and legal commentators on this problem is Reynolds, *Law of the Land*.
- 125 See, in general, McHugh, *Aboriginal Societies and the Common Law*, 202-6; and his discussion of territorial sovereignty and extraterritorial jurisdiction at 206-13.
- 126 Law Commission of Canada, *Justice Within*, 4-6.
- 127 This is a theme in McHugh, *Aboriginal Societies and the Common Law*, 117-30.
- 128 Howard, *Indigenous Peoples and the State*, 3.
- 129 McNeil, "The Inalienability of Aboriginal Title," 486.
- 130 Anaya and Grossman, "The Case of Awas Tingni."
- 131 Gilbert, *Indigenous Peoples' Land Rights*, 192-94.
- 132 Odawi, *Sovereignty*, 693-704, for the draft text, the final being Human Rights Council Resolution 2006/2 (29 June 2006).
- 133 *Ibid.*, 716-21.
- 134 *Alexkor Ltd and Another v. Richtersveld Community and Others*, [2003] Case C.C.T. 19/03.
- 135 Fairweather, *A Common Hunger*, 105-14.
- 136 <http://www.news.bbc.co.uk/>.
- 137 For a recent example of the processes, see Woolford, *Between Justice and Certainty*, 98-120.
- 138 Asch, "From Calder to Van der Peet," 428-40.
- 139 See Miller, *Compact, Contract, Covenant*, 38-40.
- 140 Ray, "History Speaks."
- 141 In *R. v. Van der Peet*, [1996] 2 S.C.R. 507, the court modified the elements of the precontact test to reflect the ethnogenesis of the Métis and differences between Native and Métis claims.
- 142 See also Chartrand, ed., *Who Are Canada's Aboriginal Peoples?*
- 143 *R. v. Powley*, [2003] S.C.C. 43 (online version).
- 144 Rigsby, "Indigenous Language."
- 145 Ray, "History Speaks."
- 146 See, for example, Choo, "Historians and Native Title"; and the essays in Toussaint, *Crossing Boundaries*.
- 147 Culhane, *The Pleasure of the Crown*, 355.
- 148 For a study of this problem, see Mainville, *Overview of Aboriginal and Treaty Rights*.
- 149 *Clarke on Behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia, and Jupagulk Peoples v. Victoria*, [2005] F.C.A. 1795, [11], cited in Strelein, *Compromised Jurisprudence*, 133.
- 150 This is the thesis of Van Drunen, *Law and Custom*.
- 151 Knafla and Swainger, eds., *Laws and Societies*, 5-7, 30-32.
- 152 For a discussion, see Strelein, *Compromised Jurisprudence*, 120-42.
- 153 Borrows, *Recovering Canada*, 5, 23-28. For the larger issue of protecting the intellectual property of the indigenous, see Battiste and Henderson, *Protecting Indigenous Knowledge and Heritage*.
- 154 *St. Catherines Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46; *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
- 155 See the discussion in *R. v. Guerin*, [1984] 2 S.C.R. 335, and its context in Borrows, *Recovering Canada*, 6-12. In Canada, both levels of government accepted the ancient legal code of the Nisga'a in their final agreement.
- 156 Commentary on Rigsby's paper at the conference. See, more specifically, Hutchins, "The Marriage of History and Law."
- 157 As noted by Edward George at the end of the wrap-up conference panel.
- 158 See the essayists in Johns, ed., *Waking Up to Dreamtime*. Examples of how Aboriginal communities can create their own structures are offered in Proulx, *Reclaiming Aboriginal Justice, Identity, and Community*.
- 159 Havemann, *Indigenous Peoples' Rights*, 470-74.

- 160 Dick, "Comprehending 'the Genius of the Common Law,'" 79.
- 161 Chief Crowchild, speaking at the conclusion of the *Delgamuukw, Mabo, and Ysleta* conference, University of Calgary, 20 September 2003.
- 162 This is the thesis of Hutchins, "Cede, Release, and Surrender."
- 163 Addresses delivered to the respective House of Commons: Prime Minister Rudd on 13 February 2008 at http://www.dfat.gov.au/indigenous_background/rudd_speech.html; and Prime Minister Harper on 11 June 2008 at <http://www.pm.gov.au/media/speech/2008>.

Part 1:
Sovereignty, Extinguishment, and
Expropriation of Aboriginal Title

1

From the US Indian Claims Commission Cases to *Delgamuukw*: Facts, Theories, and Evidence in North American Land Claims

Arthur Ray

The greatest challenge of the litigation cases lies in the fact that anthropology and law have difficulties in finding common ground in the use of basic concepts and terms. Legal concepts and principles, although derived from the Anglo-American cultural tradition, must be applied to Indian societies no matter how different they may be. Anthropologists have met this difficulty by taking positions that are often conflicting and that lack self-consistency.

– Julian Steward, “Theory and Practice in Social Science”

When anthropologist Julian Steward made this comment in 1955, he and many of his colleagues were divided into two warring camps – those who appeared before the US Indian Claims Commission (USICC) as experts in support of Indian claimants and those who appeared on behalf of the federal government (the defendant). Optimistically, Congress had created the commission in 1946 to settle the historical grievances that Indian tribes held against the federal government. Most of the claims that the tribes brought before the commission concerned dispossession and therefore raised questions about traditional land tenure. Steward correctly identified a fundamental problem that the *Indian Claims Commission Act* of 1946 and extant case law had created. Anthropological experts had to address their evidence to a specific model of tenure. This meant that they had to apply or develop theoretical frameworks and collect historical data that addressed this model in ways that advanced their clients’ objectives.

This quest, which continues to the present day, has had a significant impact on the development of the interdisciplinary approach to Native history known as ethnohistory, although it has not received much scholarly attention until recently.¹ That quest is my concern here. I will pay particular attention to the implications that research undertaken for the USICC cases

has had for ethnohistorical research in Canada and for the use of this line of evidence in Canadian Aboriginal land rights litigation. I will focus on the landmark *Delgamuukw v. British Columbia* (1997) case in which the battle of experts echoed the skirmishes that had taken place many years earlier before the USICC.

Development of American Anthropology before the USICC Era

Prior to creation of the USICC, Indian history was largely the domain of anthropologists, who focused on cultural dimensions. It is well known that, from the late nineteenth century until the middle of the twentieth, salvage ethnology and cultural element distribution surveys dominated American anthropology. This work was driven by two underlying and interrelated ideas: the notion that Indian cultures were primitive vis-à-vis those of Europeans, and the belief that these cultures would soon disappear. Accordingly, anthropologists and archaeologists undertook extensive field surveys to collect vestiges of Indian cultures that researchers believed were characteristic of precontact life. They focused their attention on remote areas, where they thought that the impact of European culture had been less destructive. They presumed that retreating into the bush was equivalent to retreating in cultural time.²

Two important assumptions informed this salvage research: the belief that Native cultures had been largely static in precontact times, and the idea that European culture had been the main catalyst for change after contact. The popularity of the latter idea meant that acculturation and assimilation viewpoints dominated anthropological studies of Aboriginal cultural change.³ These ideas and perspectives lingered well into the late twentieth century. Significantly, salvage ethnologists did not devote equal attention to all aspects of Native cultures. Rather, they emphasized material culture, Aboriginal mythology, religion, and language. They devoted relatively little attention to in-depth analyses of land tenure, political, or economic systems – topics that would be the focus of claims research.

In the 1930s, anthropologists began to synthesize the data that they had been collecting. In keeping with Boasian historical particularism, which dominated American anthropology until mid-century, most anthropologists shunned theorizing about Aboriginal cultural development in terms of evolutionary and other untested general theoretical models. Rather, they emphasized local circumstances. They did so by employing two common synthetic methods. One involved writing ethnographies of specific groups; the other sought to explore culture-environment relationships by applying the cultural area approach, a scheme that anthropologists, notably Clark Wissler, initially had developed to organize and display museum artifact collections and infer chronological information from patterns of distribution.⁴

The cultural area approach had come to dominate American anthropology on the eve of the establishment of the Indian Claims Commission. A.L. Kroeber, one of the leading figures of American anthropology at the middle of the twentieth century, and a key expert for the plaintiffs in the California Indian claims of the 1950s, had championed this perspective and had authored two great classics: *Handbook of the Indians of California* (1925) and *The Cultural and Natural Areas of Native North America* (1939).⁵

This approach to ecological anthropology had significant limitations, however. Most notably, anthropologists worked on a macroscale in terms of cultures and environments. Also, they treated the relationships between cultures and environments largely in static terms, seeking mostly to explain distributions of different cultures in terms of key features of the physical environment (notably climate and vegetation) or historical processes such as diffusion and population migration. To circumvent these problems, in the 1930s a small number of anthropologists began promoting an alternative perspective that came to be known as cultural ecology, ecological anthropology, or ethnogeography. It tended to be an economic-deterministic approach that focused on the dynamic interrelationships between technology, economy, and environment (or habitat, economy, and society).⁶ Steward, one of Kroeber's most influential students, pioneered this approach in the United States.⁷ It was in its infancy on the eve of the USICC era (1946-78). Subsequently, Steward did some of his most important theoretical writing on the subject while he was engaged as an expert witness for the government in USICC cases in the American southwest and California.⁸

These aspects of the early development of American anthropology meant that the anthropological experts who appeared before the USICC drew heavily on the vast cultural element survey database that they and their predecessors had built up over the preceding half-century. The USICC process also forced them to turn to unconventional anthropological sources, notably documentary records. There were three primary reasons for this. First, and of particular importance, the USICC process focused on the postcontact dispossession of American Indians. Second, as noted earlier, claims raised questions about Indian land tenure, economies, and political organization that had received scant attention in the earlier surveys. In many cases, informants were no longer available who could answer questions about these facets of traditional life. Third, the lawyers and commissioners were more familiar and comfortable with documentary evidence than they were with oral and archaeological data. Thus, anthropological experts began combing American archives for ethnographic evidence. They used their disciplinary concepts and perspectives to identify and interpret relevant facts.⁹

Creation of the USICC proved to be a major catalyst for the development of ethnohistory in the United States by making substantial research funding

available for the first time. For example, the federal Department of Justice funded the largest ethnohistorical research project to date. It was the Great Lakes and Ohio Valley Ethnohistorical Survey project located at Indiana University. The project had an annual budget in excess of \$35,000. Anthropologist Erminie Wheeler-Voegelin served as director from 1956 to 1969.¹⁰ The Department of Justice expected her and her team members to provide the reports and expertise that it needed to defend the US government against claims that Indian tribes brought before the commission in the midwest and west.¹¹ The *American Journal of Ethnohistory*, founded in 1955, initially was housed in the project's offices, and Wheeler-Voegelin served as its first editor (for volumes 1-11, 1955-66). One of her proteges, Harold Hickerson, followed her as an editor (for volumes 13-15, 1966-68).¹² Hickerson financed his graduate education as a project research associate. This position required him to appear as a government expert in USICC cases.

Land Tenure Models and the Battle of Ethnohistorical Experts before the USICC

The *Indian Claims Commission Act* and American case law set important parameters for researchers. The act specified that Indian tribes were entitled to financial compensation for lost lands if they could prove that their ancestors had lived as an identifiable group holding a communal title to a specific territory, which they had exclusively used and occupied at the time of dispossession. They also had to demonstrate that the latter event had not been the consequence of an equitable treaty or conquest. These terms meant that anthropological experts who supported Indian plaintiffs generally argued that all of North America had been divided into well-defined and defended tribal territories before Euro-American contact.¹³ This perspective was called the "contiguous boundary theory." Experts who supported the government defendant countered with the proposition that only the cores of tribal territories had been exclusively used and occupied. This was the "nuclear territory theory." According to this perception, boundaries often were poorly defined because land use intensity decreased outward from the centre, territories often overlapped, and "no-man's-lands" sometimes existed between tribal areas.

The USICC model also raised the vexed question about how long a group had to have occupied a region prior to dispossession for it to hold a valid claim. Ralph Barney, who headed the Department of Justice's USICC claims section, and his staff concluded that Indian tribal groups did not have to prove that their ancestors had "Aboriginal occupancy" or "immemorial possession" to make valid claims. Rather, Barney and his colleagues concluded that claimants merely had to prove that their ancestors had been in exclusive possession of a definable area of land at the time of cession (or acquisition) and had held this territory for a long time prior to that event.¹⁴ The USICC

adopted this perspective.¹⁵ It required experts for claimants and the federal defendant to consider the ways in which traditional tenure systems had changed from the time of initial European contact to the time of dispossession. Pursuit of this question forced experts to consider a series of related issues, notably the impacts of epidemics, warfare, migration, economic intercourse with Euro-Americans, and expansion of the colonial settlement frontier. These topics had long been of interest to scholars. The anthropologists who appeared for the plaintiffs searched for documentary evidence to support the supposition that basic cultural elements, such as the land tenure practices, had persisted despite a myriad of postcontact pressures. When government experts claimed that there was no evidence for the existence of distinctive tribal boundaries in a given area, plaintiffs' experts sometimes responded with the argument that Indians had developed various strategies to obscure their tribal boundaries in the hope of protecting their homelands from land-hungry white settlers.¹⁶

The government's experts, on the other hand, commonly contended that postcontact stresses had led to increases in the numbers and sizes of areas of overlap and no-man's lands. One of these experts, Hickerson, speculated that the latter had served an important ecological role by creating *de facto* game reserves because no tribe could safely hunt in these places.¹⁷ When they confronted solid evidence for the existence of bounded and defended territories, sometimes government experts argued that they had resulted from economic intercourse with Euro-American newcomers and/or through conflicts with these intruders and other Indian groups.¹⁸ This was Steward's perspective. In other words, claimants' experts tended to emphasize the continuity and persistence of "core" customs and practices and tribal boundaries. The defendants' experts, on the other hand, stressed change – particularly in the economic sphere of life. Some, notably Steward, promoted the idea that most Indian notions of property were products of Euro-American contact. In these ways, USICC claims served to intensify a long-standing clash of perspectives about postcontact Indian cultural history.¹⁹ They also accentuated debates about which customs and practices made a culture distinctive.²⁰

USICC Claims and Aboriginal and Treaty Rights Claims Research in Canada

Claims research began in Canada slightly more than twenty-five years after creation of the USICC. In the intervening period, the ethnohistorical research undertaken for USICC purposes had a direct impact on developing Canadian scholarship primarily for three reasons.

First, a number of Indian groups who lived along the Canadian border, notably the Assiniboine, Cree, Sioux, and Ojibwa, had filed claims. The

ancestors of many of these people had lived in Canada in the precontact and early contact eras, and/or they had close relatives who had lived there.

Second, from the outset, American claims researchers published their findings in scholarly journals, especially in *Ethnohistory*, and in monographs. Regarding the latter, in 1974, Garland Publishing Company published the written reports that experts had submitted to the USICC.²¹ Most of these published works had been prepared for the government's defence. Most of the Indians' experts made oral submissions to the USICC before 1965. It was not until after that year that the USICC required both parties to make written submissions. At least twenty of the Garland monographs dealt with borderland tribes in the midwestern and plains areas (see Appendix 1). Thus, a substantial portion of the early ethnohistorical literature of direct relevance to Canada had been generated for claims purposes or was an outgrowth of that work.

Third, the pioneering Canadian ethnohistory studies by Charles A. Bishop and me had direct links to USICC research and the experts who had taken part in it. Bishop, for example, was a protege of Hickerson, who, as noted above, had begun his career as a government expert in the upper Great Lakes Ojibwa cases. Hickerson applied a historical cultural ecology methodology and focused his attention on Ojibwa migrations and their changing post-contact social organization. He emphasized the atomistic impact that European contact had had on Ojibwa society. Bishop followed in Hickerson's footsteps, but he shifted his focus northward to the Ojibwa who lived in central Canada. Eventually, Bishop appeared as a government expert in *Bear Island Foundation and Gary Potts v. Regina* (1991). This case concerned some of the Anishnabay (Ojibwa) that he had included in his landmark study, *The Northern Ojibwa and the Fur Trade: An Historical and Ecological Study*, published in 1974.²² In fundamental respects, Bishop's line of argumentation echoed those that his mentor had presented to the USICC in the northern Minnesota Chippewa cases.²³

At the University of Wisconsin, I was a student of historical geographer Andrew H. Clark, who had received his doctorate from the Department of Geography of the University of California Berkeley, where he had studied with Carl Sauer and A.L. Kroeber. One member of my doctoral supervisory committee, archaeologist David Baerreis, had served as a government expert in the midwestern USICC cases, though I was unaware of this when I was a student.²⁴ He had used fur trade company account books to document postcontact economic change among the Delaware. Baerreis' work, published in *Ethnohistory* in 1961, stimulated my interest in applying a similar historical approach to Canadian groups.²⁵ As a student of the geography and anthropology departments at the University of Wisconsin, I also became very interested in employing the cultural ecological approach, particularly Steward's, to gain insights into the processes that facilitated the rapid migration

of western Canadian First Nations across major environmental and cultural boundaries during the postcontact era. Subsequently, beginning in the early 1980s, I too became involved in First Nations and Métis treaty rights cases in Alberta (two cases), British Columbia (two), Manitoba (one), and Ontario (four).²⁶ I will now focus on the Gitksan and Wet'suwet'en claim (*Delgamuukw*).

Delgamuukw

Canada lagged far behind the United States in using ethnohistorical data in Indian claims litigation. Before the 1973 *Calder* ruling, Canadian land claims had centred on interpretations of the law.²⁷ After this ruling, it became clear that ethnohistorical information about First Nations cultural history, particularly land use and more general livelihood issues, would be central. It remained uncertain, however, which kinds of legal models this evidence would have to address. In his 1980 ruling concerning *Baker Lake v. Minister of Indian Affairs and Northern Development*, Justice J. Mahoney of the Federal Court of Canada, Trial Division, adopted a historical tenure model strikingly similar to the one that the USICC had used. He decided that, to be successful, Aboriginal plaintiffs had to demonstrate that their ancestors had been members of an organized society that had occupied a specific tract of territory to the exclusion of other groups. He stipulated further that the claimants' ancestors' occupation had to have been an established fact at the time that Britain had asserted its sovereignty. Although *Baker Lake* was never appealed to higher courts, Mahoney's test became a standard in Canada, though the Supreme Court modified it in its *Delgamuukw* ruling (1997) to allow for overlapping territories, something that the USICC had also done in later years.²⁸ The Mahoney model strongly influenced the presentation of ethnohistorical evidence at trial (1987-90) in *Delgamuukw*, the first major land claim after *Calder* to be appealed to the Supreme Court.

The "frozen rights doctrine" also weighed heavily on the minds of lawyers and experts during the *Delgamuukw* trial. This legal theory held that Aboriginal rights only encompassed traditions in place when Europeans had asserted sovereignty – the mythical "time immemorial" of Canadian law. According to this outlook, cultural practices were considered to be ineligible for legal protection if they had been extensively modified or created as a consequence of interactions with the newcomers. This presumption held sway until 1990, when the Supreme Court rejected this notion in its *Regina v. Sparrow* judgment. The court ruled that traditional rights could exist in modern forms.²⁹ By this time, however, the *Delgamuukw* trial was in its final phase, and most of the ethnohistorical evidence had been presented and examined. Significantly, the frozen rights theory had different implications for researchers who supported the plaintiffs versus those who supported the defendants. Also, it had the effect of once again bringing the long-standing academic

debate about continuity versus change into the courtroom, as the discussion below will highlight.

The Mahoney test and the frozen rights doctrine were additionally problematic for the ethnohistorical experts who appeared in *Delgamuukw* because the courts had not determined when the British had established effective sovereignty over the disputed territory. The operating assumption during the trial was that British sovereignty had occurred sometime between the arrival of Captain James Cook in 1778 and the creation of the colony of British Columbia in 1858 (or possibly even later in more remote areas). This ambiguity precluded ethnohistorical experts from targeting their research to a specific year, as had been the case in most USICC claims, which usually had addressed historical treaties.³⁰

Given these circumstances, the Gitksan and Wet'suwet'en believed that, to be safe, they had to demonstrate at trial that their ancestors' way of life met the Mahoney test throughout the period from the eve of Cook's visit until at least the end of the nineteenth century. This demonstration involved gathering evidence to show that their people had traditionally lived in villages, each of which had been comprised of a number of land-owning lineages (houses) headed by hereditary chiefs. It was essential for them to demonstrate that house territories had been clearly defined, that lineage heads had effectively managed these territories on behalf of the house, and that customary laws – the *Adaawk* of the Gitksan and the *Kungax* of the Wet'suwet'en – had underpinned the system. In other words, organized societies had controlled bounded territories. Finally, the Gitksan and Wet'suwet'en thought that they needed to prove their house-territory system was neither a product of the European fur trade nor had been transformed significantly by it during the early contact period.

When the Gitksan and Wet'suwet'en began preparing for their claim in the early 1980s, a massive archaeological and ethnographic literature already existed that dealt with the northwest coast cultural area.³¹ Salvage ethnology and cultural element distribution surveys dominated this early scholarship. This literature posed several problems for the Gitksan and Wet'suwet'en claimants, however. Few ethnographers had studied their ancestors. Rather, most scholars had focused their research on the Tshimshian coastal neighbours of the Gitksan and Wet'suwet'en. And, as with other regions, ethnographers had paid little regard to local land tenure systems. Another problem for the plaintiffs was that, in northern British Columbia, ethnohistorical research had lagged far behind that in other areas of the country. Consequently, on the eve of the *Delgamuukw* claim, there were no published ethnohistories of the Gitksan's and Wet'suwet'en's participation in the Pacific slope fur trade (or that of their neighbours) comparable to those that focused on the Assiniboine, Cree, Huron, and Ojibwa involvement in the French and Hudson's Bay Company (HBC) fur trades of central Canada.³²

Most worrisome of all, the limited ethnographic literature that did address local land tenure practices suggested that those of the Wet'suwet'en were a postcontact invention. In 1932, ethnologist Diamond Jenness planted the seeds for this idea when he suggested that western Carrier groups had borrowed many cultural elements from their Tshimshian neighbours.³³ Nine years later Irving Goldman explored this idea with respect to the Alkatcho Carrier, who lived to the south of the Wet'suwet'en, and the Stuart Lake Carrier. Goldman argued that the European fur trade had provided the key stimulus for the cultural borrowing that Jenness had postulated.³⁴

At about the same time, Julian Steward also became interested in western Carrier land tenure practices, particularly those of Stuart Lake. This was because his theories about cultural ecology postulated that common cultural patterns normally emerged when environmental settings, technologies, and the economic orientations of groups were broadly similar. This was the case throughout most of the Athapascan-speaking area. The western Carrier people were a marked exception. Their house-territory scheme differed from those of most other Athapascan groups. He undertook fieldwork in the Stuart Lake area in 1939-40 to search for an explanation of this apparent anomaly. Steward published a field report in 1940 and a short article a year later. He did not write about these people again until 1955 and 1961.³⁵ By this time, his USICC claims work had encouraged him to theorize about the interrelationships between levels of sociopolitical organization and tenure systems and to consider the impact that European contact had had on those relationships. As noted, he believed that contact with Euro-Americans had led many groups to adopt more elaborate sociopolitical and land tenure systems. These had been central issues in the northern Shoshone case, in which he had argued that before Euro-American contact these Indians' cultures had not evolved sufficiently for them to have developed a property system.³⁶

Given his perspective on this issue, it is not surprising that the Jenness-Goldman diffusionist explanation for the western Carrier house-territory system appealed to Steward. When elaborating on their ideas, he too embraced the European fur trade as the catalyst. He thought that the local environment facilitated adoption of the Tshimshian-like tenure system because the region abounded in salmon and had limited populations of large game. According to Steward, these factors favoured settled village life over the nomadic hunting ways common to most other Athapascans.³⁷ Steward also argued that the fur trade had led the western Carrier to develop a regulatory scheme that protected local beaver populations. The fundamental problem with his theorizing was that he did not test his ideas against data that he could have obtained by combing the published and unpublished accounts of the North West Company fur traders who had been in the area before 1821.

To challenge the Jenness-Goldman-Steward perspective and obtain the ethnographic data that they needed to fill in the gaps in the extant literature, the Gitksan and Wet'suwet'en enlisted the help of anthropologists to undertake a massive oral history project with the objective of mapping the various house territories, recording their histories, and articulating how their tenure system operated. They also retained two historical geographers, Robert Galois and me, to provide documentary histories of the regional economy during the postcontact era. They asked me to focus on the fur trade history of the region and pay particular attention to their ancestors' involvement in the European fur trade from the time of initial local contact until the mid-nineteenth century. Galois looked at the later period.

My research in the HBC archives revealed that, in the early 1820s, one of the company's senior officers, William Brown, wrote a series of district reports and post journals that provided detailed accounts of the Gitksan and Wet'suwet'en (particularly the latter) house-territory and feast system. Apparently, he dwelt on this topic because he was new to the area and their tenure system seriously interfered with his efforts to expand the company's beaver returns from the upper Skeena River area. Of particular importance for the plaintiffs' claim, Brown noted that each village included "nobles or men of property" who controlled access to the resources of their house's territory.³⁸ In other words, his description provided independent corroboration for the oral evidence that the elders presented.

The accounts also provided important clues about the antiquity of the land tenure practices that Brown observed. Of crucial importance, he made it abundantly clear that the Wet'suwet'en and their eastern relatives, the Babine, carefully managed their beaver stocks in order to assure themselves of a supply of beaver meat, a very important ceremonial food. This meant that their conservation effort was not aimed at hoarding beaver pelts for trading purposes, as Steward supposed.³⁹ This fact suggested the probability that the beaver conservation measures, and the house-territory system that made them possible, originated in the precontact period. Rather than being the genesis of the conservation system, as Goldman and Steward proposed, the fur trade likely provided the Babine and Wet'suwet'en with an additional reason to perpetuate it. This is what I argued at trial. Understandably, crown counsel vigorously challenged my interpretation using several lines of attack. They noted that my previous research about the impact of the early fur trade on the Assiniboine, Cree, and Ojibwa of central Canada had emphasized cultural change rather than stability. They asked me why Brown had only mentioned beaver if the chiefs had husbanded all the resources of their territories. Finally, drawing on archival records, they cited many instances of interhouse and intervillage conflicts (mostly from the late nineteenth century) to suggest that the chiefs had no real authority and that the Gitksan and Wet'suwet'en lived in a Hobbesian world of chaos

until British Columbia and Canada brought the gift of civilization and established order in the region.⁴⁰

I replied to these propositions and questions as follows. With regard to the impact of the fur trade, I took a particularistic stance and emphasized the importance of doing detailed empirical research that focused on the local area. I stressed that the cultural and environmental circumstances in which the European-oriented fur trade unfolded in Skeena River country were radically different from those of the Sub-Arctic and Plains cultural areas. For these reasons, I contended that it was unsound to assume that the post-contact histories of groups from these very dissimilar regions were parallel. I observed that Brown's own experience made this point. Brown had gained his trading experience east of the Rocky Mountains among the band societies of the Cree, Ojibwa, and Dene. His accounts reveal that he found it difficult to deal with the Gitksan and Wet'suwet'en, who were very different. Most notably, they were led by hereditary chiefs who wielded considerable influence and power and had their own agendas.

Concerning Brown's focus on beaver conservation practices to the exclusion of similar discussions about the management of other resources, I pointed out that his primary goal was to increase beaver returns. Other resources, except salmon, were not of interest to Brown, which likely explains why he did not discuss the chiefs' supervision of them. His reports for the districts that he managed before moving to Gitksan and Wet'suwet'en territory in 1821 support this explanation. In these other documents, he wrote at length about the issues most relevant to his performance as a fur trader. Mostly, he dwelt on the actions of opposing traders. Of particular relevance in his earlier reports, he did not provide detailed descriptions of Aboriginal tenure systems.

The report and testimony of historical geographer Sheila Robinson comprised the centrepiece of the crown's defence. She argued that there was "no conclusive evidence that suggests that, prior to the advent of European influence in the claim area, the Gitksan and Wet-suet'en lineages and families identified ownership rights to large and precisely defined tracts of hunting territories." Elaborating on her theory, Robinson continued:

Speaking generally, one may expect that some form of organized control would have been exercised over access to the fisheries and other resources which were necessary for survival and over the local trails and bridges which facilitated prehistoric trade networks. But prior to the intensification of pressure on interior fur resources sparked by European demands for furs there would appear to have been no need of a sophisticated and elaborate body of rules governing access to resources or for extensive and defined areas of land for the exploitation. In the absence of competition over scarce resources, there is no reason for the rules to exist.⁴¹

Robinson concluded by speculating that, before the advent of the European fur trade, Native territorial holdings “were in all likelihood more limited in size, to include mainly the area surrounding villages.”⁴² In other words, she was advancing a theoretical model reminiscent of the one that the government’s experts had often advanced in USICC cases.⁴³ Her “model” was much cruder than that of her predecessors, however. For example, she made no effort to calculate land use intensity and relate it to effective occupancy, as the government’s experts had done thirty years earlier in the California Indian claims. Rather, Robinson offered a “lines and nodes” perspective that recognized usage only in terms of cultural modifications of the physical landscape (villages, trails, developed fishing sites, etc.). This was an outlook that echoed Lockean notions about property rights and was in keeping with the perspectives of successive colonial and provincial governments.⁴⁴

At the outset of her report, and in her testimony, Robinson admitted that she had not carried out any fieldwork among the Gitksan and Wet’suwet’en, nor had she done any archival work to test her theory of Aboriginal land tenure. Instead, she mostly relied on Goldman and Steward and on more recent elaborations of their work in the late 1970s by anthropologists Vernon Kobrinski and Charles A. Bishop (1979).⁴⁵ These anthropologists, as was the case with Steward, explicitly stated that they were being speculative. Of particular importance, neither Bishop nor Kobrinski had examined HBC trader Brown’s records, which had been available since the late 1960s, when the HBC archives were opened to scholars. In other words, in *Delgamuukw*, Robinson was perpetuating the speculative approach to the cultural history of the western Carrier that had become an anthropological tradition. Reiterating what her secondary sources had claimed, particularly Steward, she argued that the immediate postcontact fur trade must have brought about major transformations of Wet’suwet’en land tenure systems because the enterprise had had such impacts elsewhere in North America. When making this historical/ethnographic analogy, she did not inform the court that ethnohistorians have been debating the impact that the fur trade had on Algonquian tenure systems in eastern Canada since the beginning of the twentieth century. To date, they have not reached a consensus.⁴⁶

Conclusion

It has been almost sixty years since the Indian claims era began in North America. Many of the issues and problems that arose during the first decade of USICC hearings remain with us today. There are a number of reasons for this. Most notably, ethnohistorical experts are still expected to address their research to the same basic land tenure model that case law and the USICC act mandated, although the courts now allow for overlapping territories.

Also, scholars continue to hold fundamentally different views of the impact that contact had on the core features of Aboriginal societies and cultures, such as land tenure systems. Some emphasize continuity; others stress disruptive change. These contrasting perspectives have great significance in the legal arena, where proving or disproving the continuity of a tradition can lead to recognition or denial of Aboriginal rights.

Appendix 1

List of written reports submitted to the USICC and published by Garland Publishing*

- Baerreis, David A., Erminie Wheeler-Voegelin, and Remedios Wycoco-Moore. *Indians of Northeastern Illinois: Anthropological Report on the Chippewa, Ottawa, and Potawatomi Indians.*
- Berthrong, Donald J. *Indians of Northern Indiana and Southwestern Michigan: An Historical Report on Indians' Use and Occupancy of Northern Indiana and Southwestern Michigan.*
- Ewers, John C. *Ethnological Report on the Chippewa Cree Tribe of the Rocky Boy Reservation and the Little Shell Band of Indians.*
- Hickerson, Harold. *Chippewa Indians II: Ethnohistory of Mississippi Bands and Pillager and Winnibigoshish Bands of Chippewa.*
- . *Chippewa Indians III: Ethnohistory of Chippewa of Lake Superior.*
 - . *Chippewa Indians IV: Ethnohistory of Chippewa in Central Minnesota.*
 - . "The Genesis of a Trading Post Band: The Pembina Chippewa." *Ethnohistory* 3, 4 (1956): 289-345.
 - . "The Journal of Charles Jean-Baptiste Chaboillez, 1797-1798." *Ethnohistory* 9 (1962): 265-316, 363-427.
 - . *Sioux Indians I: Mdewakanton Band of Sioux Indians.*
- Sharrock, Susan, and Floyd Sharrock. *A History of the Cree Indian Territorial Expansion from the Hudson Bay Area to the Interior Saskatchewan and Missouri Plains in Montana, 1640-1916.*
- Stout, David B. *Chippewa Indians: Ethnohistorical Report on the Saginaw Chippewa.*
- Tanner, Helen. *Chippewa Indians: The Chippewa of Eastern Lower Michigan.*
- . *Indians of Northern Ohio and Southeastern Michigan: The Location of Indian Tribes in Southeastern Michigan and Northern Ohio.*
- Wheeler-Voegelin, Erminie. *Anthropological Report on the Ottawa, Chippewa, and Potawatomi Indians, Part 1.*
- . *Chippewa Indians V: Anthropological Report on Indian Land Use and Occupancy of Northern Michigan.*
 - . *Indians of Illinois and Northwestern Indiana.*
 - . *Indians of Ohio and Indiana Prior to 1795: Ethnohistory of Indian Use and Occupancy in Ohio and Indiana Prior to 1795.*
 - . *Indians of Northern Ohio and Southeastern Michigan: An Ethnohistorical Report.*
 - . *Indians of Northern Ohio and Southeastern Michigan: Ethnohistorical Report on the Wyandot, Ottawa Munsee, Delaware, Shawnee, and Potawatomi of Royce Areas 53 and 54.*
 - . *Indians of Northwestern Ohio: Ethnohistorical Report on the Wyandot, Potawatomi, Ottawa, and Chippewa of Northwestern Ohio.*
- Wheeler-Voegelin, Erminie, and Harold Hickerson. *Chippewa Indians I: Red Lake and Pembina Chippewa.*

* Note: All works were published by Garland in 1974 unless otherwise noted.

Notes

Epigraph: Steward, "Theory and Practice," 292-93.

- 1 Initially, experts who took part in the process wrote about their reactions and concerns. One of the most notable publications was the special issue of *Ethnohistory* 4 (1955), in which anthropologists Nancy Lurie, Julian Steward, and A.L. Kroeber all made contributions. Thirty years later Imre Sutton edited an important collection of essays on the USICC, which also included essays by some of the important experts. See Sutton, ed., *Irredeemable America*.
- 2 This was known as the "space-time equivalency hypothesis." The problem in Canada, of course, is that some of the areas that scholars thought were remote, such as Hudson Bay and James Bay, had some of the longest periods of sustained contact with Euro-Canadians.
- 3 One of the classic acculturation studies is that of Ralph Linton, *Acculturation*.
- 4 Barnard, *History and Theory*, 55-56. Chronology was inferred from the notion that cultural elements diffused outward from the centre of a cultural area. Therefore, the oldest artifacts presumably were located at the outer edges of a region. Wissler developed the age-area model because archaeologists had few reliable dating techniques in the early twentieth century.
- 5 Kroeber finished the handbook in 1919: Kroeber, *Handbook of the Indians of California*, 78; and Kroeber, *Cultural and Natural Areas*.
- 6 The classic general study of this type is Cyril Daryll Forde, *Habitat, Economy, and Society*.
- 7 Ralph Linton also made an important contribution in *The Study of Man*.
- 8 See Clemmer, Meyers, and Rudden, eds., *Julian Steward and the Great Basin*, 170-202.
- 9 Nancy Lurie, an early participant in ICC claims as an expert, noted that initially the government expected that most of the experts would be historians. Government officials were unaware that historians had, prior to the act, focused little attention on Indian history. Interview with Nancy Lurie, Milwaukee Public Museum, October 2002.
- 10 Ray, "Anthropology, History, and Aboriginal Rights: Politics and the Rise of Ethnohistory in North America in the 1950s," keynote paper presented at a symposium on Dialogues between the Disciplines: History and Anthropology, Center for Critical Theory and Transnational Studies, University of Oregon, 3-5 April 2003, 9; Ray, "Anthropology, History, and Aboriginal Rights: Politics and the Rise of Ethnohistory in North America in the 1950s," 89-112.
- 11 On 20 July 1955, Wheeler-Voegelin noted that the Department of Justice had assigned fifty ICC dockets to her project. Of these, she anticipated that forty would be tried before the commission. She anticipated that another sixty reports would be needed. Erminie Wheeler-Voegelin to Ralph A. Barney, 20 August 1955, Indian University Archives, Great Lakes and Ohio Valley Ethnohistorical Survey [GLOVES], box 1.
- 12 Dorothy Libby served as editor for volume 12 (1965).
- 13 Ray, "Anthropology, History, and Aboriginal Rights"; and Ray, "Constructing and Reconstructing Native History," 15-38.
- 14 Ralph Barney, US Department of Justice, to Erminie Wheeler-Voegelin, 29 August 1956, Wheeler-Voegelin Papers, Indiana University, box 1/3.
- 15 According to Lurie, legal theories advanced by the Department of Justice strongly influenced the thinking of commissioners. Interview with Lurie.
- 16 For example, Anthony Wallace made this argument in the Iowa claim. Besides deliberately obfuscating boundary information, he contended that Indians created alliances with neighbouring groups so that individual tribes could not surrender their lands without the consent of their allies. See Ray, "Constructing and Reconstructing Native History," 23-25.
- 17 Hickerson initially developed this idea in print in "The Virginia Deer and Intertribal Buffer Zones," 43-66. This paper was based on research that he had undertaken for USICC claims in central and northern Minnesota. Subsequently, Hickerson elaborated this thesis in his classic work, *The Chippewa and Their Neighbors*, 64-119.
- 18 Ray, "Constructing and Reconstructing Native History," 21.

- 19 Studies of cultural “continuity and change” also became popular.
- 20 There is little doubt that the *R. v. Van der Peet* (1996) decision of the Supreme Court of Canada will renew this outdated debate in Canada. In this decision, the court held that “to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right ... To be integral, a practice, custom or tradition must be of central significance to the Aboriginal society in question – one of the things which made the culture of the society distinctive.” *R. v. Van der Peet*, [1996] 2 S.C.R. 507.
- 21 Ross, *Index to the Expert Testimony*, vii.
- 22 In particular, he argued that contact, especially their involvement in the fur trade, led to a breakdown of the clan system. See Bishop, *The Northern Ojibwa and the Fur Trade*, viii-ix.
- 23 Essentially, Bishop argued that the ancestors of the claimants had immigrated into the claimed area after contact and had emerged as a “trading post band” after the Robinson Treaty of 1850. See Hodgins and Benidickson, *The Temagami Experience*, 268. Hickerson took a similar approach to the Chippewa claims in Minnesota. He developed the idea that bands had formed around trading posts; Hickerson, “Genesis of a Trading Post Band: The Pembina Chippewa,” 289-345. This opinion was based on research that he had undertaken for Docket 18-A, Red Lake, Pembina, and White Earth Bands and Minnesota Chippewa Tribe.
- 24 As an undergraduate, I had also taken courses with him.
- 25 Baerreis, “The Ethnohistoric Approach and Archaeology,” 49-77.
- 26 Those that went to trial are: *R. v. Horseman*, [1990] 1 S.C.R. 901, *Victor Buffalo et al. v. Regina*, 2002 F.C.T. 1226, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, *Regina v. Spade*, *Regina v. Wassaykessic* (Ontario Court Provincial Division [unreported], 1992), and *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 S.C.C. 43.
- 27 *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. Personal communication, Professor Doug Sanders, Faculty of Law, University of British Columbia.
- 28 *Delgamuukw v. Regina* (s. 196).
- 29 The court acknowledged that traditional rights could exist in modern forms. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
- 30 In his judgment, Chief Justice Allan MacEachen decided that it had taken place between 1803 and 1858. Chief Justice Allan MacEachen, *Reasons for Judgment*, Supreme Court of British Columbia, Smithers Registry 0843, 8 March 1991.
- 31 Franz Boas had done the pioneering fieldwork in the region in 1886.
- 32 In 1977, Robin Fisher published *Contact and Conflict*, which contained chapters on the fur trade. Fisher’s work did not focus on any single group, however.
- 33 Jenness, *Indians of Canada*, 365. The eastern Canadian studies included Bishop, *Northern Ojibwa and the Fur Trade* (1974); Heidenreich, *Huronian* (1971); Ray, *Indians in the Fur Trade* (1974); Ray and Freeman, “Give Us Good Measure” (1978); and Trigger, *Children of Aataensic* (1976).
- 34 Goldman, “The Alkatcho Carrier,” 396-418.
- 35 Steward, “Recording Culture,” 83-90. In 1955 he devoted Chapter 10 in his *Theory of Culture Change* to the Carrier.
- 36 Ronaasen et al., 174-76.
- 37 Steward, “Carrier Acculturation,” 732-44.
- 38 Arthur J. Ray, “The Early Economic History of the Gitksan and Wet’suwet’en-Babine Tribal Territories: 1822-30,” unpublished paper (1985).
- 39 Ray, “Fur Trade History of Gitxzan and Wet’suet’en Territory,” *Delgamuukw* Proceedings at Trial, Supreme Court of British Columbia, Smithers Registry No. 0843, 20 March 1989, Exhibit Number 963.
- 40 Arthur J. Ray, “Creating the Image of the Savage,” 13-28.
- 41 Sheila Robinson, “Protohistoric Developments in Gitksan and Wet-suet’en Territories,” unpublished report, 12 May 1987, 5.
- 42 *Ibid.*, 6.

43 Ray, "Kroeber and the California Claims," 248-74.

44 This is known as the labour theory of property. According to this perspective, rights derive from the modification of the natural environment through the investment of human labour.

45 Kobrinski, "The Tsimshianization of the Carrier Indians," 201-10; Bishop, "Limiting Access to Limited Goods," 148-61.

46 For an excellent discussion of this debate, see Tanner, "The New Hunting Territory Debate: An Introduction to Some Unresolved Issues," *Anthropologica* 28 (1986): 19-36.