Université de Montréal

At the Intersection of Tangible and Intangible: Constructing a Framework for the Protection of Indigenous Sacred Sites in the Pursuit of Natural Resource Development Projects

par
Elizabeth Aletta Steyn

Faculté de droit

Thèse présentée à la Faculté de droit
en vue de l'obtention du grade du doctorat en droit

septembre, 2017

Résumé

La problématique de la protection des sites sacrés autochtones dans le cadre du développement des ressources naturelles est devenue un sujet d'intérêt public suite à la couverture médiatique internationale, au début de 2017, du "*Dakota Access Line Protest (DAPL)*" du Standing Rock Sioux dans le Nord Dakota. Toutefois, cela fait très longtemps que ces préoccupations existent pour de nombreuses communautés autochtones à travers le monde. Cette thèse aborde ce sujet à partir de trois angles complémentaires : l'anthropologie juridique / la théorie autochtone, le droit international et le droit comparatif.

L'anthropologie juridique jumelée à la théorie autochtone, utilisées comme savoirs externes, permet dans cette optique une approche équilibrée, pour comprendre les conceptions du temps, de l'espace et du sacré, dans une posture non-réductrice, non-essentialisée et non-romantique, en comparant quatre juridictions, celles du Canada, des États-Unis, de l'Australie et de l'Aotearoa Nouvelle-Zélande.

L'objectif de cette étude comparative est de créer une matrice qui permettra d'évaluer les mécanismes et/ou dispositions juridiques pour la protection des sites sacrés autochtones dans le cadre du développement des ressources naturelles dans les quatre systèmes juridiques comparés. Notre but est d'élaborer un cadre juridique plus efficace, sensible aux contextes particuliers, pour la protection des sites sacrés autochtones dans chacune de ces juridictions. *Sensible aux contextes particuliers* signifie que ce cadre sera en accord avec la culture juridique du pays, les valeurs, coutumes et identités autochtones du territoire ainsi que les normes internationales potentiellement pertinentes pour ce pays. Cette approche se doit de tenir compte des différents paliers et d'être multidimensionnelle.

La perspective internationale est essentielle pour trois raisons. Tout d'abord, dans le monde moderne, on retrouve la globalisation, l'internationalisation et la glocalisation. Ensuite, les nouvelles technologies de communication permettent aux Autochtones d'obtenir des appuis à leurs causes sur la scène internationale. Et, finalement, partout à travers le monde, le principe fondamental de souveraineté des États est hautement conflictuel avec l'autodétermination des Autochtones. Cette

étude est nécessairement limitée aux relations entre le droit international et les droits internes de ces quatre systèmes juridiques.

Comme il s'agit d'une thèse de doctorat en droit, le droit comparatif en est au cœur. Une méthodologie similaire, en quatre étapes, est utilisée pour analyser chacune des quatre juridictions. En premier lieu, les mécanismes juridiques les plus pertinents pour la protection des sites sacrés sont examinés en détail. Deuxièmement, une étude de cas, abordée dans chaque juridiction, permet de jauger concrètement l'efficacité de ces mécanismes. De plus, la matrice élaborée auparavant sert de toile fond pour évaluer ces mécanismes dans ce contexte concret. Troisièmement, tous les éléments recueillis pour chaque juridiction sont mis en relation, analysés et synthétisés. Finalement, des conclusions sont tirées pour chaque pays et serviront à la construction du cadre proposé dans le dernier chapitre.

Dans le dernier chapitre, on retrouve tout d'abord, la formulation d'une solution idéale, voire idéaliste. Ensuite, des propositions pragmatiques y sont formulées pour chaque juridiction dans son contexte actuel. Somme toute, cette thèse conclut que l'approche juridique de l'Aotearoa Nouvelle-Zélande apporte une base de réflexion intéressante. Celle-ci pourrait, en effet, être transposée aux trois autres juridictions, non pas parce que ces juridictions partagent le même héritage du Common Law, mais en raison de la possible compatibilité juridique, dans ces pays, de la méthodologie utilisée par l'Aotearoa Nouvelle-Zélande pour développer les mécanismes permettant l'expression des valeurs culturelles, des traditions et des identités autochtones, à travers les concepts et structures juridiques occidentaux.

Mots-clés : American Indian law, DDPA, développements des ressources naturelles, native title, obligation de consulter, peoples Autochtones, personnalité juridique, protection du patrimoine culturel, site sacré, titre ancestral

Abstract

While the issue of protecting Indigenous sacred sites in the pursuit of natural resource projects only came to public attention with the international press coverage of the Standing Rock Sioux's Dakota Access Line Protest (DAPL) in North Dakota earlier in 2017, it has long been an issue of considerable concern for Indigenous peoples worldwide. This thesis considers the matter from three angles: legal anthropology/Indigenous theory, international law and comparative law.

The twin perspectives of legal anthropology and Indigenous theory are employed as external disciplines in a check-and-balance exercise that aims to clarify the Indigenous conceptions of time, space and the sacred in the four jurisdictions under comparison –Canada, the United States, Australia and Aotearoa New Zealand– in a non-reductive, non-essentialized, non-romanticized manner. The objective of this exercise is to create a matrix against which juridical mechanisms and/or legal provisions for the protection of Indigenous sacred sites can be measured in the four jurisdictions studied, with the ultimate aim of crafting an improved, context-sensitive framework for the protection of Indigenous sacred sites in each such jurisdiction. *Context-sensitive framework* refers to a framework aligned with the country's legal culture, Indigenous values, customs and identities found within the boundaries of that jurisdiction, and with such international norms as may potentially be pertinent in that state. This demands a multi-faceted, layered approach.

The international law perspective is crucial due to three factors: first, the predominance of phenomena such as globalization, internationalization and glocalization in the modern world; second, the telecommunications revolution, which has meant that Indigenous peoples increasingly rally support for their causes on the international stage; and third, the high-profile conflict between State sovereignty and Indigenous self-determination that is ubiquitous on the world stage. The focus of this study is necessarily limited to the relationship between international and domestic law in each of the four jurisdictions.

Since this is a thesis for a doctorate in law, there is comparative law at the heart of it. In each of the four jurisdictions a similar methodology is followed. In the first step, the most pertinent legal mechanisms for the protection of sacred sites are considered from up close. The second step is to test the effectiveness of such mechanisms with reference to a concrete case study in that jurisdiction.

The case study contemplates the legal mechanism in question in its factual contexts with the aid of the matrix as in the first portion of the thesis. Then a process of analysis and synthesis follows, until finally, some conclusions are drawn for utilization in the construction of the final chapter's proposed framework.

The final chapter proposes both an ideal solution and some pragmatic proposals in the context of each jurisdiction. In sum, the thesis concludes that Aotearoa New Zealand's legal approach provides an interesting basis for further development. It is deemed to be transposable into the other three jurisdictions not based on the fact that they share a common law heritage, but rather because of the compatibility of the methodology that was followed in developing the said mechanism in a manner that gives expression to Indigenous cultural values, customs and identity through the use of Western legal structures and concepts.

Keywords: aboriginal title, American Indian law, cultural heritage protection, duty to consult, Indigenous peoples, legal personality, native title, natural resource development, sacred site, UNDRIP

Table of Contents

Résumé i

Abstract iii

Table of Contents v

List of Tables xvi

List of Diagrams xvii

List of Acronyms xviii

Expression of Appreciation xxi

Preface xxii

PART I: CONTEXT AND CONTOURS 1

Introduction to Part I 1

Chapter 1: Theoretically Speaking 6

1.1 Introduction 6

1.2 The Research Problem 13

1.3 Research Objective 14

1.4 Hypotheses 14

1.5 Research Boundaries 15

1.6 Key Concepts 16

1.6.1 "Natural Resource Development Projects" 17

1.6.2 "Indigenous Peoples" 18

1.6.2.1 "Indigenous Peoples" under International Law 20

1.6.2.2 Self-Identification and State Identification 21

1.6.3 "Sacred Sites" 22

1.7 Thesis Structure 33

1.8 Theoretical Framework 38

1.8.1 Legal Anthropology and Indigenous Theory 38

1.8.1.1 Introduction 38

1.8.1.2 Difficulties Inherent in Indigenous Theory 40

1.8.1.3 Challenges Posed by Indigenous Theory 43
1.8.1.4 Difficulties Inherent in Legal Anthropology 45
1.8.1.5 Challenges Posed by Legal Anthropology 45
1.8.2 Legal Comparison 46
1.8.2.1 Introduction 47
1.8.2.2 Paradigms 49
1.8.2.2.1 Empathy for Alterity 49
1.8.2.2.2 Similarity and Difference 50
1.8.2.2.3 Context and Alterity 51
1.8.2.3 Approach 53
1.8.2.3.1 The Cultural Approach 53
1.8.2.3.2 Genealogical comparison 56
1.8.2.3.3 Micro and Macro Comparison 56
1.8.2.3.4 Internal and External Perspectives 57
1.8.2.4 Choice of Legal Systems 57
1.8.2.5 The Desktop Studies 58
1.8.3 International Law 59
1.9 Original Contribution to Science 62
1.9.1 Literature Review 62
1.9.2 Contribution to Scientific Advancement 66
1.10 Summary 67
Chapter 2: Insights into Indigeneity 69
2.1 Introduction 70
2.2 Key Themes 71
2.2.1 Romanticization, Reductionism and Essentialization 71
2.2.2 Identity Politics 78
2.2.3 Authenticity and Representation 84
2.3 Culture, Religion and Identity 86
2.3.1 The Importance of Cultural Continuity for Indigenous Identity 87
2.3.2 Indigenous Culture and Religion 90
2.3.3 The Identitary Role of Sacred Sites in Indigenous Culture and Religion 93

2.4 Indigenous Paradigms 95
2.4.1 Indigenous Conceptions of Time 96
2.4.1.1 North America: Native American and First Nations Traditions 96
2.4.1.2 Australia: Aboriginal Traditions 98
2.4.1.3 Aotearoa New Zealand: Māori Traditions 103
2.4.2 Indigenous Conceptions of Space 106
2.4.2.1 A Sense of Place 106
2.4.2.1.1 North America: Native American and First Nations Traditions 110
2.4.2.1.2 Australia: Aboriginal Traditions 114
2.4.2.1.3 Aotearoa New Zealand: Māori Traditions 115
2.4.2.2 The Link Between Land and Religion 118
2.4.2.2.1 North America: Native American and First Nations Traditions 118
2.4.2.2.2 Australia: Aboriginal Traditions 120
2.4.2.2.3 Aotearoa New Zealand: Māori Traditions 123
2.4.3 Indigenous Conceptions of the Sacred 124
2.4.3.1 Issues of Cultural Cross-Translation 124
2.4.3.1.1 North America: Native American and First Nations Traditions 125
2.4.3.1.2 Australia: Aboriginal Traditions 126
2.4.3.1.3 Aotearoa New Zealand: Māori Traditions 128
2.4.3.2 Translation and Universalization 130
2.4.3.2.1 North America: Native American and First Nations Traditions 130
2.4.3.2.2 Australia: Aboriginal Traditions 133
2.4.3.2.3 Aotearoa New Zealand: Māori Traditions 137
2.4.3.3 The Role of Ritual 140
2.4.3.3.1 North America: Native American and First Nations Traditions 141
2.4.3.3.2 Australia: Aboriginal Traditions 141
2.4.3.3.3 Aotearoa New Zealand: Māori Traditions 143
2.4.3.4 Secrecy about the Sacred 145
2.4.3.4.1 North America: Native American and First Nations Traditions 146
2.4.3.4.2 Australia: Aboriginal Traditions 147
2.4.3.4.3 Aotearoa New Zealand: Māori Traditions 148

2.5 Summary 149
Chapter 3: Looking Towards International Law 151
3.1 Introduction 151
3.2 Potential Impediments 152
3.2.1 Introduction 152
3.2.2 Background: Colonialism and the Doctrine of Discovery 154
3.2.3 State Sovereignty 158
3.2.3.1 State Sovereignty as Principle of International Law 158
3.2.3.2 State Sovereignty and the Right to Self-Determination 159
3.2.4 The Principle of Permanent Sovereignty over Natural Resources 161
3.3 Avenues for Protection of Indigenous Sacred Sites 163
3.3.1 Preliminary Matters 163
3.3.1.1 Introduction 163
3.3.1.2 Individual and Collective Rights 165
3.3.2 International Human Rights Instruments 169
3.3.2.1 Indigenous Rights 171
3.3.2.1.1 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 171
3.3.2.2 Cultural Rights 176
3.3.2.2.1 The Right to Take Part in Cultural Life (ICCPR, Article 27) 176
3.3.2.2.2 Cultural Heritage Rights 177
3.3.3 Jurisprudence: International Human Rights Bodies 180
3.4 The Domestic Implementation of International Law 187
3.4.1 Introduction 187
3.4.2 Canada 191
3.4.3 The United States 194
3.4.4 Australia 196
3.4.5 Aotearoa New Zealand 199
3.5 Summary 200
Conclusion to Part I 202
PART II: CRAFTING SOLUTIONS 203

Introduction to Part II 203

Chapter 4: Canada 206

4.1 Introduction 206

4.2 Timeline 208

4.3 Background: Uncovering Canada's Legal *Mentalité* 215

4.3.1 Legal Family/Legal Tradition 215

4.3.2 Constitutional Tradition 217

4.3.3 Approach to and Relationship with Indigenous Peoples 222

4.3.3.1 Self-Identification and State Identification 222

4.3.3.2 Evolving Approach 225

4.3.4 Approach to International Law 229

4.4 Summary of Sources 230

4.5 The Canadian Legal Response to Developments that (Potentially) Impact on Indigenous Sacred Sites 232

4.5.1 Introduction 232

4.5.2 Freedom of Religion: Section 2(a), *Charter of Human Rights and Freedoms* 232

4.5.2.1 Background: Indigenous Spirituality in North America – The Sacred 232

4.5.2.2 Background: Freedom of Religion 233

4.5.2.3 Freedom of Religion as Potential Avenue of Sacred Site Protection 239

4.5.2.4 Illustration: Desktop Study 1 – Ktunaxa Nation and Jumbo Glacier Ski Resort, British Columbia 243

4.5.2.4.1 Introducing the Desktop Study 243

4.5.2.4.2 Contemplating the Fact Set 245

4.5.2.4.3 The Litigation 247

4.5.2.4.4 Analysis 256

4.5.3 Aboriginal and Treaty Rights: Section 35, *Constitution Act, 1982* 259

4.5.3.1 Background: Indigenous Spirituality in North America – Time and Space 259

4.5.3.2 Background: Aboriginal Title 260

4.5.3.3 Aboriginal and Treaty Rights as Potential Avenue of Sacred Site Protection 262

4.5.3.4 Illustration: Desktop Study 2 – Prophet First Nation, West Moberly First Nations and Site C Dam, British Columbia 273

4.5.3.4.1 Introducing the Desktop Study 274
4.5.3.4.2 Contemplating the Fact Set 276
4.5.3.4.3 The Litigation 278
4.5.3.4.4 Analysis 283
4.6 Drawing Conclusions 284
Chapter 5: United States of America 289
5.1 Introduction 290
5.2 Timeline 291
5.3 Background: Uncovering the *Legal Mentalité* of the United States 301
5.3.1 Legal Family/Legal Tradition 301
5.3.2 Constitutional Culture 302
5.3.3 Approach to and Relationship with Indigenous Peoples 303
5.3.3.1 Self-Identification and State Identification 303
5.3.3.2 Evolving Approach 305
5.3.4 Approach to International Law 308
5.4 Summary of Sources 309
5.5 The Legal Response of the United States to Developments that (Potentially) Impact on Indigenous Sacred Sites 312
5.5.1 Introduction 312
5.5.1.1 Background: Indigenous Spirituality in North America 312
5.5.1.2 American Indian Law 313
5.5.2 The Federal Recognition Criterion 315
5.5.2.1 Federally Recognized Tribe 320
5.5.2.2 Terminated Tribe 323
5.5.2.3 Non-Federally Recognized Tribe 324
5.5.2.4 Illustration: Desktop Study 3: The Winnemem Wintu and the Raising of Shasta Dam, Northern California 325
5.5.2.4.1 Introducing the Desktop Study 325
5.5.2.4.2 Contemplating the Fact Set 327
5.5.2.4.3 The Litigation 330
5.5.2.4.4 Analysis 331

5.5.3 Tribal, Federal or Private Land 333
5.5.3.1 Tribal Land 334
5.5.3.2 Federal Land 337
5.5.3.3 Private Land 341
5.5.3.4 Illustration: Desktop Study 4 – The San Carlos Apache and Tonto National Forest (Oak Flat), Arizona 341
5.5.3.4.1 Introducing the Desktop Study 341
5.5.3.4.2 Contemplating the Fact Set 342
5.5.3.4.3 The Legislation 343
5.5.3.4.4 Analysis 344
5.5.4 Type of Sacred Site 344
5.5.4.1 Spiritual Beliefs or Ceremonial Practices 345
5.5.4.1.1 Freedom of Religion: First Amendment 345
5.5.4.1.2 American Indian Religious Freedom Act [AIRFA] 359
5.5.4.1.3 Religious Freedom Restoration Act [RFRA] 360
5.5.4.1.4 Executive Order 13007– Indian Sacred Sites 361
5.5.4.1.5 National Historic Preservation Act [NHPA] 362
5.5.4.2 Cultural Keystone Species, Sacred Plants, Medicinal Herbs 363
5.5.4.2.1 National Environment Protection Act [NEPA] 363
5.5.4.3 Historically Important Sites 364
5.5.4.3.1 National Historic Preservation Act [NHPA] 364
5.5.4.3.2 Archaeological Resources Protection Act [ARPA] 367
5.5.4.3.3 American Indian Freedom of Religion Act [AIRFA] 368
5.5.4.3.4 National Environment Protection Act [NEPA] 368
5.5.4.4 Graves and Graveyards 368
5.5.4.4.1 Native American Graves Protection and Repatriation Act [NAGPRA] ... 368
5.5.4.4.2 Archaeological Resources Protection Act [ARPA] (1979) 369
5.5.4.5 Illustration: Desktop Study 5 – The Standing Rock Protest and the Dakota Access Pipeline, North Dakota 369
5.5.4.5.1 Introducing the Desktop Study 369
5.5.4.5.2 Contemplating the Fact Set 370

5.5.4.5.3 The Litigation 372
5.5.4.5.3.1 Introduction 372
5.5.4.5.3.2 *Standing Rock I*: The First Preliminary Injunction 373
5.5.4.5.3.3 *Standing Rock II*: The Second Preliminary Injunction 379
5.5.4.5.4 Analysis 380
5.6 Drawing Conclusions 382
Chapter 6: Australia 388
6.1 Introduction 388
6.2 Timeline 389
6.3 Background: Uncovering Australia's Legal *Mentalité* 394
6.3.1 Legal Family/Legal Tradition 394
6.3.2 Constitutional Culture 394
6.3.3 Approach to and Relationship with Indigenous Peoples 396
6.3.3.1 Self-Identification and State Identification 396
6.3.3.2 Evolving Approach 397
6.3.4 Relationship with International Law 400
6.4 Summary of Pertinent Sources 401
6.5 The Australian Legal Response to Developments that (Potentially) Impact on Indigenous Sacred Sites 404
6.5.1 Land Rights 405
6.5.1.1 Background: Indigenous Spirituality in Australia — The Dreaming, and the Land 405
6.5.1.2 Native Title 407
6.5.1.3 The Northern Territory Aboriginal Sacred Sites Act 1989 ["Sacred Sites Act"] 416
6.5.2 Heritage Legislation 420
6.5.2.1 Background: Indigenous Spirituality in Australia — Time, Rituals and Secrecy 420
6.5.2.2 The Role of Heritage Protection Legislation in Sacred Site Protection 421
6.5.2.2.1 Overview of Commonwealth and State Indigenous Heritage Protection Legislation 421

6.5.2.2.2 Empirical Study: Commonwealth Heritage Legislation 423
6.6 Illustration: Desktop Study 6: – McArthur River Mine, Borroloola, Northern Territory, Australia 433
6.6.1 Introducing the Desktop Study 433
6.6.2 Contemplating the Fact Set 434
6.6.3 The Litigation 435
6.6.4 Analysis 438
6.7 Drawing Conclusions 438
Chapter 7: Aotearoa New Zealand 441
7.1 Introduction 441
7.2 Timeline 442
7.3 Background: Uncovering the Legal *Mentalité* of New Zealand 448
7.3.1 Legal Family/Legal Tradition 448
7.3.2 Constitutional Culture 449
7.3.3 Approach to and Relationship with Indigenous Peoples 450
7.3.3.1 Self-Identification and State Identification 450
7.3.3.2 Evolving Approach 454
7.3.4 Approach to International Law 457
7.4 Summary of Pertinent Sources 458
7.5 The Legal Response of Aotearoa New Zealand to Indigenous Sacred Site Issues 460
7.5.1 Background: Māori Conceptions of Time, Space, and the Sacred 460
7.5.1.1 Māori Conceptions of Time 460
7.5.1.2 Māori Conceptions of Space 461
7.5.1.3 Māori Conceptions of the Sacred 461
7.5.2 The Treaty of Waitangi 462
7.5.3 The Waitangi Tribunal 465
7.5.4 The Aotearoa New Zealand Court System 469
7.5.4.1 Common Law Aboriginal Title 470
7.5.4.2 Treaty of Waitangi Incorporated in Legislation 471
7.5.4.3 Treaty of Waitangi as an Extrinsic Aid to Statutory Interpretation 472
7.5.5 Direct Negotiations with the Crown 474

7.6 Illustration: Desktop Study 7 – Whanganui River Iwi and Whanganui River, Aotearoa New Zealand 475
7.6.1 Introducing the Desktop Study 475
7.6.2 Contemplating the Fact Set 475
7.6.3 The Litigation 478
7.6.4 Analysis 478
7.6.4.1 The Legal Mechanism 478
7.6.4.1.1 Juristic Personality 478
7.6.4.1.2 Legal Structure 481
7.6.4.2 Māori Cultural Values, Customs and Identity 487
7.7 Drawing Conclusions 490
Chapter 8: Creating Context-Sensitive Frameworks 494
8.1 Introduction 494
8.2 How the Thesis Structure Fits into the Research Objectives 495
8.3 Addressing the Thesis Objectives 498
8.3.1 Objective 1 498
8.3.1.1 Canada 498
8.3.1.2 United States 501
8.3.1.3 Australia 505
8.3.1.4 Aotearoa New Zealand 507
8.3.2 Objective 2 510
8.3.2.1 The Ideal Solution 511
8.3.2.1.1 Introduction 511
8.3.2.1.2 Why A Single Solution? 512
8.3.2.1.3 What is Wrong with All the Other Approaches? 513
8.3.2.1.4 Why Does Aotearoa New Zealand Have Different Results? 514
8.3.2.1.5 The Solution Proposed 515
8.3.2.2 Some Pragmatic Proposals 518
8.3.2.2.1 Canada 518
8.3.2.2.2 United States 520
8.3.2.2.3 Australia 521

8.3.2.2.4 Aotearoa New Zealand 522
8.4 General Guidelines Abstracted 523
8.5 Conclusion 525
Conclusion 526
Bibliography i

List of Tables

Table I: Brief Historical Survey – Canada 208
Table II: Overview of the Canadian Legal Framework 230
Table III: Brief Historical Survey – United States 291
Table IV: Overview of the Legal Framework of the United States 309
Table V: Brief Historical Survey – Australia 389
Table VI: Overview of the Australian Legal Framework 401
Table VII: Overview of Commonwealth and State Indigenous Heritage Legislation 421
Table VIII: A Snapshot of EPBC Heritage Protection 426
Table IX: Classification of Protected Indigenous Sacred Sites 427
Table X: Brief Historical Survey – Aotearoa New Zealand 442
Table XI: Overview of the Legal Framework of Aotearoa New Zealand 458

List of Diagrams

Diagram 1: Timeline – Whanganui River Dispute and Settlement 477
Diagram 2: Hybrid Juristic Personality 479
Diagram 3: Legal Structure Created by the Whanganui River Claims Settlement Act 482

List of Acronyms

ATNI	Affiliated Tribes of Northwest Indians (United States)
ATSIC	Aboriginal and Torres Strait Islander Commission (Australia)
BIA	Bureau of Indian Affairs (United States)
BC	British Columbia (Canada)
CERT	Council of Energy Resource Tribes
ECOSOC	Economic and Social Council (United Nations)
ERA	Energy Resources Australia
FSIN	Federation of Saskatchewan Indian Nations
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICA	Indian Chiefs of Alberta
ICC	Indian Claims Commission (United States)
ICCROM	International Centre for the Study of the Preservation and Restoration of Cultural Property
ICOMOS	International Council on Monuments and Sites
ICCPR	International Covenant on Civil and Political Rights
IFO	International Financial Organization
ILO	International Labour Organization
IMF	International Monetary Fund
MNC	Multinational Corporation
IUCN	International Union for the Conservation of Nature
NWAC	Native Women's Association of Canada
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
NAFTA	North American Free Trade Agreement
PIC	Prior Informed Consent
RCAP	Royal Commission Report on Aboriginal Peoples
RCMP	Royal Canadian Mounted Police (Canadian Federal police force)
RFRA	Religious Freedom Restoration Act

SQ	*Sûreté du Québec* (Provincial Quebec police force)
TAC	Tasmanian Aboriginal Centre
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational and Scientific Committee
UNPFII	United Nations Permanent Forum on Indigenous Issues
US	United States
WB	World Bank
WTO	World Trade Organization

To my mom, who taught me that different does not equal wrong

> Le discours des juristes, nous semble-t-il, se complait trop souvent dans la linéarité et dans la monotonie. En fait, sous prétexte d'être cartésien, logique et cohérent, bref convaincant, ce discours paraît faire de l'aridité une vertu cardinale. Mais n'est-il pas possible de convaincre autrement? Ou, plus précisément, est-il interdit d'ajouter au cartésianisme, à la logique et à la cohérence *le plaisir*?[1]

---

[1] Jean-François Gaudreault-DesBiens, *La critique identitaire, la liberté d'expression ou la pensée juridique à l'ère de l'angoisse — Un essai critique d'épistémologie de la pensée juridique* (LLD Thesis, University of Ottawa Faculty of Law, 1997) [unpublished] [Gaudreault-DesBiens, *Critique identitaire*] at 62.

Expression of Appreciation

I never had imagined that undertaking a doctoral thesis would enrich my life in so many ways.

Dean Jean-François Gaudreault-DesBiens, you have directed me with exquisite depth and delicacy: subtly, astutely, in a spirit of great generosity. My gratitude to you is profound.

Professor Marie-Claire Foblets, I encountered my own sacred space in Halle. My four-month stay at the Max Planck Institute for Social Anthropology, Department Law and Anthropology provided an immersion into the world of legal anthropology without which I could not have written this thesis. Thank you.

Professors Jean Leclair and Michel Morin, for the formal role you played in my *examen de synthèse*, and the informal role you have played as sounding boards ever since: thank you.

I have had the honour and privilege of exchanging views with some of the finest legal minds around: the Honourable Senator Renée Dupuis, the Honourable Justice David L Cameron, Professors David Bilchitz, Doris Farget, Mark Goodale, Michèle Graziadei, Dirk Hanschel, Roshna Kelbrick, Jan L Neels, René Kuppe, Ejan Mackaay, Werner Menski, Christa Rautenbach – thank you, all.

To the *Fonds de Recherche du Québec (FRQSC)*, the *Faculté des études supérieures et postdoctorales (FESP)* and the Faculty of Law of Université de Montréal, thank you for the scholarships that made this research viable.

To the superbly supportive Faculty of Law of the Université de Montréal, who welcomed me in 2013 and who has assisted me in so many concrete ways ever since: thank you.

A work of this magnitude is not possible without libraries, and I have benefited from the expertise of some of the best ones around: the librarians of the Faculty of Law and the Faculty of Social Sciences of Université de Montréal, as well as the undauntable Inter Library Loan Services staff: thank you to each and every one.

To the team at MPI Halle: Jonathan Bernaerts, Dr Brian Donahoe, Ute Gradmann, Anett Kirchhof, Markus Klank, Katerina Marencakova, Anja Neuner, Dr Bertram Turner, thank you.

To my Montreal support team: Ariane Bertouille, Hester Pretorius, Philippe Tremblay, Associate Dean Marie-Claude Rigaud, Robert Mathe, Danielle Boulanger: what would I have done without you?

To my South African family who have ungrudgingly accepted attention-by-instalments: Lara Pretorius, Marelize Pretorius, Nina Pretorius, Wikus Pretorius: your love grounds me.

To Ariane, thank you Love.

Preface

In a recent judgment the South African Constitutional Court evoked the image of "a biblical David (…) who fights the most powerful and very well-resourced Goliath".[2] The context differed, but the words ring true for what I observed on the ground during almost a decade of corporate practice in the natural resource field. There is a dire power disequilibrium when a natural resource development company arrives at a local community with a posse of sophisticated lawyers for "consultation" or "negotiation" purposes. The State itself can hardly be said to be neutral in these circumstances either: where it is not an active participant and/or stakeholder in the project at hand, it usually stands to benefit greatly through the realization thereof — whether in the form of taxes, royalties, infrastructure investments or other socio-economic outcomes that may, in turn, result in the generation of political goodwill towards the government of the day.[3]

The "transaction costs" that take the form of displaced peoples,[4] loss of biodiversity and habitat,[5] cultural and heritage loss,[6] and environmental impacts[7] are usually offset against the gains (financial,

---

[2] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 Mogoeng CJ at para 52.

[3] See e.g. the discussion by Strathern & Stewart of the role played by mining companies in Papua New Guinea: Andrew Strathern & Pamela J Stewart, "The South West Pacific" in Andrew Strathern et al, eds, *Oceania: An Introduction to the Cultures and Identities of Pacific Islanders* (Durham, North Carolina: Carolina Academic Press, 2002) 11 at 52–53.

[4] See *ibid* at 53 on the displacements occasioned by the Porgera Joint Venture gold mine ("Porgera Mine") in the Enga Province of Papua New Guinea.

[5] See e.g. Carlos Enrique Maibeth-Mortimer, "There's a Crisis Erupting Along Nicaragua's Northern Coast. Here's 5 Ways You Can Help" (6 July 2016) online: *IC Magazine* <https://intercontinentalcry.org/crisis-erupting-along-nicaraguas-northern-coast-heres-5-ways-can-help/> on illegal logging activities in the Autonomous Region of Northern Caribbean Nicaragua, where the government is alleged to turn a blind eye to both environmental damage and hardships suffered by the Indigenous Miskitu and Mayagna peoples despite laws that entrench their collective land titles on paper.

[6] Strathern & Stewart, *supra* note 3 at 53–54 cite the example of remote tailings pollution in the Strickland River, occasioned by the Porgera Mine. The resultant poisoning of river fish, vegetation and game in the adjacent bush has convinced the resident Duna groups that the Female Spirit embodying environmental fertility, the *Payame Ima*, has deserted the area (*ibid*).

[7] See *ibid* at 54 on environmental damage occasioned by unsustainable logging and fishing activities in the face of community concern about "proper 'stewardship' of the land and sea and perceptions of potential wholesale destruction."

political, and other)[8] to be made, with rather predictable consequences for minority groups who have interests at stake.[9]

I have no objection to natural resource projects, nor a desire to fossilize traditional communities in a distant past.[10] But I do believe in a fair fight.

A fair fight requires a legal system that realistically and visibly caters for the needs of the various project stakeholders in a manner that renders the law's protections accessible to *all* the parties, irrespective of their financial clout, their legal prowess or their levels of sophistication.

I am well aware that there are sophisticated Indigenous communities who very successfully participate in natural resource development projects.[11] These are not the groups that raise my

---

[8] See e.g. Graben, who cites the example of the Keystone XL Pipeline project, where the National Energy Board of Canada undertook a cost-benefit analysis but concluded that the adverse environmental effects and the perceived risks to sacred historical and archaeological sites were warranted in view of the Pipeline's anticipated benefits, namely "broader market access, greater customer choice, and efficiencies gained through competition": Sari Graben, "Rationalizing Risks to Cultural Loss in Resource Development" (2013) 26 Can JL & Jur 83 [Graben, "Rationalizing Risks"] at 83–84. Also see Sari Graben, "Resourceful Impacts: Harm and Valuation of the Sacred" (2014) 64 UTLJ 64 [Graben, "Resourceful Impacts"].

[9] *Cf* Mackaay who notes that in terms of the Coase Theorem, a problem of competing uses of a scarce resource plays out as follows: "provided the property rights on it are well defined, the most profitable use will prevail, whatever the initial allocation of rights.": Ejan Mackaay, *Law and Economics for Civil Law Systems* (Cheltenham: Edward Elgar, 2013) at 20.

[10] *Cf* Thomas F Thornton, *Being and Place Among the Tlingit* (Seattle: University of Washington, 2008) at 196: "Mr. Kitka suggests that 'progress' is not a zero-sum game. Natives do not have to give up their language, their social structure, their food-ways, or their religious rituals even as they adopt new ways to join 'the cultivated races of the world.' To do so, in fact, risks decline rather than progress, dysfunction rather than accommodation, becoming a 'lost people' rather than an emplaced people."

[11] For instance, in 2012 the Council of Energy Resource Tribes (CERT), an inter-Tribal organization made up of 54 Native American and 4 First Nation Treaty Tribes, entered into a $3 billion dollar long-term biofuel and bio-energy development project on tribal lands across California: see SustainableBusiness.com News, "Native Americans Enter $3 Billion Biofuels Deal" (24 September 2012) online: *SustainableBusiness.com* <www.sustainablebusiness.com/index.cfm/go/news.display/id/24105>. The Australia, Aboriginal and Torres Strait Islander Commission (ATSIC), *As a Matter of Fact: Answering the Myths and Misconceptions About Indigenous Australians*, 2nd ed (Canberra: Commonwealth of Australia, 1999) at 56 cites two examples of successful Indigenous enterprises based on land ownership: the Jawoyn Association at Katherine [see "Jawoyn Association Aboriginal Corporation", *Jawoyn Association Aboriginal Corporation*, online: <www.jawoyn.org>] and the Yolgnu enterprises in east Arnhem Land [see e.g. "Dhimurru Aboriginal Corporation", *Dhimurru Aboriginal Corporation*, online: <www.dhimurru.com.au/yolngu-culture.html>.] For other examples, see Peter Nabokov, "So Long as this Land Exists" in Peter Nabokov, ed, *Native American Testimony: A Chronicle of Indian-White Relations from Prophecy to the Present 1492–1992* (New York: Penguin Books, 1991) 381[Nabokov, "Land"] at 387–388.

concern. My particular preoccupation in this work is the plight of traditionalist[12] Indigenous communities who consider their cultures under attack due to threats that such development projects pose to their sacred sites.[13] In constructing a framework for the protection of Indigenous sacred sites, then, I seek not to halt natural resource development projects, but to create an equal platform for affected Indigenous communities to address their concerns, secure in the knowledge that their interests and concerns carry the same weight as those of other project stakeholders.

This means of necessity that the bulk of this thesis will portray the position of Indigenous communities in debates such as these. It is not my intention to perform a simple objective study of the *status quo* and to report back on it: I aim to contribute some mass to counterbalance the scales that I have previously experienced to be in such disequilibrium. However, my work should not be read as a desire to protect sacred sites at all costs, nor as a romantic/paternalistic attempt to "keep traditionalist societies traditionalist". My sole objective is to provide a framework that furnishes such societies with sufficient tools and information to effectively employ the law's provisions in line with their own decisions.[14] In other words: my interest lies in enhancing the fairness of the fight.

---

[12] I am not overly fond of labels. See at 2.2.1 (Romanticization, Reductionism and Essentialization) and 2.2.3 ("Authenticity and Representation") below for a discussion on cultural authenticity and traditionalism.

[13] See e.g. Gordon Mohs, "Sto:lo Sacred Ground" in David Carmichael et al, eds, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 184 at 188.

[14] This can be contentious. See e.g. David Carmichael, Jane Hubert & Brian Reeves, "Introduction" in Carmichael et al, *supra* note 13, 1 at 6: "It is unfortunate and ironic that indigenous people may stand to make economic and political gains from resource development while sacred and heritage values of the land are degraded". It may be that this is just an unfortunate formulation, but it creates the distinct impression that Indigenous peoples have an implicit obligation to preserve the sacred and heritage values of their land in the interests of the greater good even where doing so would run contrary to the best interests of their own communities, a contention that gives pause.

PART I: CONTEXT AND CONTOURS

Introduction to Part I

> The problem was truly one of translation. From the Anglo-American point of view, the attempts made by the Taos and others to explain their religion were couched in language which was frequently meaningless. The Taos themselves could not reveal their sacred knowledge. To do so would have been contrary to everything they had learned as initiated members of their tribal religion. But to argue simply that Blue Lake is "our Church," or that "we worship all of nature," meant little to those not knowledgeable about Indian cultures.[15]

This work has as genesis conflicting worldviews,[16] meanings lost in translation[17] and cultural clashes.[18] As jurists we instinctively turn to the law as arbiter of conflicts to restore equilibrium and

---

[15] John J Bodine, "Blue Lake: A Struggle for Indian Rights", (1973) 1 Am Indian L Rev 23 at 30.

[16] Stephen Bocking furnishes the example of ecologists who used ecological theory to advance the argument in Canada's North that the environment was fragile and needed to be preserved (in the sense of leaving it undisturbed), which went in direct conflict with the Indigenous way of life: Stephen Bocking, "Scientists and Evolving Perceptions of Indigenous Knowledge in Northern Canada" in Ute Lischke & David T McNab, *Walking a Tightrope: Aboriginal People and their Representations* (Waterloo, Ontario: Wilfried Laurier University Press) 215 at 230.

[17] Consider e.g. Mohs, *supra* note 13 at 192: "The Sto:lo do not have a word to describe all sites of spiritual significance. They do have a word, *stl'itl'aqem*, which is used to describe a 'spirited spot' or 'spirited place'. *Stl'itl'aqem* include places or sites which are, in themselves, believed to be spirited or inhabited by supernatural forces, notably sites with resident spirits or beings, transformer sites (…), and a few other places (…). There is also a word, *sx̲wox̲wiyam*, used to describe landmarks that have stories or legends attached to them." If both these concepts are accordingly simply translated as "sacred sites", it is not without a significant loss in meaning.

[18] *Cf* Rozwadowski on the clashes that potentially arise with a traditional Western take on Siberian cultures, in his review of Jordan: "The key feature of this pattern [of a given cultural region] can be distinguished as the lack of ontological difference between the tangible (material) and intangible (spiritual) worlds. These two spheres overlap and entwine with each other, and their separation would lead us astray from fully understanding the reality of Northern Eurasian traditional societies." Andrzej Rozwadowski, "Review of *Landscape and Culture in Northern Eurasia* by Peter Jordan" (2014) 13:1 Siberica 81 at 81–82. Also see Gordon-McCutchan on the clash occasioned by the differing philosophies of the Taos Pueblo and the US Forest Services on "nature and its uses": RC Gordon-McCutchan, *The Taos Indians and the Battle for Blue Lake* (Santa Fe, New Mexico: Red Crane, 1991) at 12, as well as Marcia Keegan, *The Taos Pueblo and its Sacred Blue Lake* (Santa Fe: Clear Light, 1991) at 50–51. The resultant 65-year struggle for the return of Blue Lake and the watershed surrounding it to the Taos Pueblo is discussed in more detail below at 2.3 ("Culture, Religion and Identity".) Nicole Price, in turn, highlights the fact that while the majority white North American cultural communities celebrate "a commemorative religion, which commemorates a person, place or event in the past", Native American

to bring certainty to our world. But what happens when the law itself replicates one of the conflicting worldviews, when it represents the thinking of the dominant culture and its actors contemplate a minority culture through the dominant culture's conceptual lens?[19]

Is the minority fated to sacrifice its worldview on the altar of legal certainty?[20] Or is the ambit of the law –as understood by the dominant culture– sufficiently broad that its positive expression may be reshaped in a fashion sufficiently familiar to the majority, yet conceptually more responsive to the minority's understanding of the world?

Is it possible to translate minority worldviews into terms cognizable to courts without encountering cultural prejudice?[21] Do legislators, in drafting instruments that accommodate minority interests,

---

religions, to the contrary, focus on renewal: "Each spring a whole renewal process started again, and each place had a ceremony dedicated to the renewal of the spirit life that was part of an area, be it sky, earth, water, animal or plant": Nicole Price, "Tourism and the Bighorn Medicine Wheel" in Carmichael et al, *supra* note 13, 259 at 261.

[19] Charles Hudson presents a good example of the type of conceptual schism I have in mind with reference to his analysis of nineteenth century Cherokee myths: "Where the Cherokee theoretical idiom is personalized, ours is mechanical. Our science fiction, and probably our social science theories as well, would seem as outlandish to the nineteenth century Cherokees as their oral traditions appear to us": Charles Hudson, "Cherokee Concept of Natural Balance" (1970) 3:4 Indian Historian 51 at 54. Also see Hirini Matunga, "*Waahi Tapu*: Maori Sacred Sites" in Carmichael et al, *supra* note 13, 217 at 219 on the distinctly different ways in which Māori and "*Paheka*" (European settlers of New Zealand and their descendants) view the past.

[20] Consider, for instance, the impact that heritage legislation aimed at "preserving" sites has on Indigenous peoples such as the Tlingit for whom the notion of sacred sites implies a certain reciprocal interaction with the land: see Thornton, *supra* note 10 at 170–171. This means that heritage legislation that prohibits harvesting on sacred lands can be deeply problematic for Indigenous peoples. It bears testimony to a fundamental philosophical difference and highlights the core difficulty of employing heritage legislation as legal mechanism for the protection of Indigenous sacred sites — the very nature of heritage legislation is to "freeze" in order to preserve. Also see PJ Ucko, "Foreword" to Carmichael et al, *supra* note 13, xii at xviii. He points out that the act of ascribing value to the past "is often as much to do with the exercise of political power as (…) with the intrinsic value of the sacred nature of a particular location" (at xxi).

[21] *Cf* the unsuccessful litigation strategy of the Tlowitsis-Mumtagila in *Tlowitsis Nation and Mumtagila Nation v MacMillan Bloedel* [1991] 2 CNLR 164 (BCSC), leave to appeal refused (1990), [1991] 4 WWR 83 (BCCA) MacKinnon J. In attempting to convey the sacredness of the Lower Tsitika Valley watershed to the British Columbia Supreme Court so as to ward off the construction of a hydroelectric dam, their counsel had described it as "being analogous to a Christian church or a Garden of Eden": *Tlowitsis Nation and Mumtagila Nation v MacMillan Bloedel* [1990] CanLII 2335 (BCCA), [1991] 4 WWR 83, 53 BCLR (2d) 69, [1990] BCJ No 2746 (QL) Legg J at 18. The argument ultimately did not fly, as the Court held that the Tlowitsis-Mumtagila had failed to establish the area's requisite uniqueness: see *ibid* at 6. The British Columbia Court of Appeal upheld the decision, holding *inter alia* that the submission relating to the spiritual nature of the site had been introduced at a very late stage and dismissing supporting affidavits that explained the witnesses' Residential School traumatism and consequent fear to speak out about their religious cultures and beliefs as "not offer[ing] an explanation for the lateness of the applicants' raising a claim that their right to engage in spiritual

simply transpose dominant values in the provisions that they enact?[22] Are such provisions truly of benefit to minorities with divergent worldviews?[23] If not, how could they be adjusted to better serve minorities without alienating members of the dominant society?

All of these questions underlie the research problem at hand.[24] I have a twin objective: first, to concretely consider to what extent the interests of Indigenous peoples in their sacred sites are presently protected in four selected jurisdictions by means of black letter law;[25] then, to explore how a more nuanced grasp of Indigenous values, customs and identity[26] in conjunction with the

---

practices in the Lower Tsitika Valley Watershed was endangered": *ibid* at 24. See below at 2.4.3.4 ("Secrecy about the Sacred").

[22] See e.g. Donahoe on the heavy burden of proof that "naming" –by which he refers both to the establishment of Indigenous community status and the specification of the site– exacts on Indigenous communities for "claiming" purposes –i.e. asserting access and natural resource management control rights–: Brian Donahoe, "Naming, Claiming, Proving? The Burden of Proof Issue for Russia's Indigenous Peoples" in Julia Eckert et al (eds), *Law Against the State: Ethnographic Forays into Law's Transformations* (Cambridge, UK: Cambridge University Press, 2012) 44 at 53. In the Russian example that he cites, this involves "a complicated process of [first] having to prove that they deserve the status, often requiring the expert testimony of state ethnographers" and then getting the site "named" — processes that, he argues, "transform not only the dispute, but also the land, the people, and the relationships between them" (*ibid*).

[23] Thus Donahoe points to the essentializing effect on Indigenous peoples who have to slot into culturally (pre)defined groups, removed from their own context, in order to obtain legal recognition: *ibid* at 65-66. This problematic is addressed below at 2.2.1 ("Romanticization, Reductionism and Essentialization"). Also see Matunga, *supra* note 19 at 222–223: he complains about the artificial way in which Aotearoa New Zealand legislation distinguishes between "traditional sites" and "archaeological sites" and argues that "For Maori people, it is the site itself that is important, for cultural and spiritual reasons, and for the associations that it may have with past events and *tapuna*. That such sites may not be archaeological is irrelevant." (at 223). Broadbent and Edvinger note a like problem that arises where the Saami wish to prove settlement by invoking sacred sites as physical manifestations of their identity: Saami prehistory and Scandinavian prehistory do not have the same relationship to the environment — "Saami archaeology is less based on land tenure, environmental impacts and non-perishable constructions, and more related to spiritual forces and characteristics of the landscape itself": Noel D Broadbent & Britta Wennstedt Edvinger, "Sacred Sites, Settlements and Place-Names: Ancient Saami Landscapes in Northern Coastal Sweden" in Peter Jordan, ed, *Landscape and Culture in Northern Eurasia* (Walnut Creek, California: Left Coast Press: 2011) 315 at 318.

[24] I am not suggesting that I am the first to contemplate issues such as these. I list them simply by way of setting the scene for the problematic to be developed in this work. The research problem is developed in detail below at 1.1 ("Introduction: The Research Problem").

[25] The United States, Canada, Australia and Aotearoa New Zealand.

[26] For instance, Mohs, *supra* note 13 suggests that archaeologists actively work with Indigenous people "to endorse legislation which better addresses Native needs and heritage concerns, and to ensure that policy changes are implemented which guarantee Indian organizations greater access to funding, a greater role in policy development and planning, and an equal voice in the decision-making process where Native heritage resources are concerned" (at 205), failing which he is cynical about the continued likelihood "that many spiritual sites will survive modern land uses" (at 206).

norms of international law[27] could be integrated with the provisions of such black letter law in a multifaceted, layered approach to construct an improved, context-sensitive framework for the protection of Indigenous sacred sites in each of the jurisdictions under consideration. By "context-sensitive framework" I refer to a framework aligned with the country's legal culture,[28] Indigenous values, customs and identities found within the boundaries of that jurisdiction, and such international norms as may be potentially pertinent in that state.

This work is divided into two parts. Part I (Chapters 1–3) establishes the parameters of the stakes raised by Indigenous sacred sites and natural resource development projects and sets the scene for the concrete study to be undertaken in Part II; Part II investigates the protection of Indigenous sacred sites in the context of natural resource development projects in four jurisdictions: Canada (Chapter 4), the United States (Chapter 5), Australia (Chapter 6) and New Zealand (Chapter 7); and then contemplates the way forward, crafting tangible measures towards the improved protection of Indigenous sacred sites in the context of natural resource development projects tailored towards the contexts of each of the jurisdictions studied (Chapter 8).

The ultimate ambition of this project, therefore, is to construct a context-sensitive legal framework that seeks to synthesize positive law with Indigenous values, customs and identities, as well as international norms relating to the protection of Indigenous sacred sites in the pursuit of natural resource development projects in respect of each of the jurisdictions studied. This does not imply the creation of a single, pan-dimensional legal framework for the protection of all Indigenous sacred sites — it is a question of context and flexibility. First, the legal cultures of the four countries compared vary significantly and thus I posit that a legal mechanism for dealing with natural resources and sacred sites would need to be context-sensitive in order to be effective. Second, by 'flexibility' I mean that such a context-sensitive legal mechanism should also be adaptable in

---

[27] See e.g. Brian Reeves, Ninaistákis — the Nitsitapii's Sacred Mountain" in Carmichael et al, *supra* note 13, 265 at 288. He proposes that the mountain Ninaistákis –sacred to the Nitsitapii and other several Native American tribes in the Montana region (at 272)– be designated as a World Heritage Site under the UNESCO *World Heritage Convention* and argues that it meets the criteria for a "World Cultural Site".

[28] On the concept of "legal culture", see below at 1.5.2.3.1 ("The Cultural Approach").

response to the heterogeneity of the country's Indigenous communities and to the range of their belief systems pertaining to sacred sites. This is no minor mission, bearing in mind law's ambition of bringing certainty to an uncertain world.

Chapter 1: Theoretically Speaking

> It is time that jurists began to take method seriously.[29]

1.1 Introduction

> The question of who gets to determine the destiny of the land, and of the people who live on it –those with the money or those who pray on the land– is a question that is alive throughout society.[30]

This is a story about land and the different ways in which we relate to it.[31] For traditionalist Indigenous peoples, land fulfills a threefold function: it serves as "their primary source of spiritual inspiration, the economic means of maintaining a tribal lifestyle, and their only guarantee of a culturally distinctive future."[32] To most Westerners, however, land is an exploitable resource[33] —

---

[29] Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method,* Kindle ed (Oxford and Portland, Oregon: Hart, 2014), "Introduction" at loc 242/4523. Similarly, Pierre Legrand complains of 'comparatists' who "were not comparatists or theoreticians but were simple technicians of the national law": Pierre Legrand, "How to Compare Now" (1996) 16 Legal Studies 232 [Legrand, "How to Compare"] at 245.

[30] Winona LaDuke, *All Our Relations: Native Struggles for Land and Life* (Cambridge, Massachusetts: South End Press, 1999) [LaDuke, *All Our Relations*] at 5.

[31] Basso encapsulates the inherent human cultural bias well: "Cultures run deep, as the saying goes, and all of us take our 'native's point of view' very much for granted.": Keith H Basso, *Wisdom Sits in Places: Landscape and Language Among the Western Apache* (Albuquerque: University of New Mexico, 1996) [Basso, *Wisdom*] at 72. Also see Jane Hubert, "Sacred Belief and Beliefs of Sacredness" in Carmichael et al, *supra* note 13, 9 at 16; Olive Patricia Dickason, "The Many Faces of Canada's History as it Relates to Aboriginal People" in Lischke & McNab, *supra* note 16, 117 [Dickason, "Many Faces"] at 118 on the "Aboriginal path".

[32] Michael M Ames, *Cannibal Tours and Glass Boxes — The Anthropology of Museums*, 2nd ed (Vancouver: UBC Press, 1992) at 80. Also see Matunga, *supra* note 19 at 219 and Bocking, *supra* note 16 at 231. *Cf* Hudson, *supra* note 19, who invokes the more cosmological vision, in terms of which all forms part of an integrated whole and man thus is part of nature.

[33] Ames, *supra* note 32 at 80; Matunga, *supra* note 19 at 219. Hudson identifies two basic Western assumptions: first, that man is separate from nature, and second, "that nature either cannot be harmed or is infinitely forgiving": *supra* note 19 at 51. Of course, Indigenous attitudes to land are not static. Thus Donahoe refers to "changing attitudes of land forced by the commodification of land and resources that has accompanied the development of the oil and gas industry" in Russia: Brian Donahoe, "Book Review: *Khanty: People of the Taiga: Surviving the 20th Century* by Andrew Wiget and Olga Balalaeva" (2014) 13:1 Siberica 84 at 86.

whether for private gain or for the public good. Nowhere is this dichotomy more pronounced than when it comes to natural resource development projects and Indigenous sacred sites.

Examples of resultant conflict abound. In Canada, the most violent clash occasioned loss of life — the 1990 standoff at Oka concerning a proposed golf resort development and a Mohawk burial site.[34] At Borroloola in the Northern Territory of Australia, the Traditional Owners obtained a High Court injunction to stop the Glencore Xstrata McArthur River Mine from pursuing a development encompassing a 5.5-kilometer river diversion, only to have Parliament intervene and give the mine statutory permission to do so notwithstanding.[35] In New Zealand, the Whanganui River Settlement was more than 150 years in the making, a process that was far from smooth sailing.[36] Native

---

[34] Quebec July 1990–26 September 1990: the problem at hand concerned a proposed golf course extension and residential development that would have further infringed on a Mohawk burial site. A crisis developed between the town of Oka and the Mohawk community of Kanesatake. It resulted in the death of one SQ officer and the eventual involvement of the Canadian armed forces. Ultimately the land was purchased by the Crown and the proposed development cancelled. However, it left the Mohawk dissatisfied, as they still did not own the land in question. See Michael Lee Ross, *First Nations Sacred Sites in Canada's Courts* (Vancouver: UBC Press, 2005) at 181 note 1; Scott Nickel, "The Oka Crisis: Building on Burial Grounds" in Jill Oakes et al, eds, *Sacred Landscapes* (Manitoba: Aboriginal Issues Press, University of Manitoba, 2009) 221. For a personal account, see Peter Blue Cloud (Mohawk), "Resistance at Oka" in Nabokov, *Native American Testimony*, *supra* note 11, 432.

[35] See *Lansen & Ors v NT Minister for Mines & Energy* [2007] NTSC 28 [*Lansen* NTSC] [the Minister of Mines and Energy acted in excess of his powers under the *Mining Management Act* when authorizing the mine's proposed conversion from underground to open-pit mining: at ¶ 38]; *McArthur River Project Amendment (Ratification of Mining Authorities) Act 2007* (NT) [ratifying the original authorization by the Minister of Mines and Energy of the project amendment]; Northern Territory Second Reading Speeches, "McArthur River Project Amendment (Ratification of Mining Authorities Bill 2007 Second Reading Speech", online: <www.austlii.edu.au/au/legis/nt/bill_srs/mrpaomab2007678/> [the purpose of the bill is "to address the technicality identified by the Supreme Court" in the aforementioned case]; *McArthur River Mining Pty Ltd v Lansen & Ors* [2007] NTCA 5 [*Lansen* NTCA] [the Northern Territory Appeals Court setting aside the judgment of the High Court on the basis that: "In my view the legislature has plainly evinced an intention to set aside the result of the litigation and to alter the rights of the parties to the benefit of the [mine] and to the detriment of the [native title holders. This Court must determine the rights of the parties in accordance with the facts before this Court and in accordance with the law today as it governs those rights." at ¶12.] Also see Northern Territory Second Reading Speeches, "Appropriation (2013-2014) Bill 2014 Second Reading Speech", online: (1 January 2013), Austlii <http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/nt/bill_srs/a20132014b2013186/srs.html?stem=0&synonyms=0&query=McArthur%20River%20Mining> [confirming that a further three phase expansion will go ahead at Xstrata McArthur River Mine]. Further see Amberly Polidor & Ashley Tindall, "McArthur River (8 May 2016), *Sacred Land Film Project* (report), online: <www.sacredland.org/index.php/mcarthur-river/>. This fact set forms the subject matter of my Australian desktop study: see below at 6.6 ("Illustration: Desktop Study 6 – McArthur River Mine, Borroloola, Northern Territory, Australia").

[36] See *Agreement re Whanganui River Claims,* "Tūtohu Whakatupua", Whanganui Iwi and the Crown (30 August 2012) [agreement made in "settlement of the historical Treaty of Waitangi claims of the Whanganui Iwi in respect of the Whanganui River."]; *Whanganui River Deed of Settlement*, "Ruruku Whakatupua — Te Mana O Te Iwi O Whanganui" (05

Americans, for their part, have witnessed everything from the manufacture of artificial snow from recycled wastewater for use on the ski slopes of a holy mountain[37] to a land swap deal involving Tonto National Forest being traded to Resolution Copper Mining with a sleigh of hand involving a bill tacked on as rider to must-pass federal defence legislation.[38]

Conflicts such as these are engendered by the existence of two contemporaneous, but divergent worlds: the growing international movement towards the recognition and protection of the rights

---

August 2014); *Whanganui River Deed of Settlement*, "Ruruku Whakatupua — Te Mana O Te Awa Tupua" (05 August 2014); Treaty Settlement Documents, "Whanganui River Deed of Settlement Between the Crown and Whanganui Iwi", online: (05 August 2014), Government of New Zealand < https://www.govt.nz/dmsdocument/2731.pdf>. I deal with this issue as my New Zealand desktop study: see below at 7.6 ("Illustration: Desktop Study 7 – Whanganui River Iwi and Whanganui River, Aotearoa New Zealand").

[37] *Navajo Nation v United States Forest Service*, 535 F 3d 1058 (9th Cir 2008) (*en banc*) Bea J [*Navajo Nation*]: in this case various Native American tribes –applicants included the Navajo Nation, the Hopi Tribe, the Havasupai Tribe, the Yavapai-Apache Nation and the White Mountain Apache Nation– held the San Francisco Peaks in Northern Arizona to be sacred. They argued that the use of recycled wastewater to make artificial snow for skiing on the Snowbowl would "spiritually contaminate the entire mountain and devalue their religious exercises" (at 1063) and while the District Court held their beliefs to be sincere, it rejected their argument on the basis that they would not be directly affected by it. On appeal to the Ninth Circuit the majority upheld the District Court's decision, ruling that "the sole effect of the artificial snow [would be] on the Plaintiffs' subjective spiritual experience" and that the intended government action would not have the effect of imposing a "substantial burden" in the sense of the *Religious Freedom Restoration Act* (2000), 42 USC §§ 2000bb1–2000bb4 [*RFRA*] on their free exercise of religion, since they would neither be forced into criminal activity nor to abandon the tenets of their belief (*ibid).* The US law on freedom of religion is dealt with in further detail below at 5.5.4.1 ("Spiritual Beliefs or Ceremonial Practices").

[38] Senate rules allow for "the attaching of a 'rider' to any bill even if the rider itself was not germane to the bill that it was amending.": Gordon-McCutchan, *supra* note 18 at 198. In the present case, the sacred site in question –Oak Flat– forms part of the Tonto National Park in Arizona that was established in 1905 and was withdrawn from mining through a Public Lands Order during the Eisenhower era. Oak Flat is an area sacred to the San Carlos Apache Tribe. The polemic arises from its transfer to Resolution Copper Mining in a land swap agreement championed by Senator John McCain (R-AZ) in the form of US Bill HR 687, *Southeast Arizona Land Exchange and Conservation Act of 2013*, 113th Cong that was included as a last-minute rider to the must-pass *Carl Levin and Howard P "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015*, Pub L No 113-291, 128 Stat 3292 [*National Defense Authorization Act of 2015*]. The Act was duly passed by Congress on December 19, 2014 despite protests by *inter alia* the Affiliated Tribes of Northwest Indians (ATNI) that the land was eligible for protection under the *National Historic Preservation Act*, 54 USC §300101 *et seq* [*NHPA*]. Efforts are currently underfoot to repeal section 3003 of the *National Defense Authorization Act of 2015*, the section that enabled the land swap arrangement. House Bill HR 2811 and its Senate Equivalent, S 2242, conjointly known as the "*Save Oak Flat Bill*" were introduced in June 2015 [by Representative Grijalva (D-AZ)] and November 2015 [by Senator Bernie Sanders (I-VT)] respectively. The former was referred to the Subcommittee on Indian, Insular and Alaska Native Affairs on 1 July 2015 and the latter to the Committee on Energy and Natural Resources on 5 November 2015. There has been no action since: see "S.2242 – Save Oak Flat", 114th Congress (2015–2016), *congress.gov*, online: <https://www.congress.gov/bill/114th-congress/senate-bill/2242/related-bills>.

of Indigenous peoples –including their claims to self-determinacy–[39] versus the global natural resource development market and the opportunities that that entails for sovereign nation-states.[40] They are also at once rooted in the world's colonial history[41] and a reflection on its future cultural and spiritual wealth.[42] My hypothesis is that we cannot rely on nation-states to resolve this dilemma in a neutral manner as they have profound economic interests that depend on natural resource development projects going ahead.[43] In addition, natural resource developments projects are often undertaken by transnational companies. The interests of such transnational companies are frequently at odds with those of the countries they invest in,[44] not even to speak of the Indigenous

---

[39] E.g. the right to self-determinacy is included in the *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, UN Doc A/RES/61/295, (2007) [*UNDRIP*] Art 3.

[40] The principle of state sovereignty holds that nation-states have absolute and exclusive control over their natural wealth and resources: see Johan D van der Vyver, "Sovereignty" in Dinah Shelton, ed, *Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) 379 at 386. This is in keeping with the principle of non-intervention derived from the Westphalian concept of human rights, which holds them to be "based on a statist concept of world polity — namely, that the only legitimate units of international politics are nation-states": Michael Haas, *International Human Rights: A Comprehensive Introduction*, 2nd ed (London: Routledge, 2014) at 8. But for a different take in the context of the right to development, notably put forward by the global south as part of the New International Economic Order ("NIEO"), see Umut Özsu, "'In the Interest of Mankind as a Whole'" Mohammed Bedjaoui's New International Economic Order" (2015) 6:1 *Humanity* 129 [Özsu, "Mankind"] and Umut Özsu, "Rendering Sovereignty Permanent? The Multiple Legacies of the New International Economic Order" 2016 *European Yearbook of International Economic Law* (forthcoming) [Özsu, "Sovereignty"]. See the discussion below at 3.2.4 ("The Principle of Permanent Sovereignty over Natural Resources") and 3.2.3.2 ("State Sovereignty and the Right to Self-Determination").

[41] *Cf* Matunga, *supra* note 19 at 218: "Experience of colonization around the world has shown that domination by a more powerful culture, which defines its reality in quite different ways, either destroys or at best drives the less powerful culture into a subservient role. What was considered culturally 'valid' can be rendered 'invalid', and the politically weaker are somehow required to modify their reality to fit in within the constraints of a new code." See e.g. Mohs, *supra* note 13 at 186–187 on the impacts of "first contact" and subsequent regulation on the Sto:lo First Nations.

[42] I do not hereby imply that there is any obligation on Indigenous communities to maintain their traditional ways (or their sacred sites), but rather that it is important that they have the means to do so should they wish to.

[43] Consider the Northern Territories Government that carved out two uranium-deposit sites from inside an area which it had declared to be a National Park under joint aboriginal control.(Jabiluka, in respect of Kakadu National Park and the Jabiluka and Ranger sites): see Ashley Tindall, "Kakadu" (10 September 2014), *Sacred Land Film Project* (report), online: <www.sacredland.org/index.html@p=79.html> [Tindall, "Kakadu"].

[44] *Ibid.*

peoples who are displaced by reason of the developments,[45] impacted by the environmental harms,[46] or affected otherwise.

Natural resource development projects will take on an increasing importance in a resource-hungry world,[47] and by nature of the physical location of natural resources and Indigenous peoples[48] there is bound to be increasing future conflict unless the situation is effectively defused. This conflict is between traditionalist Indigenous peoples and natural resource developers on the one hand,[49] and

---

[45] See e.g. Ashish Chadha, "The Anatomy of Dispossession: A Study in the Displacement of the Tribals from their Traditional Landscape in the Narmada Valley due to the Sardar Sarovar Project" in Peter J Ucko & Robert Layton, *The Archaeology and Anthropology of Landscape: Shaping Your Landscape* (London: Routledge, 1999) 148; Sthitapragyan Ray & Shashi Saini, "Development and Displacement: The Case of an Opencast Coal Mining Project in Orissa" (2011) 60:1 Sociological Bulletin 45; Alexandra J Cutcher, *Displacement, Identity and Belonging: An Arts-Based, Auto/Biographical Portrayal of Ethnicity and Experience* (Rotterdam: Sense, 2015).

[46] Lyuba Zarsky & Leonardo Stanley, *Searching for Gold in the Highlands of Guatemala: Economic Benefits and Environmental Risks of the Marlin Mine: Report Fact Sheet* (Medford, Massachusetts: Global Development and Environment Institute [GDAE], Tufts University, September 2011); Marcus W Beck, Andrea H Claassen & Peter J Hundt, "Environmental and Livelihood Impacts of Dams: Common Lessons Across Development Gradients that Challenge Sustainability" (2012) 10:1 Int J River Basin Management 73.

[47] Natural resource development is set to be one of the biggest future economic drivers at the local, national and global level, especially for purposes of resource-rich nations such as the United States, Canada, Australia and Aotearoa New Zealand. See e.g. in respect of the United States — "How Natural Resources Boost the US Economy", (10 May 2016), about.com < http://useconomy.about.com/od/supply/p/Resources.htm> ["The US has the world's largest reserves of coal, at 491 billion short tons or 27% of the total."]; Canada — Natural Resources Canada, "Key Facts and Figures on the Natural Resources Sector", (25 January 2016), online: Government of Canada < http://www.nrcan.gc.ca/publications/key-facts/16013#a5> ["Canada is blessed with a vast wealth of natural resources, which contributes significantly to [its] national economy." Insofar as its energy resources are concerned, "Canada has the 3rd largest oil reserves in the world behind Venezuela and Saudi Arabia". Oil sands account for 97% of Canada's proven reserves]; Australia — James Bishop et al, "The Resources Boom and the Australian Economy: A Sectorial Analysis", (2013), Bulletin (March Quarter 2013), online: Reserve Bank of Australia <www.rba.gov.au/publications/bulletin/2013/mar/5.html> ["Strong growth in Asia is expected to continue to provide significant benefits for the Australian economy. Most notable so far has been the resources boom."] and Parliament of Australia, "Australia's Uranium" by Greg Baker, Statistics and Mapping Section, Research Paper No 6, 2009–10, ISSN 1834-9854 (Canberra: Parliament of Australia, 2009) at 1 ["Australia has the world's largest resources of low-cost uranium."]; and Aotearoa New Zealand — "Natural Resources", online: Ministry of Business, Innovation & Employment Hīkina Whakatutuki <www.mbie.govt.nz/info-services/sectors-industries/natural-resources> ["Oil is a major export earner for the country and gas is an important input into the domestic economy."]

[48] Consider e.g. the site at Jabiluka in Australia's Northern Territory – it holds the world's largest undeveloped uranium deposit, being an estimated 163,000 metric tons of uranium to the value of twenty billion Australian dollars. In the context of Canada, Ross, *supra* note 34 at 12 notes that the problem is specifically sacred sites that are located off-reserve, on public lands.

[49] See e.g. the ongoing difficulties surrounding the Xstrata McArthur River mine in Borroloola, Northern Territory, Australia, *supra* note 35 above.

between traditionalist and non-traditionalist Indigenous peoples on the other.[50] While the focus of this work is on the first type of friction, there is a growing and important debate among Indigenous peoples comprising issues such as socio-economic development[51] and cultural authenticity.[52]

It is my hypothesis that unless we find an effective mechanism for defusing the situation, conflicts such as the Quebec Oka Crisis (September 1990),[53] Elsipogtog (October 2013)[54] and Athabasca Tar Sands (June 2014)[55] will persist.[56] Thus, for instance, members of British Columbia's Tahltan Nation shut down an exploratory drilling operation through a site take-over in September 2014.[57] They

---

[50] See e.g. Peter Nabokov, "Land" *supra* note 11 at 381, who cites Sioux politician Ben Reifel as follows at 383: "The Indian cannot go back to the buffalo economy, and they know it. Romanticists want to keep them the same as they were, but Indians have to accommodate to today. They want a modern standard of living the same as whites."

[51] The result, Nabokov argues, is that "Indians perceive more keenly than ever that their land base, its natural resources, and their cultural ways are the only leverage they have in a white man's world, but that increasingly they are forced to make choices between economic or cultural survival." (*ibid* at 387).

[52] One such divisive project is coal mining by the Peabody Coal Company at Black Mesa on the Navajo Reservation: see Asa Bazhonoodah (Navajo), "Dark Sky Over Black Mesa" in Nabokov, *Native American Testimony*, *supra* note 11, 397 for the account of a traditional tribal member who is bitterly opposed to this strip-mining project that impacts one of their sacred sites.

[53] See *supra* note 34.

[54] Ongoing clashes between the Elsipogtog community and the RCMP culminated in the arrest of 40 community members and the torching of 6 RCMP vehicles on 13 October 2013. The Elsipogtog First Nation was deeply opposed to proposed fracking activities in their (unceded) territory, as they considered it their duty to "protect these lands and to defend them" and they believed that insufficient consultation had taken place: Daniel Schwartz & Mark Gollom, "N.B. fracking protests and the fight for aboriginal rights", *CBC News* (13 October 2013), online: < www.cbc.ca/news/canada/n-b-fracking-protests-and-the-fight-for-aboriginal-rights-1.2126515>.

[55] In June 2014, the "people of the Unist'ot'en camp", being "traditional Gitxsan Wet'suwet'en people who are asserting and protecting natural law on their birthright" released a resolution denouncing "government, military and police aggression against the Unist'ot'en Camp": see Keepers of the Water Beaver River Council, "Resolution #2 — Passed on June 7th, 2014, on the Cold Lake First Nation Treaty Grounds", (2014), online: Keepers of the Water <www.keepersofthewater.ca/unistoten.pdf>. For background, see Amberly Polidor, Amy Corbin & Ashley Tindall, "Site Report: Athabasca River Delta" (20 September 2013), *Sacred Land Film Project* (report), online: <standingonsacredground.org/film-series/profit-and-loss/alberta-canada/site-report-athabasca-river-delta>. They explain that this is a matter involving land that has been the subject of an 1899 treaty between Queen Victoria and the Cree, Denne and Dunne-za, in terms of which the northern Alberta tar sand developments have become contentious, not only due to the environmental impacts implicit in the extraction process, but also due to the fact that there are "sacred sites, including burial grounds and ceremonial lands, throughout the landscape, although "details and locations are closely guarded by the communities that revere them."

[56] See Mohs, *supra* note 13 at 206.

[57] Mark Hume, "First Nations protesters shut down northern B.C. drilling site", *The Globe and Mail* (9 September 2014), online: <http://www.theglobeandmail.com/news/british-columbia/first-nations-protesters-shut-down-northern-bc-drilling-site/article20507396/>.

have for the past several years been actively blocking resource companies from exploiting the Sacred Headwaters region, which they regard as the "physical and spiritual center of their way of life".[58]

In contemplating this problem, I focus on the nexus between culture, spirituality and identity.[59] I get to my starting point of identity because of the link between indigeneity, land and culture[60] and the way in which all of this is interwoven with Indigenous spirituality.[61] Sermet argues convincingly that Indigenous identity varies from notions of nation and state,[62] due to the fact that it has been shaped by their presence on the land in question prior to colonial domination by the other.[63] It therefore is a cultural construct that links the notion of the past to the present. I wish to emphasize, though, that I am interested in fluid notions of living culture[64] not a fossilized version as has sometimes been required by the Canadian and Australian courts.[65]

---

[58] Amy Corbin, "Klabona" (5 November 2007), *Sacred Land Film Project* (report), online: <www.sacredland.org/index.html@p=120.html (2007)> [Corbin, "Klabona"].

[59] See e.g. Jean-François Gaudreault-DesBiens, "The State Management of Legal and Cultural Diversity in Canada" in Marie-Claire Foblets, Jean-François Gaudreault-DesBiens & Alison Dundes Renteln, eds, *Cultural Diversity Law and State Responses from Around the World* (Brussels: Yvon Blais, 2010) 195 [Gaudreault-DesBiens, "State Management"] who links culture to religion at 202, and religion to identity at 203. On Indigenous identity, see Ronald Niezen, *The Rediscovered Self. Indigenous Identity and Cultural Justice* (Montreal & Kingston: McGill-Queens University Press, 2009) [Niezen, *Rediscovered Self*] at 26–28.

[60] See Laurent Sermet, "Juridicité, normativité et pluralisme. De quelques enseignements tirés de la Déclaration des Nations unies sur les droits des peuples autochtones" in Ghislain Otis, ed, *Méthodologie du pluralisme juridique* (Paris: Éditions Karthala, 2012) 201 at 207–208.

[61] See e.g. ATSIC, *supra* note 11 at 43: "Wherever we may live, all Aboriginal people have retained the core elements of our spiritual association to land and this association is an assertion of our Aboriginality."

[62] But see Niezen, *Rediscovered Self*, *supra* note 59 at 30 who claims that the "international movement of Indigenous peoples is part of a transformation in the politics of culture".

[63] Sermet, *supra* note 60 at 208. On indigeneity as identity, see Niezen, *Rediscovered Self*, *supra* note 59 at 26–28.

[64] *Ibid* at 67 cites in this regard James Clifford's observation that there is a fixed approach to culture that regards tribal traditionalists and modernists as "representing aspects of linear development, one looking back, the other forward" instead of conceiving of them as "contending or alternating futures".

[65] See e.g. ATSIC, *supra* note 11 at 43 on concerns pertaining to the displacement of Aboriginal Australians and the proving of land claims.

1.2 The Research Problem

The issue at hand thus relates to the development of legal mechanisms that would enable Indigenous communities to be on a more equal footing when it comes to protecting their sacred sites against natural resource development projects.[66] The notion of protection implies that such sacred sites are at risk – this is especially the case where they are located in areas over which the communities in question do not have effective control insofar as the development of natural resources is concerned.[67] Therefore, without seeking to negate the very real problems that arise within the context of such problems on lands that are controlled by Indigenous communities,[68] the focus of this thesis falls squarely on the former group.

It should be noted that while I may from time to time refer to on-reserve or on-reservation developments, such references are merely informative or illustrative in nature and are not meant to confuse issues or to distract from my main focus.

A further nuance to be made here is that I will not enter into the debate on traditionalist versus non-traditionalist communities – in other words, the economic development rights and prospects of communities versus their desire to protect their traditional way of living, being and heritage. The scope of this thesis is already quite ambitious: it encompasses 4 legal jurisdictions and undertakes both legal and social science research: my approach is one driven by the values of substantive equality and autonomy. Substantive equality, in that my aim is to place Indigenous communities in a position where they have equal power as natural resource developers do when it comes to sacred

---

[66] See *Preface*.

[67] The careful reader will notice a surface discrepancy between my Australian case studies and those of the other three jurisdictions: In Australia, the case study deals with Traditional Owners of the land, whereas in the other contexts the land in question clearly belongs to the government. Nonetheless, this is but a surface distinction as the reader will soon come to realize that Traditional Owners are not, in fact, in effective control of the land. Because Australia adheres to the notion of property as a bundle of rights, Traditional Owners' rights to "their" land are quite limited: for instance, they are secondary to the rights of pastoralists, and they do not encompass rights to the natural resources contained within those lands. For purposes of this study I accordingly do not deem them to be in effective control of the land for when it comes to natural resource development projects. See C 6 below.

[68] This will make fertile ground for future study.

sites / natural resource development project conflicts. Autonomy in the sense that I am not advocating the protection of Indigenous sacred sites at all costs: my approach is that it should be up to the communities themselves to decide whether they wish to protect their sacred sites, *but* that they should have the necessary tools at their disposal to do so if they wish.

1.3 Research Objective

The research objective has already been outlined in *Introduction to Part I* above, *viz*–

> I have a twin objective: first, to concretely consider to what extent the interests of Indigenous peoples in their sacred sites are presently protected in four selected jurisdictions by means of black letter law; then, to explore how a more nuanced grasp of Indigenous values, customs and identities in conjunction with the norms of international law could be integrated with the provisions of such black letter law in a multifaceted, layered approach to construct an improved, context-sensitive framework for the protection of Indigenous sacred sites in each of the jurisdictions under consideration. By "context-sensitive framework" I refer to a framework aligned with the country's legal culture, Indigenous values, customs and identities found within the boundaries of that jurisdiction, and such international norms as may be potentially pertinent in that state.

1.4 Hypotheses

The thesis is predicated on three main hypotheses:

First, that there is a growing conflict between traditionalist Indigenous communities and natural resource developers and that, unless an effective mechanism is developed to defuse the situation, these conflicts will persist and may even intensify in scope.

Second, that Indigenous sacred site claims typically fail in Western courts because they are not pleaded and argued in such a manner as to acquaint the judge with the Indigenous community's conception of their sacred site.

Third, that Western jurists need a more nuanced grasp of Indigenous customs, values and identity, so that they can be in a position to more effectively influence and tailor legal outcomes.

1.5 Research Boundaries

It is important to outline a number of research boundaries prior to tackling the research problem.

First, the vastness of the thesis' scope –it compares four legal jurisdictions and comprises three building blocks, namely legal anthropology/Indigenous theory, international law and comparative law– has required a strict narrowing-down of the immediate research focus and a disciplined adherence thereto. This means that this research must necessarily abstain from attempting to resolve many tantalizing angles, and must withstand the temptation of glossing over complex situations in order to have the difficulties appear resolved. It is a highly complex field. I think here of matters such as the definition of Indigeneity,[69] issues relating to Indigeneity and authenticity,[70] and the polemic pertaining to who may legitimately represent the Indigenous perspective.[71]

Second, in order to keep the thesis at a (relatively) manageable length, it is not feasible to deal with every possible mechanism that could possibly be employed for sacred site protection. I therefore concentrate on those that appear to be the most appropriate in the context of each of the jurisdictions.

---

[69] I touch on this debate below at 1.3.2 ("Key Concepts: 'Indigenous Peoples'"), but the politics of recognition of Indigenous peoples (both on the communal and the individual levels) is a particularly complex dimension of the problem at hand. At the communal level, Indigenous groups' destinies are shaped by the way in which powerful actors such as states, multinational corporations and international financial institutions define and hence recognize (or fail to recognize) them; the same applies on the micro-level to individuals insofar as difficult issues such as self-identification and group identification are concerned. See specifically the problem at the core of the Winnemem Wintu desktop study in C 5 below at 5.5.2.4 ("Illustration: Desktop Study 3: The Winnemem Wintu and the Raising of Shasta Dam, Northern California"). In the latter context, see below at 1.3.2.2 ("Key Concepts: 'Indigenous Peoples': Self-Identification and State Identification"). On "recognition" as a polysemic concept and its potential meanings in political theory, see Michel Seymour, "Introduction" in Michel Seymour, ed, *The Plural States of Recognition*, electronic ed, (Hampshire, Palgrave Macmillan, 2010) 1 at loc 235/4347.

[70] *Cf* ATSIC, *supra* note 11 at 61: "Those who query Aboriginality often imply that loss of language and traditional cultural practices reduces the authenticity of a person's Aboriginality. This theory argues that Aboriginal and Torres Strait Islander people living in remote areas who continue to speak their traditional languages and practice their traditional culture are more 'authentic' than those who live in country towns or cities. But cultures are not static. Cultures and lifestyles change, develop and move with technological innovations and outside influences. Just as the cultural norms of non-Indigenous Australians have changed enormously over the past 200 years, so too have those of Aboriginal and Torres Strait Islander people."

[71] See below at 2.2.2 ("Identity Politics").

Third, although international law is one of the three building blocks on which the thesis framework relies, its role is limited to two specific aspects: on the one hand, it provides context; on the other it relates to international norms that are applicable within the national context of the four jurisdictions studied. This is specifically *not* a thesis on public international law.[72]

Finally, this is, at the very heart of it, a thesis in law. No matter how sincere my conviction that I must have recourse to the insights of law's neighbouring disciplines for purposes of following a contextualized approach, my training is that of a lawyer and my thinking follows the familiar footpath of the jurist at work.[73] My dabbling in other disciplines therefore is just that: a dipping of the toes rather than rushing into a headlong plunge.[74]

1.6 Key Concepts

Three concepts are key to appreciating the research problem in all of its dimensions: 'sacred sites', 'Indigenous peoples' and 'natural resource development projects'. Thorny issues of terminology arise in respect of especially the first two, while it is important that I clarify exactly what I mean by 'natural resource development projects'. We look at each of these in turn.

---

[72] Accordingly the dimension of Indigenous self-determination is expressly excluded from the ambit of this research. Mention will be made of self-determination, notably in the International Law Chapter (C 3), but the objective there is to provide context on the dynamic tensions that arise between the self-determination aspirations of Indigenous peoples and the sovereignty-based natural resource claims of independent states.

[73] A sentiment elegantly encapsulated as follows by Gaudreault-DesBiens in a different context: "*Si* (…) *cette théorisation peut servir de tremplin à une philosophie politico-juridique du fédéralisme, nous avons fait le choix délibéré de mettre davantage en exergue sa dimension juridique et, partant, sa dimension résolument normative. Même nourri par les sciences sociales, le droit demeure une activité normative, que son producteur soit le législateur ou le juge.*" See Jean-François Gaudreault-DesBiens, "Pour une théorie déontique-axiomatique de la décision en contexte fédéral, ou quelques jalons pour une philosophie politico-juridique du fédéralisme" (2016) 16 Jus Politicum 135 at 140.

[74] I therefore will not attempt to employ methodologies belonging to disciplines with which I am not completely *au fait*, notably fieldwork relating to the seven desktop studies by means of which I illustrate the limits of the positive law in my four jurisdictions. The primary function of these desktop studies is in any event to serve as factual illustrations of the effectiveness or otherwise of the norms of positive state laws, not to uncover the internal content of Indigenous law.

1.6.1 "Natural Resource Development Projects"

The technical difference between "development" and "exploitation" is one of degree. Development purports to bring out "the latent capabilities" of something, or to expand it,[75] while exploitation bears the more intrusive connotations of profit and use and is frequently employed to refer to extractive technologies utilized in respect of non-renewable natural resources.[76] For purposes of brevity I use the term "development projects" throughout in the large sense, i.e. it incorporates exploitation projects.

As yet, there is no generally accepted legal definition of "natural resources".[77] I embrace a broad definition of natural resources, such as the one supplied by the unabridged Merriam-Webster dictionary, which includes in addition to "industrial materials and capacities (such as mineral deposits and waterpower) supplied by nature" also "a natural source of wealth or revenue" and "a natural feature or phenomenon that enhances the quality of human life".[78] My choice is informed by the very essence of the debate that I am considering: from the point of view of an Indigenous group the natural resource in question may well be the mountain itself (i.e. keeping the sacred site intact), in the face of external pressures to develop the mountain's touristic potential by installing ski facilities[79] or to exploit the minerals that can be found within that mountain.[80]

---

[75] See *The Oxford English Dictionary*, 2016 ed, *sub verbo* "development".

[76] See *The Oxford English Dictionary*, 2016 ed, *sub verbo* "exploitation".

[77] See Jane A Hofbauer, *Sovereignty in the Exercise of the Right to Self-Determination* (Leiden Boston: Brill Nijhoff, 2016) at 225–226.

[78] *Merriam-Webster Unabridged*, 2016 ed, *sub verbo* "natural resources".

[79] The proposed Jumbo Glacier Resort entails a network of 23 ski lifts crisscrossing four glaciers in the Jumbo Valley, 55 km from Invermere in the heart of the Central Purcells, adjacent to the Purcell Wilderness Conservancy. Opponents argue that the proposed development threatens critical bear habitat and ignores the sacred value of the area to the Ktunaxa. See *infra* at note 157 and the Canadian desktop study discussion below at 4.5.2.4 ("Illustration: Desktop Study1 – Ktunaxa Nation and Jumbo Glacier Ski Resort, British Columbia").

[80] Such as a cyanide heap-leach open-pit gold mine project proposed by Canadian mining company Glamis Gold (now Goldcorp Ltd) in the off-reservation sacred landscape around Indian Pass in the California desert. See generally Amy Corbin, "Indian Pass" (1 September 2005), *Sacred Land Film Project*, online: <www.sacredland.org/indian-pass/trackback/> [Corbin, "Indian Pass"] in respect of the unsuccessful NAFTA complaint lodged by Glamis when its environmental permission was revoked after a federal cultural revision of the process and intervention by the California governor on the basis that it would "irreparably damage sites sacred to the Quechan Indian tribe". For the

1.6.2 "Indigenous Peoples"

As James Clifford wisely observes, "there is no universally satisfactory name" when it comes to speaking of the communities who form the subject of my research: "[d]epending on where one is and who is paying attention, one risks giving offense, or sounding tone deaf."[81] There appears to be consensus neither on terminology pertaining to constituent groups ("aboriginal", "Indigenous", "autochthone", "fourth world"[82], "first peoples", "tribal", "native", etc.), nor on their identity, whether as groups or individuals.[83] I have elected to use the term "Indigenous peoples" as that appears to be the collective *lingua franca* among multiple Indigenous communities,[84] it is the term adopted by the United Nations[85] (which is pertinent given the international dimension of my work)

---

arbitration award, see *Glamis Gold, Ltd v United States of America* (2009) (International Centre for Settlement of Investment Disputes) (Arbitrators: Michael K Young, Prof David D Caron, Kenneth D Hubbard). But see the take of Robert A Bassett, "The Impact of Cultural Resources Laws on the United States Mining Industry" in Barbara T Hoffman, ed, *Art and Cultural Heritage: Law, Policy, and Practice* (New York, NY: Cambridge University Press: 2006), 260 at 263: "The Glamis Imperial Project is an example of cultural preservation laws run amok, of project opponents using those laws in an extreme fashion, and of a well-intentioned company doing all it could to plan in advance for compliance with those laws."

[81] James Clifford, *Returns: Becoming Indigenous in the Twenty-First Century* (Cambridge, Mass: Harvard University Press, 2013) [Clifford, *Returns*] at 10.

[82] "Fourth world" is usually employed to denote an Indigenous minority who inhabits a so-called "modern" Western state. Indigenous communities in the four jurisdictions that form the subject matter of this research will therefore fall into this category. See e.g. Richard Feinberg & Cluny Macpherson, "The 'Eastern Pacific'" in Strathern et al, *supra* note 3, 101 at 130.

[83] Cf Ames, in the context of museums and art: *supra* note 32 at 70: "This uncertainty about how to refer to other peoples – only slowly and reluctantly do we learn to call others by the names they call themselves – reflects a deeper uncertainty about how we should think about what these people do and the creative works or arts they produce."

[84] Cf the explanation offered by Inuit Tapiriit Kanatami: "The term 'Indigenous Peoples' is an all-encompassing term that includes the Aboriginal or First Peoples of Canada, and other countries. For example, the term 'Indigenous Peoples' is inclusive of Inuit in Canada, Maori in Aotearoa New Zealand, Aborigines in Australia, and so on. The term 'Indigenous Peoples' is generally used in an international context. The title of the United Nations Declaration on the Rights of Indigenous Peoples is a prime example of the global inclusiveness of the term 'Indigenous Peoples'": Inuit Tapiriit Kanatami, "A Note on Terminology: Inuit, Métis, First Nations, and Aboriginal", online: <https://www.itk.ca/note-terminology-inuit-metis-first-nations-and-aboriginal>.

[85] Thus, for instance, the UN celebrated the 20th International Day of the World's Indigenous Peoples on August 8, 2014 at the UN headquarters in New York (see United Nations Permanent Forum on Indigenous Issues, "International Day of the World's Indigenous Peoples 2014", online: <http://undesadspd.org/IndigenousPeoples/InternationalDay/2014.aspx>. It proclaimed the Second International Decade of the World's Indigenous People (*sic*), which commenced on January 1, 2005 (see *Achievement of the goal and objectives of the Second International Decade of the World's Indigenous People. Report of the Secretary-General*, UNGAOR, 2014, UN Doc A/69/271. As well, the United Nations Permanent Forum on Indigenous Issues (UNPFII) is mandated as an

and it is not associated with any one nation-state (which is important in view of the fact that this work deals with the Indigenous peoples of four States.) However, when writing in a particular national context I use what appears to me to be the commonly accepted[86] collective terminology:[87] Native American (United States), First Nations[88] (Canada), Aboriginal (Australia) and Māori (New Zealand). Where necessary and thus appropriate in context I adopt the official statutory language ("Indian" – United States; "Indian"/"Aboriginal" – Canada; "Native"/"Aborigine" – Australia; Māori – New Zealand). Where possible, I have used the names that the tribes call themselves, notably within the context of my four desktop studies.[89]

The concept "Indigenous peoples" has two immediately pertinent dimensions: first, its meaning under International law;[90] second, the divergent ways in which Indigenous peoples self-identify juxtaposed with the manner in which positive state law seizes their identity in the four jurisdictions in question. I briefly touch on these, but will deal with them more comprehensively in the context of Chapters 3 (in the International law context) and 8 (in respect of the four jurisdictions studied), respectively.

---

advisory body to the UN Economic and Social Council (ECOSOC) on "Indigenous issues related to economic and social development, culture, the environment, education, health and human rights" (see United Nations Permanent Forum on Indigenous Issues, "Indigenous Peoples at the United Nations", online: <http://undesadspd.org/IndigenousPeoples.aspx>. On the battle for the adoption by the UN of the plural form "peoples", see Marie Battiste & James (Sa'ke'j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge*, Kindle ed (Saskatoon, Saskatchewan: Purich, 2000) at 4.

[86] By which I simply mean that it is commonly used by both the community in question and the state. All of these terms (except Māori) are contentious in some way.

[87] By using collective terminology, I do not imply a homogenous unit speaking with a single voice. In the words of Michael Ames: "There are many voices, many stories. They do not add up to one consistent view, nor should they, because they represent different people with different interests and experiences. We nevertheless need to listen. Native points of view may remind us that outsiders do not have the final word. It is the continuing interaction between these various perspectives that is important": *supra* note 32 at 56.

[88] "Indian" in Canada also includes Métis and Inuit People. My case study is specifically drawn from a First Nations community, hence my choice of terminology.

[89] Cf Ames, *supra* note 32 at 75, who pleads that Indigenous peoples should be afforded "at least the dignity of their own names", so that they are "defined properly in relation to themselves, not as they relate to the Western world".

[90] See Benedict Kingsbury, "Indigenous Peoples" in *Max Planck Encyclopedia of Public International Law*, by Rüdiger Wolfrum (Oxford: Oxford University Press, 2012).

1.6.2.1 "Indigenous Peoples" under International Law

UNDRIP conspicuously refrains from defining "Indigenous peoples"[91] and no UN-system body has adopted a specific definition.[92] Instead, the United Nations Permanent Forum on Indigenous Issues (UNPFII) notes that Indigenous groups tend to "practic[e] unique traditions" and "retain social, cultural, economic and political characteristics that are distinct from those in the dominant societies in which they live."[93] The UN-system accordingly functions by identifying characteristics rather than adhering to a strict definition. There are five important elements in the UN's concept of Indigenous peoples for present purposes: "Self-identification as Indigenous peoples at the individual level and accept[ance] by the community as their member"; "Strong link to territories and surrounding natural resources"; "Distinct language, culture and beliefs"; "Form non-dominant groups of society"; and "Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities."[94]

These characteristics are pertinent to the Indigenous communities in all four of the desktop studies that I have elected for inclusion in this work. However, there is often a marked divergence between way in which state legislation defines Indigenous status and the manner in which Indigenous persons and communities self-identify.

---

[91] Stephanie Lawson observes that "The definition of 'indigenous' […] is notoriously difficult to pin down and, indeed, because the political stakes are often very high when it comes to the identification of who is indigenous and who is not, it is close to entering the category of an 'essentially contested concept'": Stephanie Lawson, "The Politics of Indigenous Identity: An Introductory Commentary" (2014) 20:1 Nationalism & Ethnic Politics 1 at 2. This dimension is dealt with more fully below at 2.2.2 ["Insights Into Indigeneity: Identity Politics"].

[92] United Nations Forum on Indigenous Issues, "Factsheet: Who are Indigenous Peoples?", online: <http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> [UNPFII, "Factsheet"].

[93] *Ibid.*

[94] *Ibid.*

1.6.2.2 Self-Identification and State Identification

When it comes to the state identification of people, Axelsson *et al* observe that "[i]dentity categories and the groups they seek to describe are neither natural nor objective but are historical and political constructions, where decisions about group boundaries have tangible political consequences".[95] Typically states have discernible political objectives[96] such as assimilation (which translates into low classification rates)[97] or taxation (in which case low reporting rates are seen).[98] Population records are historically based on static ideas of unmalleable cultural units, frequently based on ethnicity and blood *quanta*,[99] and on ideas of cultural belonging not synchronous with societal reality.[100] Indigenous definitions, to the contrary, are founded on "cultural identification and community recognition".[101] In the case of Indigenous peoples, the notion of indigeneity is closely intertwined with claims to territory and self-determinacy, making it a particularly explosive subject matter.[102]

---

[95] Per Axelsson et al, "Epilogue: From Indigenous Demographics to an Indigenous Demography" in Per Axelsson & Peter Sköld, eds, *Indigenous Peoples and Demography: The Complex Relation Between Identity and Statistics* (New York: Berghahn Books: 2011) 295 at 300. Also see Tahu Kukutai, "Building Ethnic Boundaries in New Zealand: Representations of Maori Identity in the Census" in Axelsson & Sköld, *ibid* at 33 at 34–35. He explains that ethnic boundaries are cognitive frameworks employed by individuals to distinguish between "'us' and 'them'", employing the telling phrase "codifying race".

[96] Eisenberg and Kymlicka have taken a more profound look at the issue of public institutions and identity politics: see Avigail Eisenberg & Will Kymlicka, "Bringing Institutions Back In: How Public Institutions Assess Identity" in Avigail Eisenberg & Will Kymlicka, eds, *Identity Politics in the Public Realm: Bringing Institutions Back In* (Vancouver: UBC Press, 2011) 1.

[97] Axelsson et al, *supra* note 95 at 297–298. In the case of the United States, they explain that the assumption was that Native Americans would soon be extinct; Kukutai, *supra* note 95 at 35–37 makes a similar point in respect of the expected assimilation of Māori in Aotearoa New Zealand.

[98] Axelsson et al, *supra* note 95 at 300–301.

[99] *Ibid* at 298 note that blood requirements have fallen by the wayside as a consequence of the cultural revitalization of the 1960s and 1970s; see e.g. Kukutai, *supra* note 95 at 40 on Aotearoa New Zealand, where it was removed as a definitional element in 1974. He emphasizes that contrary to the position in the United States, blood *quantum* in Aotearoa New Zealand was more of a badly conceived attempt to track assimilation 'progress' than an overt discrimination mechanism (at 38). Note, however, that blood *quantum* may still be a requirement for tribal or band membership in the United States and Canada, where tribal rules are determinative in this regard.

[100] Axelsson et al, "*supra* note 95 at 299.

[101] *Ibid.* This has meant that new categories needed to be introduced, such as the Canadian Métis and the Metizaje of Latin America.

[102] Kukutai, *supra* note 95 at 33.

1.6.3 "Sacred Sites"

> To say that a specific place is a sacred place is not simply to describe a piece of land, or just locate it in a certain position in the landscape. What is known as a sacred site carries with it a whole range of rules and regulations regarding people's behaviour in relation to it, and implies a set of beliefs to do with the non-empirical world, often in relation to the spirits of ancestors, as well as more remote or powerful gods or spirits.[103]

Much has been written on the concept of "sacred sites" and yet it defies a clear-cut definition.[104] Broadly speaking, I use it to indicate areas that are of deep spiritual significance to a particular Indigenous community. I wish to clarify that I am concerned here not with strategic Indigenous claims founded on the incidental presence of sacred sites ("instrumental sacredness")[105] but with sacred sites that fulfill an identitary role because of the sacred significance that they hold for a particular people ("essential sacredness").[106]

---

[103] Carmichael, Hubert & Reeves, *supra* note 14 at 3.

[104] Alona Yefimenko, "Sacred Sites and Sanctuaries in Northern Russia" in Erich Kasten, ed, *Properties of Culture — Culture as Property: Pathways to Reform in Post-Soviet* Siberia (Germany: Dietrich Reimer Verlag, 2004) 157 at 167. Also see CAFF Technical Report No 11, *The Conservation Value of Sacred Sites of Indigenous Peoples of the Arctic: Report on the State of Sacred Sites and Sanctuaries* (Conservation of Arctic Flora and Fauna, 2004) [CAFF Technical Report No 11] c 2 at 6.

[105] Cf Ghislain Otis, "Revendications foncières, 'autochtonité' et liberté de religion au Canada" (1999) 40 C de D 741 [Otis, "Revendications foncières"] at 745 n 3: "*Les autochtones recourent fréquemment à la stratégie des 'causes types' qui consiste à défier la législation en matière de chasse et de pêche en vue d'amener le Ministère public à instituer des poursuites pénales qui deviennent alors l'occasion d'avancer des revendications de droits historiques sur la terre et les ressources. C'est ainsi, par exemple, que des membres de la communauté huronne-wendat ont pu faire reconnaître par la Cour suprême l'existence d'un traité leur garantissant le libre exercice de leur religion : voir R. c. Sioui*, [1990] 1 R.C.S. 1025." Also see *ibid* at 747 and 759.

[106] See e.g. Mohs, *supra* note 13 at 188 on the Sto:lo: "To the Sto:lo, the river and its resources represent tradition itself. The Sto:lo name is taken from the river; its resources have provided sustenance for longer than can be remembered. The river has been a great provider and a source of consolation and much sorrow. The river has been home and much, much more. It is the living force to which the Sto:lo remain deeply rooted and attached [….] Sto:lo heritage –past, present and future– is intimately tied to the river. Not surprisingly, the majority of Sto:lo spiritual sites are in some way connected with the river." Also see Matunga, *supra* note 19 at 219: historical sites and objects have a spiritual dimension and shape Māori identity, because to the Māori the past still exists in the present (he refers to it as the "living present").

"Sacred sites" can be considered from various angles. Hubert[107] has identified four: the conceptual,[108] proprietal,[109] ontological[110] and relational.[111] Although the English word "sacred" has become the *lingua franca* in global discussions of "sacred sites", "concepts expressed in a specific language are necessarily limited to that language"[112] and in its global usage divergent interpretations of the meaning and boundaries of "sacred" are apparent.[113]

The notion of "sacred sites", then, is not one that lends itself to an easy definition, a difficulty that is not eased by dichotomous cultural perceptions of the essence of sacred sites.[114] Hubert cites as example the New Zealand Māori, whose *wahi tapu* (literally, "sacred place") has a spiritual value that transcends the notion of "mere sacredness".[115] Classification of *wahi tapu* is hierarchical and complex — all the more so because the various *iwi* (tribe), *hapū* (sub-tribe) or *whanau* (extended family) independently define *wahi tapu* for themselves.[116] Matunga cites two main reasons why a site may

---

[107] Hubert, *supra* note 31 at 9.

[108] I.e., the ways in which they are defined or delineated: *ibid.*

[109] I.e., in terms of ownership rights and rights of access: *ibid.*

[110] I.e., according to the meaning that communities and individuals ascribe to them: *ibid.*

[111] I.e., with reference to their relationship to both the living and the dead: *ibid.* At 14–15 she highlights conflicts that arise pertaining the dead, the potential sacred status of burial sites and issues such as archaeological excavations and disinterment/re-interment for other reasons. This is a burning issue in one of my United States desktop studies: see below at 5.5.2.4 ("Illustration: Desktop Study3 – The Winnemem Wintu and the Raising of Shasta Dam, Northern California").

[112] Hubert, *supra* note 31 at 10.

[113] See e.g. Chantal Radimilahy, "Sacred Sites in Madagascar" in Carmichael et al, *supra* note 13, 82 at 82: "In Madagascar the meaning 'sacred' is represented by the term *masina*, whose primary meaning is 'salted'. In addition, *masina* also incorporates a notion of power and efficacy, and of sanctity. (…) A site is considered as sacred, *masina* or *manan-kasina*, when it is inhabited by *zavatra* (literally 'things'), by *angatra* ('spirit') or by the spirits of ancestors who focus these qualities and these powers." Also see Mohs on the Sto:lo who do not have a single word to convey the concept of "sacred sites": *supra* note 13, as cited *supra* at note 17.

[114] See Dorothea J Theodoratus & Frank LaPena, "Wintu Sacred Geography in Northern California" in Carmichael et al, *supra* note 13, 20 at 21. Matunga, *supra* note 19 at 219 refers here to the interpretative schism that exists in Western and Māori understandings of the past.

[115] Hubert, *supra* note 31 at 10. Also see *ibid* at 16–17 on the Adnyamathanha people of the Flinders Ranges in South Australia who consider the whole of the land to be sacred but nonetheless have discrete "especially sacred places" that impose individual rules of conduct.

[116] T Sole & K Wood, "Protection of Indigenous Sacred Sites: The New Zealand Experience" in J Birckhead, T de Lacey & L Smith (eds), *Aboriginal Involvement in Parks and Protected Areas* (Canberra: Aboriginal Studies, 1992) 339 at 342 as cited in Hubert, *supra* note 31 at 11. Cf Matunga, *supra* note 19 at 218: "Maori culture has well-defined procedures

qualify as *wahi tapu*: due to the fact that historical events took place there[117] or because it is a resource site.[118]

Among Native Americans and Canada's First Nations "places of power"[119] play a significant role, whence the concept "sacred geography".[120] These are areas whose meaning is tied up with their place in native cosmology and ceremonial practices,[121] where the material and spiritual worlds intersect.[122] Carmichael highlights the difficulties inherent in expressing the "concept of power" in English:

> Power is a spiritual energy or life force that enables an individual to interact with the forces of the natural or supernatural worlds. Supernatural power derives from a variety of plants, animals and meteorological phenomena. Once obtained, power gives one the ability to influence certain aspects of nature by virtue of a special relationship with the spirits responsible for them.[123]

Indeed, the very notion of "sacred sites" is indicative of western classification patterns: Indigenous communities may not have an easily translatable equivalent concept[124] –in the sense that it is too broad and potentially refers to any of a whole range of differentiated sites,[125] or that it is too narrow,

---

and rules for dealing with the past. It has its own litmus test for determining validity and invalidity, its own experts for dealing with the *tapu* areas and objects of the tribal past, and it can be dangerous for Maori people who do not follow correct Maori procedures when delving into the past. The fact that western cultures do not acknowledge this reality is evidence of their own limitations in their handling of other peoples' realities, rather than the result of inadequacies inherent in Maori cultural methodology."

[117] See *supra* at note 106 on the past as "living present".

[118] *Supra* note 19 at 220.

[119] Carmichael, Hubert & Reeves, *supra* note 14 at 5; David L Carmichael, "Places of Power: Mescalero Apache Sacred Sites and Sensitive Areas" in Carmichael et al, *supra* note 13 at 89. Also see Theodoratus & LaPena, *supra* note 114 at 22.

[120] Carmichael, Hubert & Reeves, *supra* note 14 at 5.

[121] Carmichael, Hubert & Reeves, *supra* note 14 at 5; Mohs, *supra* note 13 at 186, 189 and 196.

[122] Carmichael, *supra* note 119 at 91.

[123] *Ibid* at 91.

[124] Hubert, *supra* note 31 at 10; Mohs, *supra* note 13 at 192. See below at 2.4.3.1 ("Issues of Cultural Cross-Translation").

[125] See Mohs, *supra* note 13 at 192.

in that a community considers such sites to be "part of a network of powerful places that encompass entire landscapes".[126] In Māori culture, for instance, there are the closely associated concepts of *tapu* and *mana* that both play a role in this regard. While *tapu* is usually translated as "sacred", "holy", "forbidden" or "demanding of respect", *mana* "can ensure fertility, nurturance, abundance, and general well-being, but it is also dangerous and, if abused, can be a powerful source of destruction. Therefore, it must be treated with care and circumspection."[127] There thus is ample room for cross-cultural communication.[128]

Theses dichotomous cultural perceptions lead to disagreement on points such as whether such sites' sacredness is intrinsic or relational.[129] According to traditional Western conceptions the majority of sacred sites (structures such as churches) are consecrated and can be deconsecrated.[130] Their sacredness is thus relational to the people who worship at them.[131] Many Indigenous sacred sites, however, are deemed to be intrinsically sacred:[132] a mountain that is the dwelling place of

---

[126] Carmichael, Hubert & Reeves, *supra* note 14 at 6. Here, they specifically refer to Wintu geography, as documented by Theodoratus & LaPena, *supra* note 114 at 20. Also see Hubert, *supra* note 31 at 16. This is of particular importance for purposes of the United States case study discussed at 5.5.2.4 below ("Illustration: Desktop Study 3 – The Winnemem Wintu and the Raising of Shasta Dam, Northern California").

[127] Feinberg & Macpherson, *supra* note 82 at 119.

[128] See Theodoratus & LaPena, *supra* note 114 at 21. See below at 2.4.3.1 ("Issues of Cultural Cross-Translation").

[129] See Hubert, *supra* note 31 at 12.

[130] *Ibid* at 13.

[131] *Ibid* at 12 notes that "[i]n a country such as England the concept of the sacredness of the land as a whole is largely lost" and observes that sacred sites tend to be structures such as churches that are decreasingly venerated and whose sacredness "is confined to one small area of life", namely religious activities (at 12–13). But see Gabriel Cooney, "Sacred and Secular Neolithic Landscapes in Ireland" in Carmichael et al, *supra* note 13, 32 at 33: "A better view might be to suggest that the sacred is a current underlying all aspects of everyday life and that there are specific times, places and events when the sacred comes to the fore, for example in mortuary practices." Also see Katarzyna Marciniak, "The Perception and Treatment of Prehistoric and Contemporary Sacred Places and Sites in Poland" in Carmichael et al, *supra* note 13, 140 at 143 on contemporary Polish sacred places, where these include "places with pictures and/or sculptures which are regarded by the church authorities as holy and miraculous […] places where religious revelations have taken place, and […] places where supernatural phenomena have occurred".

[132] See e.g. Theodoratus & LaPena, *supra* note 114 at 22; Radimilahy, *supra* note 113 at 82; Matunga, *supra* note 19 at 220.

supernatural animal beings[133]/creational spirits[134]/ ancestors,[135] topographical features such as distinctive rock outcrops and caves that frequently host spirits,[136] and guide rocks.[137] Sites that are sacred because of historical significance (burial grounds,[138] massacre sites, battlefields, sanctuaries,[139] visionary sites[140]) may constitute a point of overlap in that for the purposes of both worldviews that site will of necessity be tied to the landscape. However, while it is clear that their sacredness will be relational in terms of Western perceptions, it may well be that a given Indigenous people regards such a site as intrinsically sacred.[141] In the case of the Aboriginal peoples of Australia the position is particularly complex: while they clearly regard all sites related to the Dreamtime's creation stories

---

[133] See e.g. Theodoratus & LaPena, *supra* note 114 at 27: "Mountains house supernatural animal beings (such as werebeasts, mountain lions, mountain boys and bush boys) which can transform themselves into human form. Werebeasts are associated with evil or malevolent influences, so areas inhabited by these creatures are avoided."; Reeves, *supra* note 27 at 289 speaks of the "Other-Than-Human-Beings" in the form of "Animal Persons and Dream Persons" who reside in the sacred mountain Ninaistákis according to Nitsitapii tradition.

[134] But mountains can also possess benevolent spiritual power, such as Mount Shasta, the Wintu's holiest mountain: see Theodoratus & LaPena, *supra* note 114 at 27.

[135] See e.g. Radimilahy, *supra* note 113 at 88: these are negative powers who are more feared and appeased than venerated.

[136] See e.g. Theodoratus & LaPena, *supra* note 114 at 23; Mohs, *supra* note 13 at 192–193.

[137] See e.g. Theodoratus & LaPena, *supra* note 114 at 27.

[138] See e.g. John FC Johnson, "The Spirits of the Chugach People of Alaska Are At Rest Once Again" in Carmichael et al, *supra* note 13, 209 on the desecration of Alaska Native American burial sites by workers cleaning up after the Exxon Valdez oil spill — including the burial place of the 1,000 year old Chugach man. Also see Mohs, *supra* note 13 at 197–198. However, a radio interview with Caleen Sisk has highlighted the fact that while the Winnemem Wintu may *revere* and *respect* burial places, they do not count them among their *intrinsically sacred* places. ATSIC, *supra* note 11 at 44 makes a similar distinction in respect of "sites indicating Aboriginal peoples' past presence in the landscape" (art sites, stone arrangements, burial sites, skeletal remains, old camp sites, etc.) and "[c]ontact sites, occupied by Aboriginal people after the European settlement" (missions, reserves, battle and massacre sites, etc.) — both of which types are important and must be protected, but are not considered *intrinsically sacred* in the way that sites associated with the Dreamtime's creation stories are.

[139] See e.g. Katarzyna Marciniak, *supra* note 131 at 144 on contemporary Christian sanctuaries in Poland; Theodoratus & LaPena, *supra* note 114 at 24 on a "basaltic formation [that] was created by a shaman to supply water to a group of Wintu who were hiding out from vigilantes and American troops".

[140] Granoff and Shinohara observe two difficulties that have arisen in the context of the Asian religions, where sacred spaces are often revealed by visions: they may become contested places and the problematic faced by missionary religions for the creation of new sacred places when expanding from their homelands: Phyllis Granoff & Koichi Shinohara, "Introduction" in Phyllis Granoff & Koichi Shinohara, eds, *Pilgrims, Patrons and Place: Localizing Sanctity in Asian Religions* (Vancouver: UBC Press, 2003) 1 at 2–3.

[141] See particularly Vine Deloria Jr, "Sacred Lands and Religious Freedom" in Deloria, *For this Land*, *supra* note 335, 203 [Deloria, "Sacred Lands"] at 205ff on difficulties created by this paradigmatic schism in the United States.

to be intrinsically sacred, there is a relational link between such sites and particular groups of Aboriginal people:

> The relationship [between Aboriginal spirituality and land] was established in what is now generally called the 'Dreaming' or 'Dreamtime' when the land was created by the journeys of the Spirit Ancestors. (…)
>
> Aboriginal concepts of land tenure differ greatly from European legal models. Complex social systems were and are expressed in particular attachments to country. The basic land-owning unit is the clan — a local descent group, larger than a family, but based on family links through a common (usually male) ancestry. For the Northern Territory Justice Woodward noted that 'everywhere the religious rites owned by a clan were "title deeds" to the land and could only be celebrated by clan members. Induction into the clan is through descent, is invested at birth and is inalienable — 'the link between an Aborigine's spirit and his land is regarded as being timeless.'
>
> The connection between a clan and its land involves both rights and duties — rights to use the land and its products, and duties to tend the land through the performance of ceremonies.
>
> Individuals may also have special relationships to special places. (…)
>
> 'Dreaming tracks' of Ancestors significant to one group usually extend into the territories of other groups, interlinking the land associations of the wider community. If a particular land-owning group decreases or dies out, there are mechanisms by which the land can pass to a related group.
>
> Failure to observe the laws of the land and interference with its spiritual places have consequences not only for the land but also for the people charged with its maintenance.[142]

Somewhat akin to the 'transferability' of Australian sacred sites alluded to above, Buggey observes in respect of North American sites with historical significance that the people bonded to the site are not limited to the present occupiers or users of the site, but may also comprise "those who have a historic relationship still significant to their culture, such as the Huron-Wendat of Quebec to the

---

[142] ATSIC, *supra* note 11 at 42–43. Sandra E Greene, *Sacred Sites and the Colonial Encounter: A History of Meaning and Memory in Ghana* (Bloomington & Indianapolis: Indiana University Press, 2002) at 2 speaks in this context of "interactive sites", namely "places where humans could influence the sacred as well through the performance, or the lack thereof, of particular rituals."

territory in southern Ontario that they left in the mid-seventeenth century", in addition to other people who "may have used these landscapes and may attach value to them."[143]

Sacred sites are connected closely to "gender, status and role",[144] they may be function-specific, and one cultural community's sites may constitute an array of sacred places.[145] For instance—

> the Sto:lo Indians of British Columbia have no word to cover all sites of spiritual significance, and […] there are many different types of site: transformer sites, spirit residences, ceremonial areas, traditional landmarks, questing sites, legendary and mythological places, burial sites and traditional resource areas.[146]

There is a deep dichotomy between traditional Western legal concepts and Indigenous law, which *inter alia* has sacred law as a source.[147] When we attempt to construe an Indigenous 'sacred site' in Western terms, layers of meaning are lost in translation. Whereas in Western terms we typically associate a 'sacred site' with the structure erected on it (church,[148] synagogue, mosque),[149] an

---

[143] Susan Buggey, "An Approach to Aboriginal Cultural Landscapes in Canada" in Igor Krupnik et al, eds, *Northern Ethnographic Landscapes: Perspectives from Circumpolar Nations* (Washington, DC: Arctic Studies Center) 17 at 20.

[144] Carmichael, Hubert & Reeves, *supra* note 14 at 4. ATSIC explains that many Australian Aboriginal peoples distinguish between different sectors of men's and women's knowledge; in addition, knowledge-distribution varies within a group according to personal age, status, or particular relationship with a site: ATSIC, *supra* note 11 at 44. Also see Galina Kharuchi as cited in Yefimenko, *supra* note 104 at 166.

[145] Carmichael, Hubert & Reeves, *supra* note 14 at 4; Hubert, *supra* note 31 at 11; Mohs, *supra* note 13 at 192.

[146] Carmichael, Hubert & Reeves, *supra* note 14 at 4, with reference to the report by Mohs, *supra* note 13.

[147] John Borrows, *Canada's Indigenous Constitution* (Toronto Buffalo London: University of Toronto Press, 2010) at 25 [Borrows, *Indigenous Constitution*]. He makes the interesting observation that Elders often consider their treaties to be sacred in the sense that they constitute creation stories (the bringing into existence of Canada), quite irrespective of the actual content of these treaties. Interestingly, Aotearoa New Zealand's Waitangi Tribunal has also characterized the foundational *Treaty of Waitangi* as a "sacred covenant entered into by the Crown and the Māori": Waitangi Tribunal, *Te Roroa Report*, *supra* note 381 at 8.

[148] See Hubert, *supra* note 31 at 12.

[149] Thus Cooney, *supra* note 131 at 35 suggests that the construction of monuments could signify that a site is sacred.

Indigenous sacred site will likely be the landscape itself,[150] though not necessarily solely the landscape.[151]

Sites may be sacred for various reasons for different communities, including due to the presence of topographical/landscape features;[152] plants or trees[153] / natural resource areas;[154] cultural keystone

[150] Szonja Ludvig, "The Tribes Must Regulate: Jurisdictional, Environmental, and Religious Considerations of Hydraulic Fracturing on Tribal Lands" (2013) BYUL Rev 727 at 727; Theodoratus & LaPena, *supra* note 114.

[151] See e.g. Radimilahy, *supra* note 113 at 83 on ancestral tombs and altars in Madagascar.

[152] See e.g. Hubert, *supra* note 31 at 14–17 on sites created by the ancestors during Dreamtime in Australian Aboriginal religions; Theodoratus & LaPena, *supra* note 114 at 21–23 on features such as caves, springs and rock outcroppings; OV Ovsyannikov & NM Terebikhin, "Sacred Space in the Culture of the Arctic Regions", translated by Katherine Judelson in Carmichael et al, *supra* note 13, 44 at 58 in respect of unusual landscape features "that fired the Nenets" imagination, and made them single out the place as a *khekhe ya*; Radimilahy, *supra* note 113 at 83 regarding "springs, lakes, caves, upright stones and the roots of trees such as tamarinds and other *ficus*" in Madagascar; Carmichael, *supra* note 119 at 92–93 regarding sacred mountains, caves and springs in the Mescalero Apache tradition (these are all "natural areas of intersection" between the physical and spiritual worlds, and thus places of power); Inga-Maria Mulk, "Sacrificial Places and their Meaning in Saami Society" in Carmichael et al, *supra* note 13, 121 at 122; Mohs, *supra* note 13 at 192–193; Matunga, *supra* note 19 at 220 on Māori places; Broadbent & Edvinger, *supra* note 23 at 319 on Saami sacred landforms; W Lloyd Warner, "Spirit Conception in Murngin Thought" in Charlesworth et al, *Religion*, *supra* note 152, 125 on sacred waterholes in the traditions of the Murngin people of Northern Arnhem Land in Australia.

[153] See e.g. Matunga, *supra* note 19 at 220 and Waitangi Tribunal, *Te Roroa Report*, *supra* note 381 at 237 on Māori places.

[154] See e.g. Carmichael, *supra* note 119 at 92 and 94–95 on the Mescalero Apache — the materials, the areas where they are sourced and where they are utilized can all be regarded as "culturally sensitive", though not "sacred in the same sense" as the natural areas of intersection and the transformational sites. Where these are located off-reservation, having an access right during the appropriate periods becomes very important, as specific materials are used during the Girls' Puberty Ceremony, which "is viewed as the basis of their tribal identity and critical to their survival as a people" (at 94). He observes that they are "among the least sensitive of the sacred places" (at 96) but cautions of their inherent potential of land-use conflict, due to the extensive geographical areas covered (*ibid*); Mohs, *supra* note 13 at 198; Matunga, *supra* note 19 at 220 on Māori places.

species;[155] artefacts;[156] or spiritual beings;[157] or the fact that they are places of spiritual power[158] and healing;[159] sanctuaries;[160] vision sites;[161] burial grounds;[162] sites used for special skills such as hunting,

---

[155] Thus salmon and salmon habitat are highly valued and respected by the Sto:lo First Nation, who has several sacred rituals with deep-rooted cultural importance revolving around salmon, such as the "first salmon ceremony" — Braeden Taylor, "An Upstream Battle: A Story of the Sockeye Salmon" in Oakes et al, *supra* note 34 at 234. Also see Ross, *supra* note 34 at 88–97.

[156] See e.g. Radimilahy, *supra* note 113 at 86: "all over Madagascar, there are 'sacred areas' which are encircled by wooden hedges, or distinguished by memorial poles (…), or marked by characteristic signs, for example the remains of offerings (sweets, honey, bananas or coins), the remains of sacrifices (blood, or the heads of birds), white or red ribbons or cut-out squares of tissues, or pictures made with chalk or white clay"; Mohs, *supra* note 13 at 196 and 198 on the ceremonial masks of the *sx̱wo:yx̱wey* dancers; Matunga, *supra* note 19 at 220 on Māori artefacts, which include "carved *poupou* representing ancestors"; Reeves, *supra* note 27 at 279–282 on the origin of the "Long-Time Medicine Pipe" held by the South Piikáni, which is associated with the sacred mountain Ninaistákis.

[157] See e.g. *Ktunaxa Nation v British Columbia (Minister of Forests, Lands and Natural Resource Operations)* 2014 BCSC 568, Sewel J [*Ktunaxa Nation* BCSC]; *Ktunaxa Nation* BCCA, *supra* note 357; *Ktunaxa Nation Appealing B.C. Supreme Court Decision on Qat'muk* (Cranbrook, BC, 2014) and Human Rights Council, *Report of the Special Rapporteur on the rights of Indigenous peoples, James Anaya. Addendum. The situation of Indigenous peoples in Canada* (2014) at 21 on the construction of the Jumbo Glacier Resort in an unceded area of spiritual significance to the Ktunaxa Nation (Qat'muk) — The Ktunaxa Nation poses severe opposition since they regard the area as sacred, being the home of the Grizzly Bear Spirit. Also see Radimilahy, *supra* note 113 at 84–85 regarding stones and springs haunted by the *vazimba* (first known earth inhabitants) in Madagascar — these are negative powers who must be appeased through sacrifices and offerings so as to prevent disease and calamities; Mohs, *supra* note 13 at 195. The *Ktunaxa Nation* case forms the subject matter of my first Canadian desktop study: see at 4.5.2.4 below ("Illustration: Desktop Study 1 – Ktunaxa Nation and Jumbo Glacier Ski Resort, British Columbia")

[158] The grounds that were flooded following the *Manitoba Northern Flood Agreement* had *inter alia* been used for "spirit quests and 'coming of age' ceremonies, as well as for collecting sacred and medicinal plants": Brittany M McLeod, "Impact of Hydro-Electric Development on Connections to Traditional Lands" in Oakes et al, *supra* note 34, 227 at 228 and 229. Also see Theodoratus & LaPena, *supra* note 114 at 23–24 on places that are "sources for shamanistic power" for the Wintu; Carmichael, *supra* note 119 at 92–93 on powerful places in the Mescalero Apache tradition; Broadbent & Edvinger, *supra* note 23 at 319 on Saami transitional sites.

[159] See e.g. Ovsyannikov & Terebikhin, *supra* note 152 at 59 in respect of stone and/or wood religious edifices constructed by the Nenets people, as well as "sacred objects that performed […] important mnemonic functions".

[160] See e.g. *ibid* at 60–72 on the Kozmin Copse.

[161] See e.g. *ibid* at 58; Carmichael, *supra* note 119 at 95 on the Mescalero Apache tradition; Mohs, *supra* note 13 on the Sto:lo First Nations; Reeves, *supra* note 27 at 276–279 and 282 on traditional and contemporary vision question among the Nitsitapii on their sacred mountain Ninaistákis.

[162] See e.g. Nickel, *supra* note 34 on the Mohawk burial site at Oka; Hubert, *supra* note 31 at 15 on the ancestral burial grounds of the Suba people of Kenya; Cooney, *supra* note 131 at 33 and 35–38 on tombs in the Gaelic landscape; Radimilahy, *supra* note 113 at 83 on ancestral tombs in Madagascar; Carmichael, *supra* note 119 at 93 on Mescalero Apache burial sites, which are powerful places of transformation and thus very dangerous until the graves have been covered; Mohs, *supra* note 13 at 197-198 on the Sto:lo First Nations; Matunga, *supra* note 19 at 220 on Māori "places associated with death"; Broadbent & Edvinger, *supra* note 23 at 320 on Saami graves.

gambling or basket-weaving;[163] ceremonial sites;[164] or sacrificial sites; [165] or they are historical/mythological sites[166] or other[167] sites. Some communities distinguish between permanent and occasional sacred sites.[168] It is thus not possible to generalize or to establish ready categories according to which to class them.[169] Even saying that they are landscape- or location-bound could be problematic, as is illustrated by the Nenets' belief that sacred sites are autonomous non-human entities who are able to displace themselves if offended.[170]

I do not go so far as some theorists who seek to employ economic importance as a marker of sacred significance[171] or who consider that the linkage of mundane ancestral memories with a place renders

---

[163] See e.g. Theodoratus & LaPena, *supra* note 114 at 23.

[164] See e.g. Cooney, *supra* note 131 at 33; Carmichael, *supra* note 119 at 93–94 on sweat lodges and the Holy Lodge utilized by the Mescalero Apache for the Girls' Puberty Ceremony — these are very powerful, transformational sites; Mohs, *supra* note 13 at 186, 189 and 195 on Sto:lo ceremonial sites; Matunga, *supra* note 19 at 220 on Māori altars.

[165] See e.g. Ovsyannikov & Terebikhin, *supra* note 152 at 58–59 in respect of the Nenets people; Radimilahy, *supra* note 113 at 83 on "altars where the people come to pray, to sacrifice or to give offerings" in Madagascar; Mulk, *supra* note 152 at 125–130 and Broadbent & Edvinger, *supra* note 23 at 319–320 on pre-Christian Saami sacrificial sites (choice of location apparently was a function of topographical conditions: Mulk *supra* note 152 at 125).

[166] See e.g. Radimilahy, *supra* note 113 at 85–86 regarding the mythical origins of the Kingory spring in the highlands of Madagascar; Carmichael, *supra* note 119 on sites important to the "mythic time of Mescalero tribal history"; Mohs, *supra* note 13 at 194 and 196–197 on historical/mythological sites significant to the Sto:lo First Nations, which include traditional landmarks, as well as legendary and mythological places; Matunga, *supra* note 19 at 220 on Māori mythological, historical and memorial sites.

[167] Mohs, *supra* note 13 at 198 additionally lists "astronomical sites, medicinal pools and springs", as well as "pictograph and petroglyph boulders". Other elements on Matunga's intricate list of Māori sites include: "burial places of the placenta; (…) sources of water for healing or death rites; (…) sacred pathways for messengers; (…) confiscated lands; (…) landscape features which determine *iwi* and *hapu* boundaries": Matunga, *supra* note 19 at 220.

[168] See e.g. Ovsyannikov & Terebikhin, *supra* note 152 at 58 in respect of the Nenets people; Carmichael, *supra* note 119 at 89 observes that historically the majority of Mescalero Apache sacred sites were of a temporary nature.

[169] Ovsyannikov & Terebikhin, *supra* note 152 at 58.

[170] Literally, in the sense of a mountain moving kilometers away because it got offended: CAFF Technical Report No 11, *supra* note 104, c 5 at 3.

[171] Cf Rachel Ten Bruggencate, "Changing Site Use and the Sacred at the Forks of the Red and the Assiniboine Rivers" in Oakes et al, *supra* note 34, 101 at 105: "This is a sanctity that springs out of economic significance and an otherness borne of palisade walls and market forces, rather than the implicit sacredness of all things and respect for their interrelatedness."

it sacred *per se*.[172] Such a totalitarian concept of sacredness[173] risks both trivializing Indigenous sacred sites and rendering any strategy intended to protect such sites unrealistic.[174]

Jean Leclair's careful analysis of the meaning of "the sacred" uncovers two characteristics that are of key importance for my research: first, that the sacred constitutes a point of anchorage for the believer[175] and second, that it is accompanied by a form of absolutism.[176] The first point is important as it fits into the culture and identity-based argument that is foundational to my central thesis; the second explains why sacred sites cannot simply be relegated to the realm of reasonable negotiations.

Depending on the people in question, sacred sites may take on various forms. Thus, for instance, the Aotearoa New Zealand Waitangi Tribunal's *Te Roroa Report* referred to above make reference to *wakatupapaku* (burial chests) deposited in *ana* (caves and crevices) and *wahi tapu* (land of special spiritual, cultural or historical tribal significance).[177]

The Australian National Parks Management Plan recognizes three types of sacred sites: *kundjamun* (secret initiation sites), *djang* (sites of significance to the Dreamtime) and *djang andjumun* (dangerous

---

[172] Cf Ainslie Cogswell, "Seasonally Scarce: Reoccupation of Archaeological Sites on Baffin Island, Nunavut" in Oakes et al, *supra* note 34, 109 at 110: "Within the theoretical framework of memoryscape it is proposed that through repeated occupation of sites, by families in the short-term and by cultures in the long-term, the landscape becomes imbued with sacred meaning to the occupants."

[173] Charles Ramble makes a similar point in the Tibetan context: "Finally, it is worth noting that our main concern here is with the idea of sacred, not everyday space. Tibetans travel a great deal, but not always because they are on pilgrimage. Many Tibetans do indeed walk around mountains because they want to acquire merit, or achieve prosperity, or cure some disease. In most cases, however, when Tibetans walk around mountains it is because the mountains are in the way.": Charles Ramble, "The Politics of Sacred Space in Bon and Tibetan Popular Tradition" in Toni Huber, ed, *Sacred Spaces and Powerful Places in Tibetan Culture: A Collection of Essays* (Dharamsala: Library of Tibetan Works and Archives, 1999) 3 at 4.

[174] Consider e.g. Carmichael, *supra* note 119 at 96: "[I]t is unrealistic to expect that all sacred sites and sensitive areas can be individually protected from damage or inappropriate use; we must rely on an educational process to promote a respect for the importance of sites and landscapes to native peoples."

[175] Leclair, "Le sacré", *supra* note 356 at 479 and 483. Note that my identity-based argument differs in substance from the one critiqued by Leclair, in that I have in mind the protection of living culture and not the fossilized essentialist version introduced by the Canadian Supreme Court in *R v Van der Peet* [1996] 2 SCR 507 Lamer CJ [*Van der Peet*].

[176] Leclair, "Le sacré", *supra* note 356 at 479: "*Les concepts de sacré et de religion renvoient donc à une sphère où la Raison n'est pas tout puissante et où certaines vérités sont incritiquables.*" Also see *ibid* at 483.

[177] Also see *ibid.*

significant sites).[178] In the Australian context, there are also sites that pertain to sacred rock art,[179] as well as to "secret women's business"[180] and "secret men's business".[181] This "secret-sacred" dimension is very important in Australia, where "[k]nowledge of sacred sites is, by definition, not public knowledge".[182]

1.7 Thesis Structure

In the *Introduction to Part I,* I have already briefly introduced the two Parts of the thesis. Together, they comprise eight Chapters. Part I establishes the parameters of the stakes raised by Indigenous sacred sites and natural resource development projects and sets the scene for the concrete study to be undertaken in Part II —

- Chapter 1 introduces the research problem; outlines the thesis' original contribution to science while also clearly delineating the boundaries of the research; and identifies potential difficulties relating to core thesis terminology, explaining and motivating choices made in this regard. It then details the thesis structure and discusses the three building blocks that make up the theoretical framework underpinning the research: legal anthropology/Indigenous theory, legal comparison, and international law. It explains and motivates the approach and methodology followed, notably with reference to the selection of legal jurisdictions for purposes of legal comparison, as well as factors that played a key role in determining the choice of desktop studies employed for illustrative purposes to gauge the operation of the applicable legal frameworks in the four jurisdictions in question.

---

[178] Tindall, "Kakadu", *supra* note 43. The Plan is co-managed by the National Parks Director and the Aboriginal Traditional Owners and governs the management of three such national parks: Uluru Kata-Tjuta, Mungo and Kakadu National Parks: *ibid.*

[179] See Tindall, "Kakadu", *supra* note 43; Polidor & Tindall, *supra* note 35 above.

[180] See Ashley Tindall, "Hindmarsh Island" (12 March 2007), *Sacred Land Film Project* (report), online: <www.sacredland.org/index.html@p=77.html> [Tindall, "Hindmarsh Island"].

[181] See ATSIC, *supra* note 11 at 44.

[182] *Ibid.* See discussion below at 2.4.3.4.2 ("Secrecy about the Sacred: Australia: Aboriginal Traditions").

- Chapter 2 lays the groundwork for the concrete studies undertaken and the eventual context-specific frameworks crafted in Part II. It maps out key challenges posed by the research problem and provides core research contexts and contours in a manner intended to complexify, deepen and enrich the debate in a multilayered and nuanced manner. In writing it I draw on the first of three key elements in my methodological framework: Indigenous theory/legal anthropology.

- Chapter 3 takes up the second methodological element: international law in a focussed investigation it identifies key concepts of international law that are pertinent to the enquiry, contemplates important international law instruments in the field at hand and considers the most recent jurisprudence of an international law human rights body dealing extensively with Indigenous sacred sites protection in a context of natural resource exploitation. Finally, as a preliminary step for the work to be undertaken in Part II, it considers the implementation of international law in each of the four jurisdictions in question.

- Part II introduces the third such element: positive national law. It investigates the protection of Indigenous sacred sites in the context of natural resource development projects in four jurisdictions: Canada (Chapter 4), the United States (Chapter 5), Australia (Chapter 6) and Aotearoa New Zealand (Chapter 7).

  — My *modus operandi* in all four of these Chapters is to first outline the applicable positive law in the jurisdiction under investigation and then to gauge the operation of such positive law through the prism of a desktop study performed in its jurisdiction.

  — In the process particular attention is paid to questions such as the following: Is the community in question able to avail itself of the legislative framework that is in place?[183]

---

[183] See e.g. Carmichael, *supra* note 119 at 89: heritage legislation often presupposes some archaeological proof in respect of historical sacred sites: this is problematic in the case of the Mescalero Apache, as "most Mescalero sites were temporary, seasonal camps which have very low archaeological visibility. The archaeological evidence of Mescalero presence is rather subtle overall, and sacred sites, as a group, are among the least visible types. Although the topographic settings of such sites can be distinctive, the associated spiritual events or activities often leave few or no physical remains." At 95 he points out that this "archaeological invisibility of sacred sites" may be part of a broader pattern insofar as Native American communities are concerned — and that their identification is nonetheless mainly left up to

Are the relevant framework's protections both sufficient and congruent with the worldviews and values of that community[184] as documented in the available literature and resources?[185] What systemic obstacles are there to effective sacred site protection? How do international law and globalization impact on the jurisdiction in question?

- Chapter 8 then puts it all together to craft context-sensitive frameworks for the protection of sacred sites in the four jurisdictions studied. This Chapter builds on the four sets of analyses in Chapters 4–7, comparing outcomes, approaches and conclusions with the ultimate aim of adding critical mass to the body of protections presently available to traditionalist Indigenous communities who are seeking to protect their sacred sites in the context of natural resource development projects. It does so against the background of insights uncovered in Chapters 2 (Indigenous notions of history, place, and spirituality and 3 (international law and pertinent insights of political theory), ultimately integrating and synthesizing these with the prescriptions of black letter law (Chapters 4–7), so as to tailor richer, more nuanced alternative proposals to the *status quo* that remain in tune with the prevailing legal culture.

---

archaeologists. Also see Mohs, *supra* note 13 at 202–204: he emphasizes the importance of "appropriate investigation and dialogue with Native peoples" in order to uncover the existence of sacred sites and duly value them.

[184] See e.g. *ibid* at 202–203. He observes that archaeologists have fought a hard battle for the recognition and protection of sacred sites, but that in the process "a lack of concern for Native interests has dehumanized Indian people and their heritage in favour of scientific research interests" (at 202). Matunga, *supra* note 19 at 218 confirms that this has been the Aotearoa New Zealand experience: "Western archaeology and historical analysis in Aotearoa New Zealand has tended to view oral tradition and traditional Maori approaches to interpretation of the past as limited in value unless substantiated by scientific analysis — wither through archaeology or written history. Evidence from the *matakites* (seers), who use their powers to discern the whereabouts of *wahi tapu* [sacred sites] by walking an area of tribal land, even if this is supported by oral evidence from *kaumatua*, is considered by scientific researchers to be invalid unless tested by scientific analysis."

[185] Not having any anthropological training, I have expressly elected not to dabble in field studies. I have carefully selected case studies for illustrative purposes where there is literature aplenty, both by and on tribe members. See below at 1.2.2 ("Research Boundaries").

The approach and methodology selected for each of the parts is directly related to the role of such part in the thesis as a whole and thus the function that it fulfills: basically, it is a three-step process with every step building on the previous one(s).

The objective of Part I is to set the parameters of the investigation to be performed in Part II and to problematize the research question a complex, multifaceted manner for purposes of effecting the aforesaid investigation. Chapter 1, which outlines the research problem, introduces key terminological concepts, and also identifies the theoretical framework as embracing a comparative, cultural, interdisciplinary approach, is primarily descriptive in nature. Chapter 2 and Chapter 3 provide depth and complexity to the apprehension of the research problem.

Part II, the core of the thesis, takes the form of genealogical legal comparison between the four most important common law jurisdictions. Here I actively investigate the central research problem in the said jurisdictions by applying the same three-step process to each such jurisdiction (Chapters 4–7): first, I compile and analyze the positive law of that jurisdiction strictly as it applies to the intersection of Indigenous sacred sites and natural resource development projects; next, I contemplate the actual and potential role of international law norms, institutions and actors in the context of Indigenous sacred sites and natural resource developments in the jurisdiction in question; finally I perform a desktop study by applying the legal norms as gleaned in the first two steps to the facts of a case study drawn from that jurisdiction, gauging the operation of the pertinent positive law framework and the (potential) international law framework insofar as the protection of Indigenous sacred sites is concerned in the context of natural resource development projects in the jurisdiction at hand. The third step involves a hermeneutic approach that takes account of all pertinent social science source material with a bearing on the desktop study problem at hand.

Chapter 8, then, represents the culmination of the work performed to date. It is here that the thesis' main original scientific contribution is made: *the crafting of a context-specific legal framework for the protection of Indigenous sacred sites in each of the four jurisdictions under investigation — that is, a framework adapted to the prevailing legal culture of the jurisdiction in question, which legal culture has been uncovered through careful deep legal comparison with the other three jurisdictions*. As outlined above in 1.2.1 ("Original Contribution to Science"), I do so by moving from the global to the local level: first, I contemplate the role and impact of pertinent international law instruments, institutions and actors on a global level (Chapter 3); next I localize the problem by means of deep genealogical legal comparison (interdisciplinary

and hermeneutic in terms of method) intended to uncover the *mentalité* of each individual jurisdiction's legal culture[186] insofar as the key research problem is concerned by comparing similarities and differences identified between the four jurisdictions in question in the context of the investigation undertaken in Part II; finally I tailor individual suggestions for *each of the respective* jurisdictions so as to propose an improved Indigenous sacred sites protection framework that is in alignment with the legal culture of the jurisdiction in question (Chapter 8).

Chapter 8 therefore ultimately undertakes a valuable exercise in legal comparison, it contributes to the public international law understanding of Indigenous peoples by integrating state and Indigenous perspectives, and it puts forward some concrete proposals on what a workable, pragmatic sacred site protection regime might entail in each of the jurisdictions in cause.

I proceed, next, to contemplate the three main building blocks with which my theoretical framework is constructed: legal anthropology and indigenous theory (1.5.1); legal comparison (1.5.2); and international law (1.5.3).

[186] *Mentalité* is not necessarily a "monolithic" concept — part of the comparatist's task is to identify what Legrand describes as "para-*mentalités* within a given legal culture": Legrand, "How to Compare", *supra* note 29 at 238.

1.8 Theoretical Framework

1.8.1 Legal Anthropology and Indigenous Theory

> At the beginning of this lecture I mentioned that British anthropology was born of a Christian/humanitarian organisation seeking to understand native races in order to lay a foundation for their compassionate concerns. I suggest that anthropology's wrong turning coincides with the eclipse of those ideals and with the subsequent emergence of positivistic scientific anthropology. Of course, I am not advocating we return to a nineteenth-century paternalistic philanthropy. But I am saying we must return humanitarianism to humanities. We must accept that our understanding of Aboriginal religion has to begin with Aborigines, not with science.[187]
>
> ***
>
> Into each life, it is said, some rain must fall. Some people have bad horoscopes, some take tips on the stock market. McNamara created the TFX and the Edsel. Churches possess the real world. But Indians have been cursed above all other people in history. Indians have anthropologists.[188]

1.8.1.1 Introduction

Mark Dockstator aptly points out that "the teachings of Native peoples, that is, the words and wisdom of Native elders and traditional people, should form the foundation for research involving Native peoples and more specifically, the development of the Native law field."[189] While I am not specifically seeking to develop the Native law field (and thus do not directly engage in field research

---

[187] Tony Swain, "On 'Understanding' Aboriginal Religion" in Max Charlesworth, ed, *Religious Business: Essays on Australian Aboriginal Spirituality* (Cambridge: Cambridge University Press, 1998) 72 at 90.

[188] Vine Deloria, Jr, "Anthropologists and Other Friends" in Vine Deloria, Jr, *Custer Died for Your Sins: An Indian Manifesto*, ed with new preface (Norman: University of Oklahoma Press, 1988) 78 at 78.

[189] Mark Dockstator, "Aboriginal Representations of History and the Royal Commission on Aboriginal Peoples" in Lischke & McNab, *supra* note 16, 99 at 100. Cf Ames, *supra* note 32 at 140: "[Indigenous people] want out of the boxes, they want their materials back, and they want control over their own history and its interpretation, whether the vehicles of expression be museum exhibits, classroom discourses, or scholarly papers, textbooks, and monographs. Since those who control history are the ones who benefit from it, people should have the right to the facts of their own lives. This is surely a cornerstone of postmodernist ideology and one of the central political implications of interpretation."

involving Indigenous peoples), I do write about Indigenous peoples and it seems somewhat patronizing to me to do so without at least specifically consulting the literature produced by Indigenous writers on the topic.[190]

Thus Basso has observed that even though anthropologists have displayed a long-standing interest in Indigenous peoples and their ecological settings, their accounts have often been uni-dimensional and incomplete, focussing solely on the materialistic aspects of this relationship.[191] He advocates an approach that takes into consideration "the cultural instruments with which American Indians fashion understandings of their environments, the ideational resources with which they constitute their surroundings and invest them with value and significance."[192] By "cultural instruments" he refers to the "ideas, beliefs, stories, songs"[193] of these peoples, the main thrust of his argument being that it is only in understanding the ideational world of such peoples that we will understand their reciprocal relationship with the land[194] — an understanding sorely needed if we are to render more complex our grasp of their relationship with their places.

My approach in this thesis is to draw on the insights of both legal anthropology and Indigenous theory to avoid the twin pitfalls of reductionism and ethnocentrism.[195] The question may well be posed why not simply rely on Indigenous theory *per se* — by way of a response, I outline five

---

[190] See in this context the thoughtful piece by Jonathan Wiens, "Including Traditional Knowledge in a Wildlife Study" in Oakes et al, *supra* note 34, 171.

[191] Basso, *Wisdom*, *supra* note 31 at 66; Bocking, *supra* note 16 at 225.

[192] Basso, *Wisdom*, *supra* note 31 at 66. Also see Bocking, *supra* note 16 at 226. He argues that this has now come to pass in the field of anthropology, to the extent that many anthropologists conceive of themselves as "cultural translators" between Indigenous communities and the state authorities ("advocacy anthropology"). However, he admits that this new role has generated "active distrust" among Indigenous peoples, bringing "new challenges and uncertainties for anthropologists" (at 231).

[193] *Ibid* at 106.

[194] *Ibid* at 106.

[195] See Christoph Eberhard, *Droits de l'homme et dialogue interculturel*, Kindle ed (Paris: Connaissances & Savoirs, 2011) [Eberhard, *Droits de l'homme*] at "Préface de l'auteur à la deuxième édition". Thus Borrows, *Indigenous Constitution*, *supra* note 147 at 3 calls Canada's legal system "incomplete" and argues that "[m]any Indigenous peoples believe their laws provide significant context and detail for judging our relationships with the land, and with one another."

difficulties potentially inherent in Indigenous theory below. Finally, I identify two key anticipated challenges with the selected methodology and indicate how I intend to address them.

1.8.1.2 Difficulties Inherent in Indigenous Theory

The first main difficulty inherent in working with Indigenous theory is that some –not all– Indigenous theory smacks of insiderism, the suggestion being that only an Indigenous person is capable and qualified to write about Indigenous issues and the Indigenous experience.[196] While I cannot pretend to have the subjective insights offered by indigeneity,[197] I believe that there is an argument to be made for objective distance[198] and neutrality.[199] Thus, Ames argues:

> Anthropology as well as museums must continually reconstitute their relationship to the 'Other' as a legitimate object of study and discussion. Even though the morality of using others as a source of knowledge is now widely contested – with good reason considering the unequal power relations typically involved and the distorted representations that frequently have resulted (…) – that task is still worthwhile, probably even necessary. The two extremes are to be avoided: the imperialist assumption that the scholar, curator, or museum has a natural or automatic right to intrude upon the histories or cultures of others in the 'interests of science and knowledge'; and the nihilistic, postmodernist claim that all knowledge is relative, all voices equal, therefore 'We' can only 'invent', rather than more or less accurately come to know, the 'Other', and only 'They' can speak knowingly about themselves. Reality is found, however imperfectly and incompletely, somewhere between the extremes.[200]

---

[196] Jean-François Gaudreault-DesBiens, *La liberté d'expression entre l'art et le droit* (Montreal & Quebec: Liber & Presses de l'Université Laval, 1996) [Gaudreault-DesBiens, *Liberté d'expression*] at 124 and 130 n 8.

[197] See *ibid.*

[198] See Jean-François Gaudreault-DesBiens, "L'Université dans la Cité/le Droit dans l'Université" in Gaudreault-DesBiens, *Le droit, supra* note 356, 3 [Gaudreault-DesBiens, "L'Université"] at 6–11 for a concrete example of "*la mise à distance*" applied.

[199] *Contra* e.g. Leane Simpson, "Advancing an Indigenist Agenda: Promoting Indigenous Intellectual Traditions in Research" in Oakes et al, *Sacred Landscapes*, *supra* note 34, 141 [Simpson, "Indigenist Agenda"] at 143: "Indigenist theory and methodology provides a way to confront this reality while employing Indigenous intellectual traditions for the purpose of decolonization, liberation and to disconnect from the colonial infrastructure. In any other situation, our collective intellectual traditions can too easily become coopted, taken out of context, and used to further colonize our knowledge systems and peoples."

[200] Ames, *supra* note 32 at 12.

A second difficulty with Indigenous theory is that it occasionally reverts to cultural reductionism, sometimes perpetuating Rousseau's "noble savage" archetype.[201] In the sphere of sacred sites, this takes the form of claims that Indigenous peoples have a different worldview in that they necessarily construct the earth as forming part of an existential cosmological space where they have a responsibility towards one another and towards other beings.[202]

In the third place, while Indigenous theory has the advantage of countering ethnocentrism, it poses the related risk of essentialism.[203] Indeed, this goes to the core of the ongoing traditionalist/non-traditionalist dialogue. Either position, when taken to an extreme, is problematic: the extreme traditionalist position fossilizes itself in the past,[204] while the extreme non-traditionalist one casts off the past altogether and shrugs off its traditions in the process. Taking a more moderate-traditionalist position, Borrows calls upon both the Indigenous and the non-Indigenous community to let go of notions of immutability and historicity when it comes to Indigenous peoples' lives and their laws.[205]

Niezen has demonstrated that this is also a danger inherent in judicial attempts to "recognize and affirm the rights of aboriginal peoples to their own culture[206] – it becomes an exclusionary practice

---

[201] See Gaudreault-DesBiens, *Liberté d'expression*, *supra* note 196 at 105–106. Of course, this problem is not unique to Indigenous theorists: see, e.g., Ames, *supra* note 32 at 73 on the "myth of the Romantic Native" in museum art, an obstacle frequently encountered by contemporary Indigenous artists who are criticized for being "inauthentic" because their work is not "primitive" enough…

[202] See Leclair, "Le sacré", *supra* note 356 at 481–482. He is fiercely critical of *inter alia* Ross, *supra* note 34 and Battiste & Henderson, *supra* note 85.

[203] See e.g. the examples cited by Leclair, "Le sacré", *supra* note 356 at 485.

[204] Of course, essentialism is not the preserve of Indigenous peoples: see Ronald Niezen, *Rediscovered Self*, *supra* note 59 at 85–87 on the potential havoc wreaked by cultural preservationists who consider Indigenous peoples to be "living representatives of environmental wisdom" with a consequent duty to live a "pure" Paleolithic lifestyle and share it with others (*ibid* at 85).

[205] Borrows, *Indigenous Constitution*, *supra* note 147 at 38. Also see *ibid* at 60. Cf Ames' take on Indigenous art: "Contemporary Native artists who try new media or new forms are criticized for abandoning their traditions or for catering to the money market. If Native art is to retain its purity, its acceptability in wider society, it seemingly must remain parochial, unchanging, and exotic, that is, 'primitive'. Evolution of form and style, like freedom from cultural embeddedness, is a privilege reserved for white art": *supra* note 32 at 73.

[206] Niezen, *Rediscovered Self*, *supra* note 59 at 69.

when utilised in the sense that it has been in, for instance, *R. v. Van der Peet,*[207] where the upshot has been that the cultural right in question cannot been a human right.[208] Leclair rightly points out that such fundamentalism (whether Indigenous or judicial in origin) assumes a collective Indigenous identity that does not exist in real terms.[209]

A fourth difficulty with certain Indigenous theory is that it utilizes overly emotive language and Manichean thinking, opposing the interests of Indigenous and non-Indigenous peoples in absolutist terms and placing Indigenous peoples in a victim mode.[210] This often neo-colonialist dialogue[211] fails to recognize the progress that has been made[212] since original colonialization amidst Vattelian conceptions of international law,[213] serves to accentuate points of difference rather than points of

---

[207] *Van der Peet*, *supra* note 175.

[208] Niezen's take is as follows: "Rather than (…) requiring aboriginal societies to demonstrate 'advancement' in the precontact period, resulting in the institutional wherewithal to effectively integrate with the legal formalism and institutions of the dominant society, they are now required to demonstrate the opposite: simple subsistence economies, comparatively simple technologies, rudimentary social organization – in other words, those qualities that make them 'distinct' from the dominant society, defined principally as the absence of technological and institutional similarity to the dominant society": *Rediscovered Self*, *supra* note 59 at 73.

[209] Leclair, "Le sacré", *supra* note 356 at 485. He also cautions that spirituality is but one facet of the debate on what Indigenous authenticity involves (*ibid* at 486).

[210] See e.g. Battiste & Henderson, *supra* note 85 at 2: "We were the unofficially colonized peoples of the world, the tragic victims of modernization and progress. In every state and educational system, we were underrepresented or, more often, ignored. We were the forgotten peoples. Our daily wretchedness, violent deaths among our peoples, and our powerlessness to remedy our situations drove us to the United Nations (…)". However, I do not seek to deny that Indigenous peoples have suffered prejudice, nor that this provides them with a valid agenda for political action. Gaudreault-DesBiens' characterization of the treatment traditionally meted out to Indigenous art presents a good description of attitudes that have prevailed towards Indigenous peoples in general: "*[f]ossilisation, stéréotypie et exclusion*": *Liberté d'expression*, *supra* note 196 at 117.

[211] See e.g. Simpson, "Indigenist Agenda", *supra* note 199 at 144–145: "Indigenist research in Canada: (…) contests colonialism as its starting point, confronts colonialism in all facets, and acknowledges the colonial context within which Indigenous research takes place". Cf Gaudreault-DesBiens, *Liberté d'expression*, *supra* note 196 at 107–111.

[212] Gaudreault-DesBiens, *Liberté d'expression*, *supra* note 196 at 111.

[213] Siegfried Wiessner, "The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges" (2011) 22 Eur J Intl L 121 [Wiessner, "Cultural Rights"] at 122. For a sophisticated discussion, see Michel Morin, "Propriétés et territoires autochtones en Nouvelle-France" (2013) 43:2-3 Recherches amerindiennes au Québec 59 [Morin, "Propriétés et territoires"] and Michel Morin, "Propriétés et territoires autochtones en Nouvelle-France: ii - La gestion des districts de chasse" (2014) 44:1 Recherches amerindiennes au Québec 129 [Morin, "Gestion de chasse"].

similarity and provides a poor basis for practical, pragmatic solutions to the conservation of sacred sites.[214]

My final difficulty with certain Indigenous theory lies in its acute relativism:[215] certain Indigenous theorists decry the notion of fundamental human rights as a Western construct that is foreign to Indigenous culture. I note here that this does not apply to all Indigenous theory and that serious Indigenous scholars such as John Borrows have indeed expressed the need for the introduction of human rights principles in (*inter alia*) Indigenous law so as to counter fundamentalism and dogmatism.[216]

1.8.1.3 Challenges Posed by Indigenous Theory

Two of the challenges highlighted by Borrows in the context of potential objections against Indigenous law seem particularly pertinent to me in the context of my research project: intelligibility and accessibility. With reference to intelligibility, he notes that law is an expression of culture, and cautions that a "eurocentric approach to legal interpretation" could be destabilizing to Indigenous law.[217] Accessibility of Indigenous laws relates to the issue of "where to find them, how to learn them, and who to speak to if they have questions about them."[218] A closely related issue, for me, lies in the fact that while state legal norms are typically captured in writing, Indigenous law is heavily reliant on oral transmission.[219]

---

[214] Cf Gaudreault-DesBiens, *Liberté d'expression*, *supra* note 196 at 125–126: "*En s'autofétichisant, la victime rejoint le martyrologue des opprimés, s'élève à la sainteté et, ce faisant, se présente comme un Juste, dont les convictions sont inattaquables. Mais en se plaçant ainsi hors du champ critique, elle se ferme à tout dialogue avec la société dominante, rendant improbables les compromis avec elle.*"

[215] See *ibid* at 128.

[216] Borrows, *Indigenous Constitution*, *supra* note 147 at 22, 151–152 and 204–205.

[217] *Ibid* at 218.

[218] *Ibid* at 142. Of course, the same applies to notions of Indigenous culture, see Niezen*, Rediscovered Self*, *supra* note 59 at 68. At 69–77 he explains how this has been particularly problematic in the context of the Canadian judiciary.

[219] Borrows, *Indigenous Constitution*, *supra* note 147 at 59. He argues that this aids flexibility: *ibid* at 57 and 143. With regards to Indigenous knowledge that is transmitted orally from generation to generation, Gaudreault-DesBiens makes the important point that it becomes "*le jardin secret de leur identité, alors même que leur mode de vie traditionnel est menacé par la modernité*": *Liberté d'expression*, *supra* note 196 at 123.

Concerning the sources of Indigenous law, Borrows furthermore cautions that Indigenous laws need to be understood in all of their complexities: for instance, they are not all rooted in or expressed as custom.[220] In *Canada's Indigenous Constitution*, he deals with five such sources: sacred law;[221] natural law;[222] deliberative law;[223] positivistic law;[224] and customary law.[225]

Sacred law and deliberative law are of particular interest for my purposes. Borrows remarks that "[d]ue to their broad reach and revered nature, laws that have sacred aspects at their source may be less flexible" than laws derived from other sources.[226] Sacred laws comprise *inter alia* creation stories such as treaties, which deal with the coming into existence of Canada.[227] Not all treaties are considered to be sacred,[228] but where they are, it helps explain "why many First Nations would not consider abandoning them despite generations of government neglect."[229]

Whereas deliberative law involves "processes of persuasion, deliberation, council, and discussion",[230] Borrows sees it as being core to countering fundamentalism and dogmatism in legal

---

[220] Borrows, *Indigenous Constitution*, *supra* note 147 at 24.

[221] *Ibid* at 24–28.

[222] *Ibid* at 28–35. He cautions that while there may be an overlap, this is not the same as the Western legal theoretical conception thereof: *ibid* at 29.

[223] *Ibid* at 35–46.

[224] *Ibid* at 46–51. He conceives of these in the Austenian sense of orders based on command: at 47. Such orders could therefore emanate from "hereditary chiefs, clan mothers, headmen, sachems, or band leaders" (*ibid*).

[225] *Ibid* at 51–55.

[226] *Ibid* at 25.

[227] *Ibid* at 25; Dockstator, *supra* note 189 at 107. Also see *supra* note 147 on the *Treaty of Waitangi* in Aotearoa New Zealand, which has been held to fulfil a similar role.

[228] Borrows, *Indigenous Constitution*, *supra* note 147 at 27. He notes specifically in respect of British Columbia that historical treaties were rare and furthermore that "the harsh injustice of British Columbia's resettlement can hardly be regarded as a sacred event." See in this regard Ross, *supra* note 34 at 182 n 4. British Columbia is where my Canadian case study hails from.

[229] Borrows, *Indigenous Constitution*, *supra* note 147 at 26.

[230] *Ibid* at 35.

thought and practice.[231] It is here that he sees an opening and the need for introducing human rights principles,[232] preferably in accordance with international human rights standards.[233]

1.8.1.4 Difficulties Inherent in Legal Anthropology

Finally, I should note that anthropology is not without its problems either. James Clifford, for instance, describes well the "anthropological enlightenment" that accompanied the discipline's realization, in the late twentieth century, that Indigenous peoples do have a future after all and are not destined to disappear…[234]

1.8.1.5 Challenges Posed by Legal Anthropology

I am not suggesting that I will be in a position to scientifically substitute field work with information gleaned from the perusal of Indigenous theory: what I am saying is that I hope to observe a dialogue between the more empirically-based legal anthropology literature and the Indigenous theory that I will be consulting. This is my way of responding to what Gaudreault-DesBiens has termed, "[*c*]*e devoir éthique d'ouverture à la parole de l'Autre*".[235]

A midway seems to be offered by anthropologist Michael Ames, speaking in the museum context:

> What I should have said was that non-Natives, including curators and other scholars, cannot themselves adequately *represent* the views of others, and should no longer try. What they can do, however, is to report on those views and provide better opportunities for people to represent themselves within the established museum context (…) through collaboration, joint curatorships, commissioned programs and exhibitions, and other forms of 'empowerment' (...) This requires a 'reoriented point of view' (…), one in which First Nations individuals take on an identity as speaking subject, rather than as the traditional

---

[231] *Ibid* at 36.

[232] *Ibid* at 37.

[233] *Ibid* at 38. In this regard, he considers that the Canadian *Human Rights Act* might be of partial assistance (at 37) but that it lacks "the level of detail necessary to overturn the *Indian Act*'s central assimilatory premises" (at 38).

[234] Clifford, *Returns*, *supra* note 81 at 22. He attributes the phrase to Marshall Sahlin.

[235] Gaudreault-DesBiens, *Critique identitaire*, *supra* note 1 at 11.

> object of museum classification and interpretation. Like all good things, that is easier said than done.[236]

He thus distinguishes between considering Indigenous peoples as "informants *on* their cultures" and "representatives *of* their cultures", noting that legitimacy calls that they be listened to and allowed to participate in presentations of their history.[237]

1.8.2 Legal Comparison

> To privilege a commitment to theory, to follow a practice which respects and values difference, to foster a way of acting in the world that is critical, even polemical, will naturally take the comparatist away from the traditional approaches to comparative legal studies which, because such obsolete routines only focus on crude formalistic solutions to raw legocentric problems, do not accept the need for theory and obstinately pursue similarity and consensus as if confined to a groove. In other words, the comparatist is invited to register a dissenting opinion, to mark her disapproval of what continues to be done in the name of comparative legal studies. She is asked to place herself firmly in opposition. She is asked to pursue the 'contrarian challenge'.[238]

---

[236] Ames, *supra* note 32 at 6.

[237] *Ibid* at 7.

[238] Legrand, "How to Compare", *supra* note 29 at 242.

1.8.2.1 Introduction

The core methodological approach in my thesis is that of deep genealogical legal comparison,[239] undertaken from an external perspective and performed on a micro-basis.[240] It is an approach that is both critical[241] and interdisciplinary[242] in nature.

---

[239] Genealogical comparison explores the "form and structure that two distinct species have inherited from a common ancestry", meaning that similarities observed are ascribed to their common heritage: Samuel, *supra* note 29, c 3, "What is 'Comparison'?" at loc 1419/4523.

[240] On deep legal comparison, see Mark Van Hoecke, "Deep Level Comparative Law" in Mark Van Hoecke, ed, *Epistemology and Methodology of Comparative Law* (Portland, Oregon: Hart, 2004) 165 [Van Hoecke, "Deep Level"]. Legrand observes with regards to a superficial legal comparative exercise that consists of the mere juxtaposing of rules that the 'comparatists' are not *comparing* but *contrasting*: see Legrand, "How to Compare", *supra* note 29 at 234. He cautions about the importance of remembering to consider the "historical, social, economic, political, cultural and psychologic context which has made the rule or proposition what it is": *ibid* at 236. Similarly, in his "blueprint for comparison", Peter de Cruz highlights the importance of critically considering and analyzing all possible angles to the problem, including "possible cultural differences or socio-economic factors, where relevant", as well as "any other non-legal factors such as local custom, local conventions, or religious traditions": see Peter de Cruz, "Comparative Law, Functions and Methods" in *Max Planck Encyclopedia of Public International Law* by Rüdiger Wolfrum (Oxford: Oxford University Press, 2013) [De Cruz, "Comparative Law"] at § 63. Samuel furthermore cautions against imposing a definition of what "law" is on a legal culture in what would constitute "an act of legal imperialism": *supra* note 29, c 1, "Problems and Promises of Comparative Law" at loc 378/4523.

[241] See Legrand, "How to Compare", *supra* note 29 at 240–241. He believes it to be the comparatist's duty to "draw the national lawyer out of her complacency" (at 240), meaning that "the comparatist must learn to think *not* like a national lawyer" (at 241: emphasis in the original text) and must be prepared to expand her awareness beyond the national lawyer's narrowly positivistic notion of official sources of law: *ibid*; also see De Cruz, "Comparative Law", *supra* note 240 at § 20: he cautions against overlooking "'extra-legal' factors, which may be informal customs and practices, which operate outside strict law, or various non-legal phenomena which may ultimately influence the state of the law" such as "radical changes in the economy or the political leadership, and/or landscape" of the jurisdiction under investigation. On the virtues of a differential approach, see Pierre Legrand, "The Same and the Different" in Pierre Legrand & Roderick Munday, eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2015) 240 [Legrand, "The Same"].

[242] Legrand argues that not only is a commitment to theory paramount, but a comparatist must be committed to interdisciplinarity, for "[l]aw does not operate in a vacuum; it is a social phenomenon if only because, at the minimum, it operates within a society": Legrand, "How to Compare", *supra* note 29 at 238. He notably emphasizes consulting the fields of anthropology, linguistics and cognitive psychology: *ibid.* Also see De Cruz, "Comparative Law", *supra* note 240 at B.2 (§§ 11–14). To this list, Samuel adds "philosophy and theory in the social and natural sciences": *supra* note 29, c 1, "Problems and Promises of Comparative Law" at loc 681/4523 and he suggests with reference to the work of Annelise Riles that "Legal notions (…) are as much incorporated into the social sciences as the social science thinking is incorporated into law": *ibid* at loc 700/4523.

I inscribe myself firmly within the cultural paradigm[243] of Pierre Legrand with its associated hermeneutical[244] scheme of intelligibility.[245] This means that I am *a priori* cynical about universalist,[246] holistic solutions[247] and that, like Legrand, I operate from a presumption of difference between the legal systems that I am comparing,[248] rather than one of similarity.[249] I thus agree with Legrand that the purpose of legal comparison is to deepen our knowledge about the law *as such* rather than the harmonization of laws;[250] where I differ from Legrand is insofar as his subsequent conclusion is concerned that legal comparison should accordingly not take place within the same legal family.[251] While I completely agree with his premise that such an approach would yield richer knowledge about the law in the strictly epistemological sense,[252] my interest here is a somewhat nuanced one: I am intrigued by what micro differences[253] in legal systems forming part of the same legal

---

243 Thus Legrand argues that for the comparatist to understand a foreign law or rule, she needs to have insight into the jurisdiction's "legal culture as a whole and, arguably, into [its] culture *tout court*": see Legrand, "How to Compare", *supra* note 29 at 232–233. Also see Samuel, *supra* note 29, c 10, "Paradigm Orientations" at loc 3521/4523.

244 On hermeneutic interventions, see Legrand, "The Same", *supra* note 241 at 253ff.

245 Cf Samuel, *supra* note 29, c 1, "Problems and Promises of Comparative Law" at loc 626/4523: "[F]rom the position of legal science, the idea of 'comparative-law-as-method' is untenable since the dichotomy between science and method is epistemologically dangerous. There is no science without method; and what links the two is the scheme of intelligibility whose purpose is to relate the experience of the real world to an abstract scheme of elements and relations." I thus reject Zweigert and Kötz's assertion of functionalism as the only useful method of legal comparison: see *ibid* at loc 378/4523.

246 Cf Pierre Legrand, *Le droit comparé*, 4th ed (Paris: PUF, 2011) at 100: "*La comparaison* (…) *doit poursuivre l'objectif de faire ressortir le divers dans le droit et de justifier ce divers; dès lors, elle peut contribuer à l'anéantissement de la notion de l'universalité.*". Also see Samuel, *supra* note 29, c 8, "What is 'Law'(1)?" at loc 2860/4523.

247 See De Cruz, "Comparative Law", *supra* note 240 at § 18.

248 See Legrand, "How to Compare", *supra* note 29 at 239–240. He argues that this endows the comparatist with "an empathy for alterity", which is "an indispensable condition of serious comparative work about law" (at 240).

249 See Legrand, "The Same", *supra* note 241 at 246–247 for a critique of the *praesumptio similtudinis*. Samuel supports Legrand's perspective, pointing out that a presumption of similarities may lead to the establishment of "universalist myths": *supra* note 29, c 3, "What is 'Comparison'?" at loc 1365/4523.

250 See Legrand, "How to Compare", *supra* note 29 at 239. Similarly I espouse the view that legal comparison amounts to more than a mere methodology: on the method/social science debate, see De Cruz, "Comparative Law", *supra* note 240 at A.2 (§§ 2–5). Also see Samuel, *supra* note 29 "Introduction" at loc 396/4523 and c 2, "Asking the Right Question" at loc 1070–1110.

251 See the discussion in Samuel, *supra* note 29, c 3, "What is 'Comparison'?" at loc 1365/4523.

252 See Samuel's summary of various angles of the controversy: *ibid*, c 1, "Problems and Promises of Comparative Law" at loc 482/4523.

253 See below at 1.5.2.3.3 ("Micro and Macro Comparison").

tradition[254] say about the *mentalité*[255] of the legal cultures in which the rules in question have evolved.[256] This requires, of necessity, the selection of legal systems that could be expected to yield similarities on the macro comparative level.[257] Legal comparison provides a valuable tool here, because it provides the comparatist with the opportunity to study several objects and the dialectic between them –each object is contemplated in terms of the 'other'– in a process where knowledge is generated.[258] This is relative knowledge, but it may have practical value.[259]

1.8.2.2 Paradigms

1.8.2.2.1 Empathy for Alterity

For my purposes, one of the key concepts emphasized by Legrand is that of "an empathy for alterity",[260] something that he considers to be a *sine qua non* to the effecting of serious comparative work in the legal field. Citing Peter Goodrich, he explains this in the following terms:

> Comparative legal studies must 'recognize and lay out a space of the other within the law. It is a question of identifying the conditions of difference, the places, occasions, energies, and institutional focuses within which difference, as difference, can appear or the other speak.'[261]

---

[254] Although the difficulties associated with translation from a foreign language thus do not ostensibly arise in the context of the four (predominantly) Anglophone traditions that I have selected for comparison, linguistic issues play an important role in problems associated with the rendering of Indigenous notions of sacred sites intelligible to courts in these jurisdictions: see below at 2.4.3.1 ("Issues of Cultural Cross-Translation"). With regards to foreign language and translation as challenge for the comparatist, see Legrand, "How to Compare", *supra* note 29 at 234–235; De Cruz, "Comparative Law", *supra* note 240 at B.1 (§§ 7–10)

[255] Legrand speaks in this context of "the unconscious of law": see Legrand, "How to Compare", *supra* note 29 at 238.

[256] See below at 1.5.2.3.1 ("The Cultural Approach").

[257] See below at 1.5.2.2.2 ("Similarity and Difference"). Samuel emphasizes that 'similarity' and 'difference' are frequently relative concepts: *supra* note 29, c 1, "Problems and Promises of Comparative Law" at loc 451/4523.

[258] *Ibid.*

[259] *Ibid.*

[260] See *supra* at the text to note 248.

[261] Legrand, "How to Compare", *supra* note 29 at 240, citing Peter Goodrich, *Oedipus Lex* (Berkeley, 1995) at 241.

This "empathy for alterity" is tied up closely with Legrand's affinity for difference, leading him to "defend calls for the voice of the other, and specifically, for the other-in-the-law to be allowed to be heard above the chatter seeking to silence it."[262] It is specifically the voice of the "other-in-the-law" that preoccupies me in this thesis. In addition, he accentuates "non-totalizing thought", explaining that it renders "experience in all its looseness and complexity in all its formlessness."[263] The very act of rendering is loaded: what is rendered becomes accessible, but there is necessarily an implicit element of representation to it.[264] This means that it is absolutely crucial that there be a critical distance between the comparatist's gaze and her object[265] and thus presumes an external/outsider perspective on the part of the comparatist.[266]

1.8.2.2.2 Similarity and Difference

When it comes to legal comparison, Dannemann makes the crucial point that both similarity and difference are needed for it to have value, noting: "There is no point in comparing what is identical, and little point in comparing what has nothing in common."[267] I have therefore selected four jurisdictions for comparison bearing in mind the delicate balance between the search for similarity and the appreciation of difference as one of the important objectives of comparative law.[268] The jurisdictions in question are: the United States, Australia, Aotearoa New Zealand and Canada.

---

[262] Legrand, "The Same", *supra* note 241 at 250.

[263] *Ibid* at 251.

[264] See *ibid.*

[265] *Ibid.* For a powerful illustration of the operation of this critical distance, see Gaudreault-DesBiens, "L'Université", *supra* note 198. Samuels speaks in this context of a "deliberately speculative" distance between the enquiring mind and the object of its enquiry: see *supra* note 29, c 2, "Asking the Right Question" at loc 970/4523.

[266] See Legrand, "The Same", *supra* note 241 at 251–252. I am fortunate here in that my hybrid South African heritage gives me a sufficient level of comfort with common law systems to find my way but makes me wary of overconfidence in a system that is not quite my own. De Cruz, "Comparative Law", *supra* note 240 at § 12, emphasizes that the "very 'foreignness'" of other legal systems "should be a spur to the comparatist, not an obstacle."

[267] Gerhard Dannemann, "Comparative Law: Study of Similarity or Differences?" in Mathias Reimann & Reinhard Zimmermann, eds, *Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 383 at 384.

[268] Samuel points out that overemphasizing similarities comparison in law results in a quest for universals: *supra* note 29, c 3, "What is 'Comparison'?" at loc 1346/4523. It therefore remains a very fine balance.

The present thesis subscribes to five of the six "functions and purposes" of comparative law as outlined by De Cruz, *viz*: (1) the epistemological –adding to and enhancing current knowledge–; (2) as "an aid to legislation and law reform"; (3) as a "means of supplementing and supporting judicial decisions"; (4) as an "aid to understanding legal rules"; and (5) as a "contribution to the understanding and application of international law".[269] It expressly does not form part of "systematic unification and harmonization of law" efforts (the other such "function and purpose" identified by him.)[270]

1.8.2.2.3 Context and Alterity

> It is not a matter of either or, an insider versus an outsider monopoly or truth. Nor is it correct to believe that the reconstructed contextualist view of the modern anthropologist is an adequate portrayal of the insider view. Insiders reject that possibility out of hand. It is, rather, a question of how the insider and outsider perspectives might interact and build upon one another in the process of truth-seeking and understanding.[271]

In the section on *Similarity and Difference* above I refer to the importance of respecting otherness (alterity). In this section I briefly consider two interrelated aspects that play a significant role in the appreciation of otherness: the role of context and culture: Context is important because the comparatist can only truly appreciate the otherness of a legal system if she understands how that system is shaped by and reflects social and political concerns.[272] Culture is an expression of

[269] De Cruz, "Comparative Law", *supra* note 240 at § 21. Also see Dannemann, *supra* note 267 at 401–406. His proposed approach, in accordance with the objectives aimed for, would appear to point to achieving a balance between similarity and difference.

[270] De Cruz, "Comparative Law", note 240 at § 21.

[271] Ames, *supra* note 32 at 6.

[272] See Samuel's discussion on Legrand's deep hermeneutical approach, *supra* note 29, c 7, "Hermeneutical method" at loc 2760/4523.

otherness,[273] thus by paying attention to it the comparatist gains important insights into the legal system.

I will continue to refer to similarity and difference, as that appears to me to be intertwined with the appreciation of otherness.

In order to appreciate otherness, it is vital for the comparatist to pay attention not only to rules and functions, but also to their operational context and to the context in which legal problems arise.[274] One should, particularly when engaged in constitutional comparison, not restrict the terms in which law is defined to only its institutions, rules and solutions.[275] Jackson observes in this regard that "[s]ome contextually oriented scholarship seeks to elicit more intense understanding of how particular paradigmatic social or political concerns shape or are reflected in constitutional law."[276]

Mark van Hoecke distinguishes between legal and non-legal context and notes that in deep legal comparison the comparatist is often "lost" due to the fact that the pertinent contexts are not treated in domestic research.[277] What exactly the relevant contexts are, will depend on the topic, but these may include anything from constitutional context to legal culture to socio-economic context. He suggests that intensive dialogue should take place between lawyers from different countries on all aspects of the proposed comparative research so as to establish the contextual similarities and differences and to determine their relevance for the rules that are the subject of comparison.[278]

---

[273] Bicskei, Bizer and Gubaydullina have pointed to an important link between culture and identity: see Marianna Bicskei et al, "Der Schutz kultureller Güter: Der Ökonomie der Identität" in Regina Bendix et al, eds, *Die Konstituierung von Cultural Property. Forschungsperspektiven* (Göttingen: Universitätsverlag Göttingen, 2010) 135 at 135.

[274] John Bell, "Comparing Public Law" in Andrew Harding & Esin Örücü, eds, *Comparative Law in the 21st Century* (Great Britain: Kluwer Law International, 2002) 235 at 236.

[275] Marie-Claire Ponthoreau, *Droit(s) Constitutionnel(s) Comparé(s)*, (Paris: Economica, 2010) at 207.

[276] Vicki C Jackson, "Comparative Constitutional Law: Methodologies" in Michel Rosenfeld & András Sajó, eds, *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 54 at 67.

[277] Van Hoecke, "Deep Level", *supra* note 240 at 167.

[278] *Ibid* at 168. It is not quite clear to me why this dialogue should be restricted to lawyers if the objective is to establish all contexts pertinent to these rules.

1.8.2.3 Approach

1.8.2.3.1 The Cultural Approach

Closely related to context, is the cultural approach.[279] Cotterrell and Gordley deem culture to be of fundamental importance for the comparatist, calling it "a kind of lens through which all aspects of law must be perceived, or a gateway of understanding through which every comparatist must pass so as to have any genuine access to the meaning of foreign law."[280] They distinguish between cultural approaches that emphasize legal difference and those that stress similarity, illustrating that both approaches are possible when perceiving law through the lens of culture.[281] However, they caution that "there is always a danger of reading into legal culture what one wishes to see."[282]

The cultural approach is usually associated with an interpretative or hermeneutical methodology. For me, the attractiveness of the hermeneutical method lies in its desire to *understand* rather than to *explain*.[283] In the words of Samuel, "[t]he methodology of the social sciences is one of comprehension; it is a question (…) of understanding the interior of society which [is] hidden behind a mass of exterior signs."[284]

The hermeneutical method seeks to grasp the lived experience of the writer from the reader's actual vantage point.[285] I subscribe to the classic Gadamerian conception of hermeneutics, in terms of

---

[279] See Annelise Riles, "Comparative Law and Socio-Legal Studies" in Reimann & Zimmermann, *supra* note 267, 775 at 797, and Legrand, *Le droit comparé*, *supra* note 246 at 36–39.

[280] Roger Cotterrell & James Gordley, "Comparative Law and Legal History" in Reimann & Zimmermann, *supra* note 267, 709 at 711. Also see *ibid* at 728.

[281] *Ibid* at 714. John C Reitz, "How to Do Comparative Law" (1998) 46:4 Am J Comp L 617 at 632 recommends actual in-country experience, so as to gain both cultural and geographical context.

[282] Cotterrell & Gordley, *supra* note 280 at 717.

[283] See Samuel, *supra* note 29, c 5, "Alternatives to Functionalism" at loc 2086/4523.

[284] *Ibid.*

[285] *Ibid.*

which two concepts play a key role: "prejudice" (*Vorurteil*)[286] and "pre-understanding" (*Vorentwurf*).[287] The Gadamerian comparatist knows that her background creates certain "prejudices" on her part, of which she needs to be conscious and against which she needs to guard. It is her task to open herself up to the meaning of the text,[288] so that the text can "assert its own truth" against her anticipations.[289] The methodology of the comparatist, who approaches a text with a distinct "pre-understanding" of meaning, is to confront her "prejudices" with the "horizon of the text"[290] and to adjust her initial "pre-understandings" until such time as she experiences a "fusion of horizons".[291] In order to reach the eventual Heideggerian "circle of understanding"[292] she performs a contextual integration in terms of which the portion is related to the whole, and the whole to the portion.[293]

Thus the deep hermeneutical approach of Pierre Legrand seeks to understand the *meaning* of a law within a given culture, that is, a law is produced by people who have been institutionalized within that law's culture; a law accordingly is a manifestation of that culture, as is art, literature, etc.[294] The force of the hermeneutical method is therefore to be found in its desire to understand the other rather than attempting to "explain different legal systems in reductionist terms."[295] Importantly,

---

[286] "*Vorurteil*": Hans-Georg Gadamer, *Wahrheit und Methode* (Tübingen: J.C.B. Möhr (Paul Siebeck) Tübingen, 1965) [Gadamer, *Wahrheit*] at 255. He emphasizes that the Latin word "*praejudicium*" had no inherent negative meaning prior to the Enlightenment, and employs it in the neutral sense. See at 256–261.

[287] "*Vorentwurf*": *ibid* at 251; also translated as "fore-conception" — see Hans-Georg Gadamer, *Truth and Method*, 2nd ed by Garrett Barden and John Cumming (New York: The Seabury Press, 1975) [Gadamer, *Method*] at 236.

[288] Gadamer, *Wahrheit*, *supra* note 286 at 253 speaks of "*Offenheit*" (openness) to another opinion or the text.

[289] *Ibid* at 238.

[290] See Gadamer, *Method*, *supra* note 287 at 269 on the concept of "horizon". Also see William N Eskridge, Jr "Gadamer/Statutory Interpretation" (1990) 90 Colum L Rev 609 at 620.

[291] Gadamer, *Method*, *supra* note 287 at 273. Also see Eskridge, *supra* note 290 at 622–623.

[292] "*Zirkelstruktur des Verstehens*": Gadamer, *Wahrheit*, *supra* note 286 at 250.

[293] *Ibid* at 274.

[294] Samuel, *supra* note 29, c 7, "Hermeneutical method" at loc 2600/4523. He describes these manifestations as being "mere signifiers of a deeper mentality operating within the complex matrix of the foreign law's culture" (*ibid*). All such signifiers are considered to be equally important: *ibid* at loc 3535/4523.

[295] *Ibid*, c 7, "Hermeneutical method" at loc 2789/4523.

while the comparatist is entitled to be critical, it is her task to "re-present" the law in question from within the *mentalité* that marks it.[296]

Clearly, the cultural approach is not compatible with a strictly positivist legal ideology. While I do not reject positivism or the positive law *per se*, I do discard positivist legal ideology. To me, positivist legal ideology is antithetic to my research objectives, particularly where it is founded on Kelsen's Pure Theory of Law.[297] It is state-centric[298] and thus institutionalized. Legal positivism holds state law to be the principal source of law, necessarily relegating Indigenous law to a secondary and inferior position.[299] In this thesis I consider not only state norms, but also Indigenous cultures, customs and identities, as well as international law norms. I have already mentioned that I am eager to avoid legal imperialism. I also do not want to unduly exclude sources that may be pertinent for purposes of helping me understand the *mentalité* of my four jurisdictions, even when these are not formally encased in legal format.

Legal positivist theory advocates a scientific approach to law,[300] whereas I am motivated by a contextual one. Thus Kelsen proposed a general theory of law,[301] while I am looking at law applied in a particular cultural context. He conceived of law as an actual system of "ought-propositions" ("*Sollsätze*");[302] while I am more concerned with what the law ought to look like. By his own recognition, it is a formalistic system:[303] it is the flexibility inherent in the cultural approach that appeals to me. Legal positivism is by definition an exclusionary system; I am searching for inclusive

---

296 See the discussion by Samuel, *ibid* at loc 2622/4523.

297 I am not suggesting that Kelsenian positivism is the only, or indeed the predominant form of positivism — Bobbio has illustrated how positivism can present itself variously as an approach to the study of law, as a theory or as an ideology: Norberto Bobbio, "Sur le positivisme juridique" in Paul Roubier, ed, *Mélanges en l'honneur de Paul Roubier Vol I: Théorie générale du droit et droit transitoire* (Paris: Dalloz & Sirey, 1961) 53 at 54. I am focussing on it, because it represents positivism in its most acute form to me.

298 Hans Kelsen, "Qu'est-ce que la théorie pure du droit?" (1992) 22 Dr et soc 551 at 562.

299 Bobbio, *supra* note 297 at 59.

300 Kelsen, *supra* note 298 at 559.

301 *Ibid* at 552.

302 *Ibid* at 556. Also see Bobbio, *supra* note 297 at 56.

303 Kelsen, *supra* note 298 at 567.

solutions. The theory of legal positivism entails knowledge of the actual positive law and thus does not examine whether in terms of values the positive law can be considered as just or unjust, good or bad.[304] In short, I am opposed to positivist ideology because it operates on the preconception that the written word constitutes truth,[305] irrespective of context and objectively speaking[306] and because it has no intrinsic interest in either improvement or innovation.

1.8.2.3.2 Genealogical comparison

Chapters 4 thru 7, which form part of Part II, contain 4 legal jurisdictions that have specifically been selected for their filiation lines, i.e. I am performing genealogical comparison on them. As mentioned previously, this is because I am interested in uncovering differences that ostensibly similar legal systems may yield under micro comparison in the domain studied.

1.8.2.3.3 Micro and Macro Comparison

Samuel cautions that although distinctions are drawn between comparison on a macro (whole legal systems)[307] and micro (particular areas of law) scale, undertaking either form requires a sophisticated understanding of the other.[308] Accordingly I undertake my detailed investigation into the legal systems of the four countries against the background of their broader socio-juridical, political, cultural, economic and historical contexts.

---

[304] *Ibid* at 559. Bobbio refers in this regard to the concept of "*Wertfreiheit*" as employed by Weber: *supra* note 297 at 56.

[305] Hans-Georg Gadamer, *Vérité et métode: Les grandes lignes d'une herméneutique philosophique* (Paris: Seuil, 1996) at 293.

[306] Jean-François Gaudreault-DesBiens, "Libres propos sur l'essai juridique et l'élargissement souhaitable de la catégorie 'doctrine' en droit" in K Benyekhlef, ed, *Le texte mis à nu* (Montreal: Éditions Thémis, 2009) at 119 [Gaudreault-DesBiens, "Libres propos"].

[307] He observes that macro comparison continues to play an important role in legal comparison, but raises the spectre of scientific reductionism: see *supra* note 29, c 3, "What is 'Comparison'?" at loc 1317/4523.

[308] *Ibid* at loc 1270/4523.

1.8.2.3.4 Internal and External Perspectives

There are two senses in which internal and external perspectives are pertinent here:

First, this is a legal thesis and its primary focus is an internal one, the law. That said, I take various moderate external perspectives in pursuit of the cultural approach outlined above. My idea is not to render it any less of a legal thesis, but rather to avoid what Samuel terms "legal imperialism".[309]

Second, insofar as the legal comparison is concerned, my approach is necessarily external,[310] or that of outsider to all four of the systems studied. I consider it an advantage that I do not have a "domestic" jurisdiction in the sample, in the sense that I can approach all four systems with the same degree of critical objectivity. Since English is one of my native tongues, this does not present a challenge linguistically speaking; nonetheless, I am alert to the fact that meaning is not always static across borders.

1.8.2.4 Choice of Legal Systems

While Dannemann notes that a choice of legal systems is often fuelled by no more than linguistic accessibility and the existence of ties for the researcher,[311] I have consciously based my choice of legal system on three criteria: legal family/tradition, constitutional culture, and Indigenous culture. This is in line with my purpose of constructing a context-sensitive framework for the protection of Indigenous sacred sites in the context of natural resource development projects in each of the jurisdictions under investigation, the ultimate test insofar as compatibility criteria are concerned according to De Cruz.[312] As previously explained, my objective is to do genealogical comparison – i.e. comparison among jurisdictions that boast a common structure and institutions due to their shared filial lineage to a common ancestor– and to do so within a cultural paradigm by means of

---

[309] *Ibid*, c 8, "What is 'Law'(1)?" at loc 2860/4523.

[310] See *ibid*, c 3, "What is 'Comparison'?" at loc 1490–1508/4523 for arguments in favour of pursuing an external approach to comparison.

[311] Dannemann, *supra* note 267 at 409.

[312] De Cruz, "Comparative Law", *supra* note 240 at § 17.

hermeneutic analysis inspired by Legrand's deep hermeneutic approach. My aim then is to see which differences result inter-jurisdiction in terms of legal *mentalité* insofar as the micro-domain of sacred site regulation is concerned — which, in turn, will enable me to fine-tune suggested approaches in each jurisdiction to the legal *mentalité* of the jurisdiction in question. This therefore supposes 4 jurisdictions with a shared legal tradition and a preliminary observation of their constitutional culture. In view of the growing importance of globalization both in the natural resources sector and the Indigenous networking sectors, it will be important to know how these four jurisdictions interact with international law. Finally, and of cardinal importance for purposes of the framework proposals that I ultimately wish to put forward, I need information on the Indigenous peoples located within the boundaries of the four jurisdictions.

1.8.2.5 The Desktop Studies

The desktop studies fulfil a key role in this thesis, but theirs is a finely circumscribed role. One of the recurrent themes in all of the jurisdictions studied is the diversity and heterogeneity of the communities in question. The fact that I am homing in on one Indigenous community per jurisdiction does not at all mean that I consider such community to be representative of the country's Indigenous population. Instead, it points to two things: the research reality that this is a limited scope project, and the fact that I am performing the desktop study in question with the objective of gauging the effectiveness of a *national* (or provincial, as the case may be) legislative framework. In other words: the community qualifies by virtue of the fact that they are Indigenous, that their sacred site is located within the jurisdiction of the state studied, that the facts peculiar to their struggle strike me as being particularly illustrative of the kind of issue that Indigenous communities could likely encounter with *that* framework in *that* state, and that a sufficient quantity and quality of source material is available to make the desktop study viable. The community are not meant to represent anyone. The question, then, is to see how well the legal framework caters to *their* difficulty, as lived by them. The objective of the exercise is thus to learn about the *mentalité* of the legal culture, and the way in which that state's law deals with alterity. It is not expected to be the source of universal guidelines about sacred site protection.

1.8.3 International Law

International law informs many aspects of this thesis, and yet it is not a thesis on public international law. In 1.5.2 above ("Legal Comparison"), I explained the basis for my *a priori* belief that solutions for the protection of Indigenous sacred sites must necessarily be context-sensitive –in the sense that they need to be crafted with a specific national legal system in mind and against the backdrop of a particular social, political, economic and cultural context– in order to be effective. This does, however, not preclude the operation of international law where applicable and appropriate. Indeed, given the ever-expanding role of international law,[313] it is imperative for us to consider how the solutions proffered by it would slot into the legal frameworks of the four jurisdictions in question. My third building block, accordingly, is public international law.

In international law terms, my topic straddles two worlds that are hard to reconcile: natural resource development –traditionally a domain of sovereign state jurisdiction– versus human rights protection –a domain where there are increasing international efforts aimed at protecting individuals[314] and groups. Due to the vast scope of international human rights law I emphasize that my objective is in no way to propose an international law route to the protection of Indigenous sacred sites, nor to document in an exhaustive manner all potential avenues that may exist to sacred site protection under international law. Given that the positive law comparison portion of this thesis already comprises four common law jurisdictions, that clearly would be too ambitious an undertaking.[315] My argument is simply that in view of globalization and the growing importance of international law, it would be artificial to consider the research problem in a purely national context.[316]

---

313 Malcolm N Shaw, *International Law*, 7th ed, (Cambridge, UK: Cambridge University Press, 2014) at 31.

314 Shaw, *supra* note 313 at 33.

315 For the same reason I do not enter into a discussion of the primary difficulty posed by the traditional view according to which nation-states are the principal subjects of international law, not individuals or communities: see Shaw, *supra* note 313 at 1 and 5; but see *ibid* at 33 and 92 – it is now "an overly simplistic assertion."

316 Cf Shaw, *supra* note 313 at 98–99: "There is indeed a clear trend towards the increasing penetration of international legal rules within domestic systems coupled with the exercise of an ever-wider jurisdiction with regard to matters having an international dimension by domestic courts. This has led to a blurring of the distinction between the two previously maintained autonomous zones of international and domestic law, a re-evaluation of the role of international legal rules

Pentikäinen points out that worldwide in excess of 190 million Indigenous people and their traditional cultures are affected in important ways by globalization in two discordant senses: globalization "has both created a global family network and has also threatened traditional cultural values."[317] In addition, the global diaspora has had significant effects on their religious lives due to the fact that their spirituality usually is not transferred by way of ideology or institutions: where their cultures have been able to withstand colonial assaults this has been because of their profound associations with language and land — with nature in particular and with their sacred places specifically.[318]

Globalization[319] has indisputably become a major economic and political force at play insofar as the plight of Indigenous communities is concerned. Thus Stuart Kirsch provides a succinct summary of the way in which Indigenous peoples have managed to harness the global community where their national governments fail to provide them with the concrete support needed to protect their lands:

> The Yonggom struggle against the mine is an example of so-called 'Lilliput strategies' of tying down and impeding transnational flows and globally dispersed work chains by linking 'local struggles with global support' and connecting 'local problems to global solutions' (Wilson and Dissanayake 1996:3). The international context of their activism follows the need to trace 'the complex and sometimes ironic political processes through which cultural forms are imposed, invented, reworked, and transformed,' as Akhil Gupta and James Ferguson (1997:4) have recently argued. Central to these processes is the effort to 'recover the concreteness of space [or place] that capitalism makes disappear' (Wilson and Dissanayake 1996:3; cf Harvey 1996).[320]

---

and a greater preparedness by domestic tribunals to analyse the actions of their governments in the light of international law."

317 Juha Pentikäinen, "Thinking Globally about Local Religious Societies" in Mark Juergensmeyer, ed, *The Oxford Handbook of Global Religions* (Oxford: Oxford University Press, 2009) 558 at 558.

318 *Ibid* at 558–559.

319 Defined by Shaw, *supra* note 313 at 34 in the following terms: "[it] encompasses the inexorable movement to greater interdependence founded upon economic, communications and cultural bases and operating quite independently of national regulation."

320 Stuart Kirsch, "Changing Views of Place and Time Along the Ok Tedi" in Alan Rumsey & James Weiner, eds, *Mining and Indigenous Lifeworlds in Australia and Papua New Guinea* (Oxon: Sean Kingston, 2004) 182 at 198–199. He writes in the context of Papua New Guinea. A different line of argument is pursued by Indigenous theorists like Winona LaDuke: she reasons that Native Americans are seeking to enforce their treaty rights, and treaties "are instruments of

At this point it is salient to summarize some of the key characteristics of international law that are pertinent insofar as the research problem is concerned:

- Traditionally, international law's principal subjects are nation-states, not individuals or communities *per se*.[321]

- It creates hierarchical rather than vertical relationships, in that the nation-states are the subjects, but also the creators of the law, and all nation-states are theoretically equal.[322]

- There are two main sources of international law: international agreements and customary rules.[323] International agreements (e.g. treaties, conventions, etc.[324]) create rules that bind only the signatories to such agreements;[325] customary rules (*ius cogens*) are "state practices recognized by the community at large" that have the status of peremptory rules and thus are binding on all nation-states.[326]

---

international law": see Winona LaDuke, "Succeeding into North America: A Secessionist View" in Ward Churchill, *Struggle for the Land: Native North American Resistance to Genocide, Ecocide and Colonization* (San Francisco: City Lights, 2002) 11 [LaDuke, "Secessionist View"] at 12.

[321] See *supra* at note 315.

[322] Shaw, *supra* note 313 at 4. He observes, though, that while the essential nature of international law is such that all states may participate, the views of the powerful are predominant: *ibid* at 57.

[323] Shaw, *supra* note 313 at 5.

[324] *Cf* Shaw, *supra* note 313 at 66: "Treaties are known by a variety of differing names, ranging from Conventions, International Agreements, Pacts, General Acts, Charters, through to Statutes, Declarations and Covenants." Shaw distinguishes between "treaty-contracts" that only apply between a small number of states, and "'law-making' treaties" that have a more universal ambit: *ibid* at 67. Despite this universal field of application in the case of such 'law-making' treaties, non-signatories are not bound unless the treaty is a reaffirmation of a rule of customary law – in which case its mandatory nature is ascribable not to its universal nature, but to the fact that it affirms a rule of customary law: *ibid* at 68.

[325] Shaw, *supra* note 313 at 5.

[326] Shaw, *supra* note 313 at 5. Shaw argues that there often is an overlap, in that treaties may simply reiterate customary rules (*ibid* at 50) but points out that doing so does not substitute, abrogate or absorb the customary rule (*ibid* at 68). That means that two rules may exist with the same content but that differ in terms of interpretation and application: *ibid* at 69.

- Although there is no supreme authority with enforcement powers,[327] nation-states tend to comply with international law.[328] Shaw ascribes this to two main factors: the "element of reciprocity"[329] and the advantages that observance may hold for such states.[330]

- Importantly, "while states from time to time object to particular rules of international law and seek to challenge them, no state has sought to maintain that it is free to object to the system as a whole."[331]

- Although states are historically the primary creators of law, international organizations have an increasingly important role and profile.[332]

1.9 Original Contribution to Science

1.9.1 Literature Review

I certainly am not the first researcher to contemplate the issue of Indigenous sacred sites, particularly when it comes to the United States where the ample literature includes a *Habilitationsschrift* by René Kuppe of Universität Wien's *Institut für Rechtsphilosophie, Religions-. und*

---

[327] Shaw, *supra* note 313 at 49.

[328] Shaw, *supra* note 313 at 5. Thus, for instance, US law has a presumption that Congress will not legislate in contradistinction to the state's international duties: see *ibid* at 118.

[329] Shaw, *supra* note 313 at 6, 53. His argument here is that states will forsake short-term gains that may lead to long-term disadvantages if they "disrupt the mesh of reciprocal tolerance" upon which international law depends: *ibid* at 6. However, he also notes the difficulty of distinguishing legally-motivated behaviour from that which was motivated by "other reasons ranging from goodwill to pique, and from ideological support to political bribery" (*ibid* at 53).

[330] Shaw, *supra* note 313 at 6.

[331] Shaw, *supra* note 313 at 8.

[332] See e.g. Shaw, *supra* note 313 at 9.

Kulturrecht,[333] books by Peter Nabokov[334] and Vine Deloria, Jr[335] and articles by authors such as John W Ragsdale, Jr,[336] Kathleen Sands,[337] Allison M Dussias,[338] Michael D McNally,[339] Ann M Hooker,[340] Sandra B Zellmer,[341] Martin C Loesch,[342] Boone Cragun,[343] Joshua A Edwards,[344] Anita Parlow,[345] Michael N Ripani,[346] Joel Brady,[347] Jeff Pinter,[348] and Howard J Vogel.[349]

---

[333] René Kuppe, *Indianische* Sacred Sites *und das Recht auf Religionsfreiheit in den Vereingten Staaten von Amerika* (*Habilitationsschrift*, Faculty of Law, Universität Wien, Austria, 2003) [unpublished].

[334] Peter Nabokov, *Where the Lightning Strikes: The Lives of American Indian Sacred Places* (New York: Penguin Books, 2006) [Nabokov, *Lightning*].

[335] See particularly Vine Deloria Jr, *For This Land: Writings on Religion in America* (New York: Routledge, 1999) [Deloria, *For This Land*], though Indigenous sacred sites were one of the central themes in his work.

[336] John W Ragsdale, Jr, "Sacred in the City: The Huron Indian Cemetery and the Preservation Laws" SSRN Paper No 2648526 (August 2015), online: < ssrn.com/abstract=2648526 >.

[337] Kathleen Sands, "Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases", (2012) 36 Am Indian L Rev w 253.

[338] Allison M Dussias, "Room for a (Sacred) View? American Indian Tribes Confront Visual Desecration Caused By Wind Energy Projects" (2014) Am Indian L Rev 333.

[339] Michael D McNally, "From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion" (2015) 30:1 JL & Religion 36.

[340] Ann M Hooker, "American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts Between Religious Use and Multiple Use at El Malpais National Monument" (1994) 19 Am Indian L Rev 133.

[341] Sandra B Zellmer, "Sustaining Geographies of Hope: Cultural Resources on Public Lands" (2002) 73 U Colo L Rev 413.

[342] Martin C Loesch, "The First Americans and the 'Free' Exercise of Religion" (1993) 18 Am Indian L Rev 313.

[343] Boone Cragun, "A Snowbowl *Déja Vu*: The Battle Between Native American Tribes and the Arizona Snowbowl Continues" (2005) 30 Am Indian L Rev 165.

[344] Joshua A Edwards, "Yellow Snow on Sacred Sites: A Failed Application of the Religious Freedom Restoration Act" (2009) 34 Am Indian L Rev 151.

[345] Anita Parlow, "Cry, Sacred Ground: Big Mountain, USA" (1988) 14 Am Indian L Rev 301.

[346] Michael N Ripani, "Native American Free Exercise Rights in Sacred Lands: Buried Once Again" (1990) 15 Am Indian L Rev 323.

[347] Joel Brady, "'Land is Itself A Sacred, Living Being': Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of *Bear Lodge*" (1999) 24 Am Indian L Rev 153.

[348] Jeff Pinter, "In Cases Involving Sites of Religious Significance, Plaintiffs Will Fall in the Gap of Judicial Deference that Exists Between the Religion Clauses of the First Amendment" (2005) 29 Am Indian L Rev 289.

[349] Howard J Vogel, "The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict Over Native American Sacred Sites on Public Land" (2000) 41 Santa Clara L Rev 757.

There is some specific Canadian literature, notably the pre-UNDRIP[350] work by the Sahtu Heritage Places and Sites Joint Working Group,[351] Michael Ross,[352] and Darlene Johnston,[353] as well as the more recent cost-benefit analyses of sacred sites by Sari Graben,[354] a doctoral thesis on sacred ecology,[355] and Jean Leclair's seminal article on the interplay between the law and the sacred.[356] In view of the renewed spotlight cast upon the issue by the Canadian Supreme Court's acceptance to hear the Ktunaxa Nation's dispute relating to an intended ski resort in Jumbo Valley, British Columbia,[357] there is certain to be an upsurge in interest.[358]

Australian books and articles on Indigenous sacred sites for the most part predate 2000, including such authors as Ronald M Berndt,[359] Ken Gelder and Jane L Jacobs,[360] David Ritchie,[361] Philip

---

350 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007: *supra* note 39.

351 The Sahtu Heritage Places and Sites Joint Working Group, *Rakekée Gok'é Godi: Places We Take Care Of* (January 2000), 2nd ed.

352 Ross, *supra* note 34.

353 Darlene Johnston, "Respecting and Protecting the Sacred: Report for the Ipperwash Inquiry" (31 October 2006) *Ministry of the Attorney General Ontario*, online: < www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Johnston_Respecting-and-Protecting-the-Sacred.pdf >.

354 Graben, "Resourceful Impacts", *supra* note 8; Graben, "Rationalizing Risks", *supra* note 8.

355 Alexis Reichert, *Sacred Trees, Sacred Deer, Sacred Duty to Protect: Exploring Relationships between Humans and Nonhumans in the Bishnoi Community* (MA Dissertation, Department of Classics and Religious Studies, Faculty of Arts: University of Ottawa, 2015) [Unpublished].

356 Jean Leclair, "Le droit et le sacré ou la recherche d'un point absolu" in Jean-François Gaudreault-DesBiens, ed, *Le droit, la religion et le "raisonnable": le fait religieux entre monisme étatique et pluralisme juridique* (Montreal: Thémis, 2009) 475 [Leclair, "Le sacré"].

357 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)* 2015 BCCA 352 [*Ktunaxa Nation* BCCA].

358 Probably the first publication to deal comprehensively with it is Dwight Newman's edited volume, *Religious Freedom and Communities* (Canada: LexisNexis, 2016) [Newman, *Religious Freedom*].

359 Ronald M Berndt, "The Gove Dispute: The Question of Australian Aboriginal Land and the Preservation of Sacred Sites" (1964) 1:2 Anthropological Forum: J Social Anthropology & Comparative Sociology 258.

360 Ken Gelder & Jane L Jacobs, *Uncanny Australia: Sacredness and Identity in a Postcolonial Nation* (Victoria, Australia: Melbourne University Press, 1998) [Gelder & Jacobs, *Uncanny Australia*]; Ken Gelder & Jane L Jacobs, "'Talking out of Place': Authorizing the Aboriginal Sacred in Postcolonial Australia" (1995) 9:1 Cultural Studies 150 [Gelder & Jacobs, "Postcolonial Australia"].

361 David Ritchie, "Principles and Practice of Site Protection Laws in Australia" in Carmichael et al, *supra* note 13, 227.

Clarke,[362] Steve Hemming,[363] Rod Lucas,[364] Robert Layton,[365] John Fielder,[366] and Marcus B Lane et all.[367] Post 2000 authors include Diane Bell,[368] GAC Ginn,[369] Christoph B Graber,[370] Veronica Brady,[371] and Marcia Langton.[372] Other important literature incorporates the *Final Report of the Royal Commission Into Aboriginal Deaths in Custody* (April 1991),[373] the *Saunders* Report in the Hindmarsh Affair (1994)[374] the *Hindmarsh Island Royal Commission Report* (December 1995),[375] the *Mathews Inquiry* (June 1996)[376] and Parliamentary Research Paper 11 1999–2000.[377]

---

[362] Philip Clarke, "Response to 'Secret Women's Business: The Hindmarsh Island Affair'" (1996) 20:50–51 J Australian Studies 141.

[363] Steve Hemming, "'Not the Slightest Shred of Evidence': A Reply to Philip Clarke's Response to 'Secret Women's Business'" (1997) 21 J Australian Studies 130.

[364] Rod Lucas, "The Failure of Anthropology", (1996) 20:48 J Australian Studies 40.

[365] Robert Layton, "The Alawa Totemic Landscape: Ecology, Religion and Politics" in Ucko & Layton, *supra* note 45, 219.

[366] John Fielder, "Sacred Sites and the City: Urban Aboriginality, Ambivalence, and Modernity" in Rob Wilson & Arif Dirlik, eds, *Asia/Pacific as Space of Cultural Production* (Durham and London: Duke University Press, 1995) 101.

[367] Marcus B Lane et al, "Sacred Land, Mineral Wealth, and Biodiversity at Coronation Hill, Northern Australia: Indigenous Knowledge and SIA" (2003) 21:2 Impact Assessment & Project Appraisal 89.

[368] Diane Bell, *Ngarrindjeri Wurruwarrin*: *A World That Is, Was, and Will Be*, new ed, Kindle version (North Melbourne, Vic: Spinifex 2014) [Diane Bell, *Ngarrindjeri Wurruwarrin*].

[369] GAC Ginn, "Holy Ground and Mortal Promises: The Campaigns for the Mothers' Memorial, Toowoomba" (2010) 34:3 J Australian Studies 331.

[370] Christoph B Graber, "Aboriginal Self-Determination vs Propertization of Traditional Culture: The Case of the Sacred Wanjina Sites" (2009) 13 Australian Indigenous L Rev 18.

[371] Veronica Brady, "Sacred Ground: An Exploration" (2005) 29:86 J Australian Studies 91.

[372] Marcia Langton, "The Edge of the Sacred, the Edge of Death: Sensual Inscriptions" in Bruno David & Meredith Wilson, eds, *Inscribed Landscapes: Marking and Making Place* (Honolulu, Hawai'i: University of Hawai'i Press, 2002) 253.

[373] Vol 1–5 are available on the *Indigenous Law Resources* website, online: <www.austlii.edu.au/au/other/IndigLRes/rciadic/>.

[374] Cheryl Saunders, *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the Significant Aboriginal Area in the Vicinity of Goolwa and Hindmarsh (Kumarangh) Island* (Adelaide: South Australian Government Printer, 1994).

[375] Iris Stevens, *Report of the Hindmarsh Island Bridge Royal Commission* (Adelaide: Hindmarsh Island Bridge Royal Commission, 1995).

[376] Jane Mathews, *Commonwealth Hindmarsh Island Report* (27 June 1996).

[377] Australia, Parliament of Australia, "Indigenous Religions in Secular Australia" by Marian Maddox, Consultant, Social Policy Group, Research Paper 11 1999–2000 (14 December 1999) online: <

New Zealand Indigenous sacred site-specific literature is scarcer, although I have chanced upon one Master's thesis in this context.[378] Other authors in the field include Hirini Matunga[379] and Joseph S Te Rito.[380] Of core importance is the 1992 *Te Roroa* Report of the Waitangi Tribunal.[381]

Insofar as comparative work between the legal systems of the four countries in this specific research area is concerned, the only relatively comprehensive study that I have been able to track down dates back to 2003.[382]

1.9.2 Contribution to Scientific Advancement

There are three important ways in which this thesis contributes to scientific advancement:

First, in crafting solutions, the final chapter adopts a threefold perspective: it offers an 'ideal' solution that could be suitable for adoption in any of the common law jurisdictions studied, which solution develops a mechanism in a manner that gives expression to Indigenous cultural values, customs and identity through the use of Western legal structures and concepts; next, it proposes a set of pragmatic suggestions in the context of each of the four jurisdictions, intended to assist parties wishing to protect sacred sites in each of these legal jurisdictions under the present *status quo*; finally, a number of general guidelines aimed at jurists are abstracted for purposes of the protection of Indigenous sacred sites.

---

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP11 > [Maddox, "Indigenous Religions"]

[378] Lisbeth Margl, *The Protection of Indigenous Sacred Sites (Wahi Tapu) in New Zealand: An Analysis of the Legal and Political Situation for Maori People of Aotearoa concerning the Protection of Wahi Tapu (Indigenous Sacred Sites)* (LL.M. Dissertation, Faculty of Law, Universität Wien, Austria, 2008) [unpublished].

[379] Matunga, *supra* note 19.

[380] Joseph S Te Rito, "Struggles to Protect Puketapu, a Sacred Hill in Aotearoa" in Gloria Pungetti, Gonzalo Oviedo & Della Hooke, eds, *Sacred Species and Sites: Advances in Biocultural Conservation* (Cambridge, UK: Cambridge University Press, 2012) 165.

[381] Waitangi Tribunal, *Te Roroa Report* (1992).

[382] Richard B Collins, "Sacred Sites and Religious Freedom on Government Land", (2003) 5:2 U of Pa J Const L 240.

Second, in both the ideal and pragmatic solutions proposed, a cardinal role is played by a matrix constructed with the aid of legal anthropology/Indigenous theory to aid jurists' understanding of and approaches to Indigenous spirituality. The social science research undertaken in Chapter 2 is thus intrinsic to the synthesis effected and the framework proposed in Chapter 8. This means that the social science matrix becomes the bridge which enables the Court to access the conceptual meaning that the sacred site holds for the community involved.

Third, the research constitutes an important piece of comparative work as such, given that no in-depth comprehensive study of the subject matter has yet been undertaken.

1.10 Summary

Thus far I have identified and contextualized the research problem (1.2); outlined the research objectives (1.3); indicated the three main hypothesis on which the thesis is predicated (1.4); delineated some research boundaries (1.5); and addressed three core terminological concepts employed in the thesis (1.6), *viz* "Natural Resource Development Projects" (1.6.1), "Indigenous Peoples" (1.6.2) and "Sacred Sites" (1.6.3). Next, I focussed on the theoretical framework around which this thesis is constructed. I commenced by outlining the structure of the thesis (1.7), followed by a discussion of the three building blocks that constitute its theoretical framework (1.8): legal anthropology and Indigenous theory (1.8.1), legal comparison (1.8.2) and international law (1.8.3). In the process I delineated and motivated the central approach and methodology followed, demonstrating how these serve the research objectives of the thesis in the broader sense. Finally, I outlined my original contribution to science (1.9).

The research problem can thus be summarized in the following terms: in essence it constitutes a quest to bridge the divide between Western economic aspirations and traditionalist Indigenous spiritual and cultural identities. The methodology comprises legal comparison of four major common law jurisdictions against the backdrop of international law, informed by a pluralist approach that has regards to both Indigenous theory and legal anthropology, the former to avoid ethnocentrism, and the latter to guard against essentialism. The common law systems in question are the United States, Australia, Aotearoa New Zealand and Canada. The thesis makes a threefold contribution to science: it constitutes a valuable exercise in legal comparison as such; it adds to the

literature in a field that has so far not seen widespread coverage, and the methodology is innovative in that it advocates the crafting of context-sensitive legal frameworks that take into account the cultures, customs and identities of the pertinent Indigenous communities that they seek to govern.

The world's hunger for natural resources is not going to suddenly decline. Indigenous peoples cannot viably lay claim to the non-disturbance of entire river systems.[383] But we also cannot sacrifice living cultures just because it is expedient to do so. We are dealing with the intrinsic value of human dignity as opposed to the power of hard currency. We find ourselves, thus, at the very intersection of tangible and intangible.

[383] See e.g. Polidor & Tindall *supra* note 35.

Chapter 2: Insights into Indigeneity

> Pour miner l'empire du manichéisme, pour éviter de même le triomphe du dogmatisme et de la pensée totalitaire, nous proposerons donc l'adoption d'une épistémologie de la complexité, fondée sur le doute. L'adoption d'une telle épistémologie est commandée, soutiendrons-nous, par le devoir éthique d'ouverture à la parole de l'Autre qui nous incombe dans une société valorisant l'égalité, le pluralisme et le respect et l'égale dignité de chacun. Le doute qu'elle suppose vise à rendre constante la réflexion sur nos convictions et sur la manière dont nous appréhendons les faits. Il doit être vu comme un moyen de combattre les certitudes trop confortables et les préjugés dans lesquels s'engonce la pensée dès lors que la dimension 'foi' d'une conviction en vient à prendre le pas sur la dimension 'critique' de la pensée. Cela dit, préconiser l'adoption d'une épistémologie de la complexité et, partant, dénoncer les intégrismes ainsi que les processus par lesquels ceux-ci se construisent et se maintiennent, n'emporte nullement qu'il faille se cantonner dans l'indécision ou la passivité. Le doute peut être vu comme un frein, mais il peut aussi servir de tremplin pour aller vers l'Autre, pour s'ouvrir à lui ou elle.[384]

***

> We are, remember, a society of book-worms. The absence of an Aboriginal tradition of literacy has enabled us to patronise a people whose languages are now revealing to professional linguists a semantic subtlety, a conceptual richness, and a categorical quiddity that in the next five or ten years will bring about a Copernican change in our understanding of Aboriginal culture and, incidentally, in our self-perception of what we did from 1788 onward.[385]

---

[384] Gaudreault-DesBiens, *Critique identitaire*, *supra* note 1 at 11.

[385] WEH Stanner, "Some Aspects of Aboriginal Religion" in Charlesworth, *Religious Business*, *supra* note 187, 1 [Stanner, "Aboriginal Religion"] at 7.

2.1 Introduction

The objective of this Chapter is to nuance the debate broached by this thesis. It commences by introducing three key themes that form part of the broader background against which the thesis unfolds: (1) romanticization, reductionism and/or the essentialization of Indigenous peoples; (2) identity politics and recognition policies; and (3) questions relating to authenticity and representation.

Next, it considers the intimate relationship between culture, religion and identity. In particular, attention is paid to the following three dimensions of this relationship: the importance of cultural continuity for Indigenous identity; the link between Indigenous culture and religion; and the identitary role of sacred sites in Indigenous culture and religion.

It is the last part of this Chapter that presents us with the first of our building blocks for the context-sensitive frameworks to be constructed in Chapter 8. It seeks to uncover Indigenous paradigms relating to time, space and the sacred in the geographical area corresponding to the legal jurisdictions studied. Here I offer two *caveats*: the research as presented does not claim to be exhaustive and necessarily makes somewhat bold statements that may appear essentialized and/or reductive. I am caught here in the twin demands that the length of the thesis must remain manageable and that legal certainty requires a certain measure of categoricality, or the 'conclusions' offered here will be of no help at all when it comes to their intended application in Chapter 8. I also note that, unlike the four legal jurisdictions, the geographic areas have been divided into three: Aotearoa New Zealand; Australia and North America. The reason for the fusion of the Canadian and American territories lies in the fact that their border is entirely arbitrary insofar as the Indigenous peoples within their respective territories are concerned. I therefore felt that it would be artificial and tautological to separate "Native Americans" and "First Nations" *merely* on the basis of geographical quirks.

Indigenous conceptions of space are important, insofar as these relate to Indigenous communities' sense of history. Indigenous conceptions of space are studied from two angles: a sense of place, and the link between land and religion. Finally, four aspects of Indigenous conceptions of the sacred are contemplated: issues of cross-cultural translation; problems surrounding translation and universalization; the role of ritual; and the importance of secrecy about the sacred.

We thus begin by considering the three key themes as delineated above.

2.2 Key Themes

2.2.1 Romanticization, Reductionism and Essentialization

> In Mr. Curtis we have both an artist and a trained observer, whose pictures are pictures, not merely photographs, whose work has far more than mere accuracy, because it is truthful. (…) The Indian as he has hitherto been is on the point of passing away. His life has been lived under conditions thru which our own race past so many ages ago that not a vestige of their memory remains. It would be a veritable calamity if a vivid and truthful record of these conditions were not kept. (…) [Mr. Curtis] is an artist who works out of doors and not in the closet. He is a close observer, whose qualities of mind and body fit him to make his observations out in the field, surrounded by the wild life that he commemorates. [386]
>
> ***
>
> Edgar Allan Poe believed that the most poetic topic in the world was the death of a beautiful woman. From the literature produced during the nineteenth century, second place would have to go to the death of the Indian.
>
> Not that Indians were dying. To be sure, while many of the tribes who lived around the east coast of North America, in the interior of Lower Canada, and in the Connecticut, Ohio, and the St. Lawrence river valleys had been injured and disoriented by the years of almost continuous warfare, by European diseases, and by the destructive push of settlers for cheap land, the vast majority of the tribes were a comfortable distance from the grave.
>
> This was the Indian of fact.
>
> In 1830, when the American president, Andrew Jackson, fulfilling an election promise to his western and southern supporters, pushed the Removal Act through Congress, he did so in order to get rid of thousands

[386] Theodore Roosevelt, excerpt from "Foreword" to Edward S Curtis, *The North American Indian, Vol 1* (1907) at xi (The Project Gutenberg EBook of the North American Indian by Edward S Curtis, released 3 October 2006, Ebook #19449). For a modern take, see Anderson et al on the "uninformed presumption" that "American Indian nations vanished long ago": Robert T Anderson et al, *American Indian Law: Cases and Commentary*, 3rd ed (St Paul, MN: West Academic, 2015) at 2.

> of Indians –particularly the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles– who were not dying and not particularly interested in going anywhere.
>
> These were not the Indians Curtis went west to find.
>
> Curtis was looking for the literary Indian, the dying Indian, the imaginative construct. And to make sure that he would find what he wanted, he took along boxes of "Indian" paraphernalia –wigs, blankets, painted backdrops, clothing– in case he ran into Indians who did not look as the Indian was supposed to look.[387]

This is an area where stereotypes and myths abound.[388] Indigenous peoples are frequently understood in binary, simplistic terms that tend to reduce discrete cultures to a single, conglomerated vision readily translatable to the majority culture in terms that are familiar to it.[389] This identitary levelling process is accompanied by commonly perpetuated myths,[390] resulting in oft-repeated stereotypes that are reproduced in the popular arts and media.[391] Thus the Canadian/American author Thomas King (Cherokee) observes of film:

---

[387] Thomas King, "You're Not the Indian I had in Mind" in *The Truth About Stories. A Native Narrative* (Toronto, Ontario: Anansi, 2010) 20 [King, "Indian"] at 20–21.

[388] Ute Lischke & David T McNab, "Introduction" in Lischke & McNab, *supra* note 16, 1 [Lischke & McNab, "Introduction"] at 1; Leclair, "Le sacré", *supra* note 356 at 485. This translates, for instance, into the fossilized approach to Indigenous peoples taken by *inter alia* the Canadian Courts, that Leclair refers to as "*la sacralisation de l'identité culturelle*": *ibid* at 487. Also see the criticism posed in this regard by Ronald Niezen, *Rediscovered Self*, *supra* note 59 at 69 and 73; Gaudreault-DesBiens, "State Management", *supra* note 59 at 207; and Otis, "Revendications foncières", *supra* note 105 at 762–768, as well as the cases cited by him at n 78. Also see Kukutai, *supra* note 95 at 36 on historical assumptions of "a corporate supra-tribal identity" among the Māori.

[389] Lischke & McNab, "Introduction", *supra* note 388 at 2 point out that "the Indian" is a category that has been created by Westerners for Westerners: it implies a homogeneity among America's Indigenous peoples that simply does not exist. One consequence, so they argue, is that non-Indigenous persons represent 'Indians' as "European categories of thought rather than human beings" (at 5). Implicit in this statement is the claim that only Indigenous persons should be writing on matters relating to Indigenous peoples — a matter touched on at 2.2.3 below ("Authenticity and Representation"). Contrary to some Indigenous theorists, however, Lischke & McNab do not seek to deny that it is possible for non-Indigenous persons to present accurate portrayals of Indigenous peoples: see *ibid* at 13.

[390] An example put forward by Lischke & McNab, *ibid* at 2–3 in the Canadian context is the so-called "northern experience" — the appropriation of "Inuit voices (…) as part of the 'Canadian experience'."

[391] See e.g. Lischke & McNab, "Preface" in Lischke & McNab, *supra* note 16, xvii [Lischke & McNab, "Preface"] at xviii on Kafka's portrayal of the "'Indian' as a 'disappearing noble savage'"; Phillip Bellfy, "Permission and Possession:

> Film dispensed with any errant subtleties and colourings, and crafted three basic Indian types. There was the bloodthirsty savage, the noble savage, and the dying savage. The bloodthirsty savage was the most common. This was the familiar character who rode around wagon trains, burned settlers' cabins to the ground, bashed babies against trees, and trapped cowboys and soldiers in box canyons. The second type was the noble savage, an Indian who assisted Whites in their struggles with bloodthirsty Indians, spoke fluent English, and understood the basic precepts of supply-side capitalism. The dying Indian, on the other hand, was just that. Dying. (…) The dying Indian generally had an element of nobility in him. You normally didn't find all three elements in the same Indian, but you would have no trouble finding all three Indians in the same film.[392]

While the bloodthirsty savage appears to have been predominantly relegated to history books, the stereotypes of the dying savage and the noble savage appear to be alive and well, both the fruit of reductive, essentialized thinking. These are old stereotypes, though: Gaudreault-DesBiens traces the noble savage archetype back to Jean-Jacques Rousseau[393] and J Worden Pope's article entitled, "The North American Indian – The Disappearance of the Race [:] A Popular Fallacy", dates back to 1896.[394] Good examples of the bloodthirsty savage are to be found in works such as *Colonization and*

The Identity Tightrope" in Lischke & McNab, *supra* note 16, 29 at 31 on the ubiquitous "full-headdress wearing, horse-riding, buffalo-killing, Custer-killing, tepee-dwelling 'Indian'".

[392] Thomas King, *The Inconvenient Indian: A Curious Account of Native People in North America*, electronic ed v3.1, (Canada: Anchor Canada, 2013) [King, *Inconvenient Indian*] at 46. In the Māori context, Kukutai, *supra* note 95 at 37 identifies three similar stereotypes that were predominant in Victorian Aotearoa New Zealand: "'Black' (permanently inferior), 'White' (convertible) and 'Grey' (dying) savages".

[393] Gaudreault-DesBiens, *Critique identitaire*, *supra* note 1 at 73–74 n 228. He identifies the work at the root of this myth as: Jean-Jacques Rousseau, *Discours sur l'origine et les fondements de l'égalité parmi les hommes. Discours sur les sciences et les arts* (Paris: Flammarion, 1992).

[394] J Worden Pope, "The North American Indian — The Disappearance of the Race [:] A Popular Fallacy" (Nov 1896) 16 *The Arena* 945. In this carefully researched piece replete with statistical data he argued that accounts of Native American occupation of American pre-colonialization were much exaggerated in terms of tribal numbers: in fact, there had not been a significant decrease, but their numbers had remained the same (*ibid* at 945). What had changed, was a sharp increase in the number of White settlers (*ibid* at 947). His extensive reasoning includes arguments such as: estimations were based on "very flimsy evidence […] mere guesswork, in truth, complicated by the invariable tendency to exaggerate numbers"(*ibid* at 946); it was in the interests of Indian agents to inflate their numbers as they made a "direct pecuniary gain" (*ibid*); the US territory could not have supported such numbers subsisting primarily by hunting and fishing (*ibid* at 947); the small initial settlements of Whites would not have been able to resist them so well (*ibid*); the Five Nations Confederacy would not have been able to exercise such massive power as it was said to have done (*ibid* at 953); and the French and English would have been able to make much more liberal use of them in their early wars, possibly changing the continent's ultimate fate (*ibid*). But see James Anthony Froude, *Oceana or England and her Colonies* (London: Longman, Green, and Co, 1886) at 300: "The Red Indian and the Maori pine away as in a cage, sink first into apathy and moral degradation, and then vanish" and J Langfield Ward, *Colonization in its Bearing on the Extinction of the Aboriginal Races* (London: William Clemens, 1873). And Hacker & Haines argue that there is a substantial body of qualitative evidence that supports the contention of high American Indian mortality rates during the first five centuries

Christianity (1838),[395] *Life Among the Maories of New Zealand* (1872)[396] and *The Claims of Uncivilized Races* (1900).[397]

In the binary thinking that typically accompanies these stereotypes, the modern version of the dying savage could likely be more accurately described as the useless savage:[398] the stereotypical image of the drunk/drugged, poorly educated, lazy, dirty, poverty-struck Indigenous person who lives on the margins of society.

The noble savage archetype, on the other hand, (while no less reductive and essentialist) is also mythicized and romanticized, by certain Indigenous and non-Indigenous persons and/or groups alike. In non-Indigenous circles, the noble savage myth frequently accompanies all manner of alternative holistic spiritual movements.[399] Certain ecological advocacy groups equally fall prey to

---

post European contact: J David Hacker & Michael R Haines, "The Construction of Life Tables for the American Indian Population at the Turn of the Twentieth Century" in Axelsson & Sköld, *supra* note 95, 74 at 74. Also see Ward Churchill, "The Indigenous Peoples of North America: A Struggle Against Internal Colonialism" in Churchill, *Struggle for the Land*, *supra* note 320, 15 [Churchill, "Internal Colonialism"] at 16. Ultimately it is James Clifford who sums it up best: "Many native people were indeed killed; languages were lost, societies disrupted. But many have held on, adapting and recombining the remnants of an interrupted way of life. They reach back selectively to deeply rooted, adaptive traditions: creating new pathways in a complex postmodernity. Cultural endurance is a process of becoming": Clifford, *Returns*, *supra* note 81 at 7.

395 Complete, e.g., with scalping and torture scenes: William Howitt, *Colonization and Christianity, A Popular History of the Treatment of Natives by the Europeans in All their Colonies* (London: Longman, Orme, Brown, Green & Longmans, 1838) at 324ff.

396 Described in the Introduction as "one of the best books extant– on that once most barbarous and interesting people, among the ashes of whose horrid cannibal fires our holy Christianity has built its altars and fanes, blunted the points of their battle-spears, split their murderous clubs, and tamed their savage, hostile passions": Thomas Lowe & William Whitby, "Introduction" in Rev Robert Ward, *Life Among the Maories of New Zealand: Being a Description of Missionary, Colonial, and Military Achievements* (London: G Lamb, 1872) vii at x. In a similar vein, see John Beecham, *Remarks on Colonization in General with an Examination of the Proposals of the Association which has been Formed for Colonizing New Zealand*, 2nd ed (London: Hatchards, Piccadilly: 1838) at 12–13.

397 Featuring, e.g., "cannibalism", "human sacrifices" and "the gross superstitions known as witch-doctoring": HR Fox Bourne, *The Claims of Uncivilized Races: A Paper Submitted to the International Congress on Colonial Sociology, Held in Paris in August, 1900* (London: Aborigines Protection Society, 1900) at 11.

398 See e.g. Bocking, who describes the fairly recent scientific portrayal of Indigenous hunting as "wasteful[,] marked by careless slaughter, wounding with no killing (…) primitive, and contrary to 'rational' resource use": Bocking, *supra* note 16 at 221.

399 See e.g. the examples cited by Churchill, "Internal Colonialism", *supra* note 394 at 18.

them, idealizing Indigenous groups as the representatives of some kind of lost Eden.[400] The noble savage myth may further be embraced and internalized as identitary atavism by Indigenous persons engaged in an identity struggle of their own.[401]

Insofar as these stereotypes are concerned, Chandler *et al* caution that a binary vision which conceives of entire cultures or individuals in broadly dichotic terms[402] is "both crude and misleading".[403] The authors warn that the broadly advocated notion of Indigenous people being "somehow more collectivist and harmonious than their colonizers"[404] is one to which some Indigenous peoples may themselves subscribe because of the way in which they have been socialized rather than it being a heart-felt form of self-presentation[405] and impress upon their readers the need for, at the very least, a more complex debate than the one that such simplified notions entail.[406] In addition, Anderson *et al* point out that romanticizing Indigenous peoples and their lives has the pernicious effect of "obscur[ing] the hardships of poverty and its consequences" in these

---

[400] See e.g. Bocking, *supra* note 16 at 223, 234. But see Ezra Rosser, "Ahistorical Indians and Reservation Resources" (2010) 40 Environmental Law 437 [Rosser, "Ahistorical Indians"] on the romanticism surrounding the Navajo, and the realities of coal extraction and the operation of a coal-fired generation plant on a Navajo reservation.

[401] It is ironic that Western society not only stereotypes Indigenous peoples, but frequently seeks to appropriate even the (frequently stereotypical) images associated with them, leaving Indigenous peoples not only with an identity struggle, but also a battle to control their own images, both in the historical and contemporary sense. For a richly illustrated analysis, see Bellfy, *supra* note 391. Thus, Native American men are often portrayed as "the Great Plains Warrior", women as "romantic objects" and children as "savage cartoon characters": *ibid* at 34–36. This makes for incongruous pairings, such as a feather together with the word "Apache" in the logo of Apache Software Foundation (while the Apache were not traditionally inclined to "the feather look") or, in the Canadian context, the use of totem poles in the logos of companies with no Indigenous connection, such as the logo of Totem Ginseng Trading that contains, in addition to the totem pole, the Chinese characters for "Chief": *ibid* at 37-38.

[402] They provide the following examples: "duty-based vs. rights-based, independent vs. interdependent, egocentric vs. sociocentric, individualistic vs. collectivistic": Michael J Chandler et al, "Personal Persistence, Identity Development, and Suicide: A Study of Native and Non-Native North American Adolescents" (2003) 68:2 *Monographs of the Society for Research in Child Development,* Series No 273, at 111.

[403] *Ibid.*

[404] *Ibid* at 113.

[405] *Ibid.*

[406] *Ibid. Cf* Carmichael, Hubert & Reeves, *supra* note 14 at 7: "Unlike many others in the world, native peoples have respect for the earth; not only humans, but also plants, animals, rocks, burials, and other sacred places all have a right to be here. It is this reverence for the earth that is embodied in concepts of sacred geography, and there is now a growing realization among scholars that sacred sites are indeed very special places."

societies.[407] For, while it is not true that Indigenous persons are incapable of successfully integrating into society, the fact remains that Indigenous communities frequently have disproportionately high incarceration, unemployment, poverty, youth suicide, and school dropout rates.[408] Note, however, that these are the result of structural societal problems that are the likely legacy of colonialism and assimilationist policies[409] — they are not due to some archetypal 'defect' inherent in Indigenous peoples. In other words, there are complex causes at work, not mere stereotypes. Also note that individual Indigenous persons and Indigenous communities can and do achieve great success, even measured in conventional Western terms. For instance, *Canadian Lawyer*'s recently released "Top 25 Most Influential 2016" list includes three Indigenous jurists: Jody Wilson-Raybould, Justice Minister and Attorney General of Canada; Murray Sinclair, Senator and Chair of the Truth and Reconciliation Commission of Canada; and Aimée Craft, Assistant Professor, University of Manitoba, Robson Hall Faculty of Law.[410] Also in Canada, the high-profile and long-awaited National Inquiry into Missing and Murdered Indigenous Women and Girls is headed up by Marion

---

[407] Anderson et al, *supra* note 386 at 2.

[408] E.g., in Australia, Indigenous children are 26 times more likely to be imprisoned than non-Indigenous children and the juvenile detention population is 50% Indigenous, whereas Indigenous Australians only account for 3% of the population. In the Northern Territory the Indigenous juvenile detention rate is particularly poor, at 97%. See Karina Marlow, "Update: Royal Commission into NT Detention" (27 July 2016) *NITV*, online: <www.sbs.com.au/nitv/article/2016/07/26/update-royal-commission-nt-detention>. According to Statistics Canada data, Indigenous women over the age of 15 are 3.5 times more likely to encounter violence that non-Indigenous women, and are in excess of 5 times more likely to die a violent death: see Jillian Kestler-D'Amours, "Canada Unveils Inquiry Into Murdered Indigenous Women" (4 August 2016) *Al Jazeera*, online: <www.inkl.com/news/canada-unveils-inquiry-into-murdered-indigenous-women>. Data recently provided by the Canadian Centre for Suicide Prevention indicate a suicide rate of 126 per 100,000 for Indigenous males in the age-group 15-24, compared to 24 per 100,000 for their non-Indigenous counterparts; Indigenous females of the same age group have a suicide rate of 35 per 100,000 compared to 5 per 100,000 for their non-Indigenous peers: see Jillian Kestler-D'Amours, "Canada and the Aboriginal Mental Health Crisis" (22 March 2016) *Al Jazeera*, online: < http://www.aljazeera.com/indepth/features/2016/03/canada-aboriginal-mental-health-crisis-160317100523366.html>. Also see Clifford, *Returns*, *supra* note 81 at 17; and see Kukutai, *supra* note 95 at 45 on the Māori, but note his warning about easy conclusions regarding the link between stronger Māori identity and poorer outcomes.

[409] See Erin M Genia, "The Landscape and Language of Indigenous Cultural Rights" (2012) 44 Arizona Student Law Journal 653 at 656–657. John Borrows and Leonard Rotman draw a direct link between such problems and Canada's residential school system: see John J Borrows & Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 3rd ed, (Canada: LexisNexis, 2007) [Borrows & Rotman, *Aboriginal Legal Issues*] at 832. They also indict the Canadian Child Welfare System where federal and provincial "jurisdictional wrangling [has] left Indians caught in a legal no-man's land, with devastating results for their children" (at 833).

[410] See Gail J Cohen, "The Top 25 Most Influential 2016" (1 August 2016) *Canadian Lawyer*, online: <www.canadianlawyermag.com/6098/The-Top-25-Most-Influential-2016.html>.

Butler, first female First Nations judge in British Columbia.[411] As a matter of fact, Ward Churchill argues that the United States' "enlightened republicanism" as established in the late 1700s was "lifted directly from the model of the currently still functioning Haudenosaunee (Iroquois) confederacy"[412] and he points to the extensive land base of and uranium riches controlled by the Navajo Nation as an example of contemporaneous self-sufficiency.[413]

A particularly pernicious form of romanticization (perpetrated by Indigenous people and outsiders alike) involves the notion of a kind of mythical ecological warrior or guileless child of nature.[414] Indigenous theorist Ward Churchill refers to this as "a sort of socio-cultural retardation on the part of Indians [that] is typically held responsible for the pristine quality of the Americas at the point of their 'discovery' by Europeans."[415] Perhaps the last word on this is best left to Max Charlesworth. In the context of his caution against the idealization of "the religions of 'primitive' societies"[416] he invokes Lévi-Straus' cultural law that "every cultural complex has its cost-benefit structure so that benefits and advantages are always bought at a price and that what a culture makes up on the roundabouts it loses on the swings",[417] concluding that Indigenous religions, like any other, have their pros and cons — something that an "honest and objective comparative approach" would appreciate.[418]

---

411 See Jillian Kestler-D'Amours, "Canada Unveils Inquiry Into Murdered Indigenous Women" (4 August 2016) *Al Jazeera*, online: <www.inkl.com/news/canada-unveils-inquiry-into-murdered-indigenous-women> and Native Women's Association of Canada (NWAC), Press Release, "Government of Canada Officially Launches National Inquiry Into Missing and Murdered Indigenous Women and Girls (MMIWG)" (3 August 2016), online: <nwac.ca/2016/08/press-release-government-of-canada-officially-launches-national-inquiry-into-missing-and-murdered-indigenous-women-and-girls-mmiwg/>.

412 Churchill, "Internal Colonialism", *supra* note 394 at 16.

413 *Ibid* at 21.

414 *Cf* Clifford, *Returns*, *supra* note 81 at 13, who emphasizes the need to adopt a realistic approach, avoiding both "romantic celebration and knowing critique."

415 Churchill, "Internal Colonialism", *supra* note 394 at 15.

416 Max Charlesworth, "Introduction" in Charlesworth et al, *Religion*, *supra* note 152 at 14.

417 *Ibid* at 15.

418 *Ibid* at 15.

2.2.2 Identity Politics

> By noting this we are not –let us be clear– arguing against the notion of indigenous rights or indigenous title. Our point is to underscore that within the context of twenty-first-century multinational resource extraction, indigeneity –its content, philosophy and aspirations– is not self-evident, but rather a terrain of struggle or contestation. Indeed, the ways in which the state, MNCs, multilateral institutions, and indigenous peoples themselves take up indigeneity and insinuate their interests by circumscribing what it is has complexly influenced the sphere of engagement such that indigenous rights in and of themselves have no a priori political valence or trajectory. Seeking and acquiring indigenous rights is not in and of itself emancipatory. Rather, it recalibrates the arena of struggle.[419]

The 21st century identity struggles and self-determination quest of Indigenous peoples must necessarily be understood against the background of the structural damage wrought on them and their communities by the legacy of colonialism with its assimilationist logic. Colonialism systematically sought to disassemble cultural and spiritual community practices and structures through measures such as the Residential (Canada)[420] and Indian Schools (United States),[421] the

---

[419] Edmund Terence Gomez & Suzana Sawyer, "Transnational Governmentality in the Context of Resource Extraction" in Edmund Terence Gomez & Suzana Sawyer, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations and the State*, electronic ed (London: Palgrave-Macmillan, 2012) 1 ["Gomez & Sawyer, "Transnational Governmentality"] at loc 252/6236.

[420] See Borrows & Rotman, *Aboriginal Legal Issues*, *supra* note 409 at 829–832; Jim R Miller, "Reconciliation with Residential School Survivors: A Progress Report" in Jerry P White et al, eds, *Aboriginal Policy Research: A History of Treaties and Policies* vol VII (Toronto: Thompson Educational, 2010) 133; Canada, Truth and Reconciliation Commission (TRC), *Canada's Residential Schools*, vol 1–6 (2015); TRC, *The Survivors Speak* (2015); TRC, *What We Have Learned: Principles of Truth and Reconciliation* (2015); TRC, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015); and TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015). All can be accessed online at: <nctr.ca/reports.php>. A poignant image is provided by Thomas King. He illustrates the Canadian Residential School experience by deconstructing Robert Alexie's novel, *Porcupines and China Dolls*, as follows: "James Nathan and Jake Noland return from Aberdeen residential school, where the girls had been scrubbed and powdered to look like china dolls and the boys had been scrubbed and sheared to look like porcupines, and where each night, when the children cried in their beds, the sound was like a 'million porcupines crying in the dark.": Thomas King, "A Million Porcupines Crying in the Dark" in King, *Stories*, *supra* note 387, 91 [King, "Porcupines"] at 116.

[421] Such as Carlisle and Hampton: see Felix Cohen, *Cohen's Handbook of Federal Indian Law*, 5th ed, Nell Jessup Newton, ed (Albuquerque, New Mexico: LexisNexis, 2012) [Newton, *Cohen's Federal Indian Law*] at 77; Anderson et al, *supra* note 386 at 771–772; Vine Deloria, Jr, "Completing the Theological Circle: Civil Religion in America" in Deloria, *For This Land*, *supra* note 335, 166 [Deloria, "Theological Circle"] at 173.

banning of religious practices such as the Sun Dance (United States)[422] and the Potlatch (Canada),[423] the forced removal of children (Australia's Stolen Generation),[424] and prohibitions/discouragements of the use of Indigenous languages.[425] Stephanie Lawson thus observes in respect of settler states such as these that their very existence is thanks to the large-scale dispossession of Indigenous peoples of their traditional territories in the "[m]odern European imperialism" process.[426]

Nonetheless, this is a complex and sometimes-treacherous terrain where essentialized cultural notions can become entrenched in a hegemonic, fundamentalist manner[427] — sometimes because of non-Indigenous do-gooders fearful to offend, but also in an unfortunate manifestation of Indigenous minority oppression by the (self-proclaimed?) "elders" of Indigenous majorities.[428]

Identification is one of the big issues: who determines what "Indigenous" means and who qualifies as "Indigenous"? As recent as 1977 the second assembly of the World Council of Indigenous People

---

[422] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 77–78: a Court of Indian Offences was created to eliminate "heathenish practices" such as the sun dance and the scalp dance; Anderson et al, *supra* note 386 at 771–772; Deloria, "Theological Circle", *supra* note 421 at 173. Also see Vine Deloria, Jr, "Missionaries and the Religious Vacuum" in Deloria, *Custer*, *supra* note 188, 101 at 106–107 on the prohibition of the Ghost Dance.

[423] Mohs, *supra* note 13 at 200.

[424] See Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney: Commonwealth of Australia, 1997); Deborah Bird Rose, *Dingo Makes Us Human: Life and Land in an Aboriginal Australian Culture* (Cambridge: Cambridge University Press, 1992) 19–20.

[425] See on Canada: Borrows & Rotman, *Aboriginal Legal Issues*, *supra* note 409 at 831; and the United States: Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 77; Anderson et al, *supra* note 386 at 771–772; Deloria, "Theological Circle", *supra* note 421 at 173.

[426] Lawson, *supra* note 91 at 1. She points out that territorial dispossession has been followed by the "permanent demographic swamping" of Indigenous groups by settler majorities in these states as well: *ibid.* Winona LaDuke makes a similar point in respect of North America: LaDuke, "Secessionist View", *supra* note 320 at 11. Churchill, "Internal Colonialism", *supra* note 394 at 24–25 speaks of "internal colonialism" insofar as states such as these are concerned, his argument being that it constitutes "an especially virulent and totalizing socioeconomic and political penetration whereby the colonizing power quite literally swallows up contiguous areas and peoples, incorporating them directly into itself." This, so he argues, distinguished these states from the more classic ones where the pattern is domination from abroad (at 25).

[427] See e.g. Braden Hill, "Searching for Certainty in Purity: Indigenous Fundamentalism" (2014) 20:1 *Nationalism and Ethnic Politics* 10 [Hill, "Indigenous Fundamentalism"]: he speaks of the "politicization of difference" (at 10).

[428] *Ibid* at 11.

resolved that, "only indigenous people could define indigenous people."[429] Such a somewhat circular insider resolution would appear to presuppose a consensus among Indigenous peoples that simply does not exist — after all, who determines the identity of the "indigenous people" in the first part of the phrase so that they can then proceed to issue a definition? Lawson pinpoints associated difficulties in loaded concepts with exclusionary potential such as "culture" and "culturally authentic" and cautions that where it is left to "indigenous elites" to determine the content of such cultural authenticity, it may lead to perverse effects.

A graphic illustration of such exclusionary practices is provided by Australian Indigenous academic Braden Hill, who recounts being relieved of university teaching duties related to a course on Indigenous culture because such "self-proclaimed elders" had complained that, as a gay man, he did not meet their cultural authenticity standards.[430] He observes that prior to the 1967 referendum Australian "Aboriginal politics were informed by a universalist discourse based on justice and equality that appealed to a common sense of humanity" essentially founded on lack of difference with Europeans; the 1967 referendum and consequent constitutional amendments constituted a watershed moment, so that subsequent politics have proceeded from a logic of key differences between European and Aboriginal culture, one accompanied by "a newly radicalized indigenous protest movement" that utilises "essentialist constructs of culture as its fundament" in order to assert indigenous sovereignty claims.[431] In other words, where the prior political strategy had been to "distance Aboriginality from primitivism", contemporary radical Aboriginal politics embrace it and invoke "culture" as "doctrine of difference".[432] This refocused strategy has been bolstered by

---

[429] See Lawson, *supra* note 91 at 3.

[430] See Hill, *supra* note 427 at 11–12. To him, the constitutive parts of his identity is that he is "black, (…) gay, and (…) educated": at 11. He is a Nyungar (*ibid*]. Homosexuality, somewhat predictably, is dismissed by the purported Nyungar elders as being "a European affliction" (at 12). Hill argues that such a form of "disciplining" for "cultural deviance" constitutes, in turn, a breach of his broader human rights as an Indigenous person (at 20–21). In contradistinction, Ward Churchill argues that "Homosexuals of both genders were, and in many settings still are, deeply revered as special or extraordinary, and therefore spiritually significant, within most indigenous North American cultures": Ward Churchill, "I am an Indigenist: Notes on the Ideology of the Fourth World" in Churchill, *Struggle for the Land*, *supra* note 320, 367 [Churchill, "Indigenist"] at 379.

[431] Hill, *supra* note 427 at 13.

[432] *Ibid* at 13–14.

the emergence of "land rights" as coherent political narrative,[433] one that has undoubtedly been consolidated by the native title test as introduced in *Mabo*[434] and taken up in the Northern Territory's *Land Rights Act*:[435] in requiring a "maintained connection to an ancestral past" claimants are encouraged to provide the court with a reductionist, essentialized version of Aboriginality.[436] Hill accordingly submits that such a simplistic, culture-based essentialist Aboriginality has lost touch with the socio-economic realities lived by many Indigenous people.[437]

A second version of Indigenous identification is brought about externally, through recognition policies. We have already looked at divergences that arise where the state is involved in the context of 1.3.2.2 above ("Self-Identification and State Identification); another important category of actors –particularly in the natural resource development context– is institutional: international financial organizations (IFOs) such as the World Bank (WB) and the International Monetary Fund (IMF), as well as multinational corporations (MNCs).

Fixed notions of "cultural authenticity" are therefore problematic on multiple levels, both intra- and extra-community. At the community level problems arise within the natural resource development context when communities are offered concrete incentives such as financial payouts, infrastructure investments or employment — this may create internal divisions[438] which give rise to

---

[433] *Ibid* at 14–15. This has meant that land claims from the "urban south" and the "remote north" are framed in terms that closely resemble each other, irrespective of "notable social, cultural, political, and economic differences": *ibid* at 15. Also see Ronald M Berndt, "A Profile of Good and Bad in Aboriginal Religion" in Charlesworth, *Religious Business*, *supra* note 187, 24 [Berndt, "Good and Bad"] at 41–42; Max Charlesworth, "Introduction" in Charlesworth, *Religious Business*, *supra* note 187, xiii [Charlesworth, "Religious Business"] at xviii on distortions and public rhetoric surrounding spiritual attachment to land in the context of the land claims movement.

[434] *Mabo v Queensland (No 2)* [1992] HCA 23, 175 CLR 1 [*Mabo*].

[435] *Aboriginal Land Rights (Northern Territory) Act* 191 of 1976.

[436] See Hill, *supra* note 427 at 15.

[437] *Ibid* at 16. Hill argues that a different approach is called for, namely one that is not based on a system of "passive welfare" (*ibid* at 16), one that he closely associates with the "detrimental veneration of land rights in Australian politics" (*ibid*). But such argumentation is possibly more appropriate in the context of Australia, which does not have a treaty-making tradition. Cf LaDuke, "Secessionist View", *supra* note 320 at 12 — her land rights argument is based on the enforcement of treaty rights rather than on the fact of an ancestral territorial history. Of course, that raises a question of equity in respect of tribes whose treaties were not ratified, such as those of the so-called "California Indians". See the discussion below in the context of my Desktop Study 3 at 5.5.2.4.1 ("Introducing the Desktop Study").

[438] See Clifford, *Returns*, *supra* note 81 at 17.

difficult questions relating to who may legitimately speak for the community[439] and group pressure and minority suppression concerns. The community may also experience problems that freeriders wishing to share in potential payouts crawl out of the woodwork, creating definitional and group membership issues.[440] Conversely, individuals may see themselves excluded because of greedy or corrupt community factions or due to abuses of power.[441] A concrete example would be the issue of traditional ownership in Australia: it has been argued that by awarding traditional ownership to a small group of traditionalist Indigenous persons, the rights of a larger group of Indigenous persons to that land are in fact being denied.

Insofar as extra-group difficulties are concerned, this frequently takes the form of a fossilization of the pertinent community's culture, such as the pre-contact requirement posed by the Canadian and Australian courts for aboriginal/native title purposes.[442] There is no reason why an Indigenous culture should be any less fluid than a non-Indigenous one. However, as illustrated above, this may be as much an Indigenous insider strategy as an externally imposed legal requirement. In this regard, Hill argues that while strategic essentialism could possibly be legitimately employed to attain the

---

[439] Consider, for instance, the problem of dual leadership structures in Canada and the United States, where tribes may have both traditional leadership and state-elected band leadership in place: see e.g. LaDuke, "Secessionist View", *supra* note 320 at 12.

[440] For instance, see in the Māori context: Roger Maaka & Augie Fleras, "Ngā Tangata Whenua: Māori in Aotearoa" in Roger Maaka & Augie Fleras, *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (Dunedin, New Zealand: University of Otago Press, 2005 65 [Maaka & Fleras, "Ngā Tangata Whenua"] at 87–90.

[441] Hill, *supra* note 427 cites the example of the Tasmanian Aboriginal Centre (TAC) who has added a fourth element (the need to prove a continuous cultural connection) to the existing 3-part Commonwealth criterion for Aboriginality in their membership definition, and who, in an increasingly fundamentalist stance is refusing services to persons who do not meet their stricter criterion (at 19). Bronwyn Carlson explains the aforesaid 3-part criterion as follows: "A person can be accepted if the candidate in question is a 'person of Aboriginal or Torres Strait Islander descent and who identifies as an Aboriginal or Torres Strait Islander, and is accepted as such by the community in which he (she) lives or has lived) […] Proof of the last requirement requires a supporting letter from an Aboriginal council or organisation. Formal Confirmation of Aboriginality is important to work in identified positions and to access services designed specifically for Aboriginal people within and beyond Aboriginal organizations. It is not a trivial or sentimental certificate; it is a quasi-legal document": Bronwyn Carlson, *The Politics of Identity: Who Counts as Aboriginal Today* (Canberra, Aboriginal Studies Press, 2016) at 7–8.

[442] See *Van der Peet*, *supra* note 175 and *Mabo*, *supra* note 434, respectively.

political ends sought, it presents a very real danger of minority oppression by a dominant few, which in itself would be destabilizing to shared political consciousness.[443]

Typically Indigenist discourse invokes a close association of culture, identity and ancestral land.[444] It ultimately is one of power relations.[445] James Clifford traces the roots and present and past usages of the word "indigenous" to show that it is essentially employed to invoke "native" priority — originally, it was used with reference to roots and plants.[446] He confirms the appropriation and repetition of "colonial primitivisms"[447] as an Indigenous strategy characterized by strategic essentialism, but cautions that "Indigenous movements need to be located in shifting power relations (…), particular histories of conquest, hegemony, and inventive survival that interact with new regimes of freedom and control."[448] This strategy, which he calls "*indigènitude*",[449] reflects a rearticulation of cultural, historical and political commonalities, one that engages globalizing neoliberalism as it plays out on two different levels: the modernizing agendas of nation-states, as well as transnational capitalism:

> *Indigènitude* is less a coherent ideology than a concatenation of sources and projects. It operates at multiple scales: local traditions (kinship, language renewal, subsistence hunting, protection of sacred sites); national agendas and symbols (Hawai'ian sovereignty, Mayan politics in Guatemala, Maori mobilizations in Aotearoa/New Zealand); and transnational activism ("Red Power" from the global sixties, or today's social movements around cultural values, the environment, and identity, movements often allied with NGOs). *Indigènitude* is sustained through media-disseminated images, including a shared symbolic repertoire ("the sacred", "Mother Earth", "shamanism", "sovereignty", the wisdom of "elders", stewardship of "the land"). The images can lapse into self-stereotyping. And they express a transformative renewal of attachments to culture and place. It is difficult to know,

---

[443] Hill, *supra* note 427 at 17–18.

[444] See Clifford, *Returns*, *supra* note 81 at 20.

[445] See *ibid* at 13–15.

[446] *Ibid* at 14. In the Indigenist discourse it is used not so much to indicate cultural correspondence, but rather in reference to "comparable experiences of invasion, dispossession, resistance, and survival": *ibid* at 15.

[447] *Ibid* at 14.

[448] *Ibid* at 14–15.

[449] With reference to the "*nègritude*" movement of the 1950s: see *ibid* at 15–16.

> sometimes even for participants, how much of the performance of identity reflects deep belief, how much a tactical presentation of self.[450]

Clifford accordingly advocates "realist accounts of indigenous cultural politics" that do not seek to deny the "commodification of identity politics" but keep looking for ways in which older practices continue to exist: embodied understandings of place, manifestations of social continuity and intercultural negotiation, and oral tradition.[451] He thus proposes an approach that builds on the work of Marshall Sahlins,[452] based on cultural continuity through structural transformation.[453] But because structural transformation has been all but a smooth process over the past two centuries, he also brings articulation theory into the mix to account for other, more politically contingent processes.[454] In a nutshell, articulation theory as set out by Clifford entails that *both* the notion of primordial, traditional attachment *and* postmodern identity politics are reductive and simplistic on their own as explanation for contemporary Indigenous cultural politics — each contains a partial truth: Indigeneity is therefore "articulated".[455] This is an approach that I identify with.

2.2.3 Authenticity and Representation

When notions like *culture* and *identity* are invoked, we are apt to find *authenticity* and *the right to represent* trailing not far behind. Much as *identification* implies an internal process,[456] *authentication* is an external

---

[450] *Ibid* at 16.

[451] *Ibid* at 18.

[452] See e.g. Marshall Sahlins, *Historical and Mythical Realities: Structure in the Early History of the Sandwich Islands Kingdom* (Ann Arbor: University of Michigan Press, 1981); *Islands of History* (Chicago: University of Chicago Press).

[453] See Clifford, *Returns*, *supra* note 81 at 61.

[454] See *ibid* at 61.

[455] See *ibid* at 54.

[456] *Cf* Gaudreault-DesBiens, *Critique identitaire*, *supra* note 1 at 40: "*En somme, chaque personne devient actrice de sa propre construction identitaire; elle se mue en sujet agissant et délaisse le statut d'objet subissant que l'on appelle l'Autre. La construction identitaire devient à toutes fins pratiques une démarche personnelle de type autoréférentiel, où la personne médiatise systématiquement les 'inputs' environnementaux en fonction de sa condition particulière. Ainsi, l'individu postmoderne, replié sur sa propre condition et ne cherchant pas à porter sur ses épaules le poids d'une condition identitaire déterminée par l'histoire, est Narcisse plutôt qu'Atlas.*"

one — the community or state or society at large placing its stamp of approval, so to speak.[457] Problems can arise at all of these levels. Here, we focus on the community.

Clifford reminds us that while the public and global face of "*indigènitude*" is visible and inescapable, there also are other Indigenous realities that are not always harmonious. One of these schisms is between urban and rural communities, as they may have little in common.[458] Thus Bronwyn Carlson denounces the use of

> wedge politics to emphasize the differences between remote and urban Aboriginal people. The suggestion was that 'the real Aboriginal people' were the ones still on the land and these urban 'white' Aboriginal people were somehow fraudulently passing as 'Aboriginal' to receive benefits denied to other Australians.[459]

Her family, so she recalls, do not identify as Aboriginal based on the lightness of their skins.[460] Her dark hair and eyes thus are objects of envy, considered to be doorways to an identity concealed to them.[461] This, she terms being "suspended in the land of not belonging."[462]

Another *authenticity*-related problem is blood politics: in the United States and in Canada tribes and bands constitute their own membership rules, and blood *quantum* frequently features. This has been especially contentious in relation to the so-called "black Cherokees".[463]

When it comes to the *right to represent*, Indigenous authors also sometimes advance the fairly radical argument that only someone who has lived the Indigenous experience is by means to authentically

---

[457] See e.g. Karen I Blu, "'Where Do You Stay At?' Home Place and Community among the Lumbee" in Steven Feld & Keith H Basso, eds, *Senses of Place* (Santa Fe, New Mexico: School of American Research Press, 1996) 197 at 224: she refers here to non-Indigenous notions that "Indians who change are not 'really' Indians".

[458] See Clifford, *Returns*, *supra* note 81 at 21.

[459] Carlson, *supra* note 441 at 5.

[460] See *ibid.*

[461] See *ibid* at 5–6.

[462] *Ibid* at 6.

[463] See "Cherokee Nation Expels Descendants of Tribe's Black Slaves" (25 October 2011) *The Huffington Post*, online: <www.huffingtonpost.com/2011/08/25/cherokee-nations-expels-d_n_936930.html>.

voice their concerns.[464] This somewhat reactionary stance should be understood in the light of the stereotypical, reductive representations that they so often have borne the brunt of. Unfortunately the latter experience has not exempted Indigenous authors from themselves sometimes falling into the trap of appropriating stereotypical, reductive images of themselves in the quest of tying down the bounds of their own distinctive identities.[465] But this does not mean that every Indigenous author does so, and it certainly does not detract of the validity of the argument that "[t]o be clearly represented, Aboriginal peoples must tell their own stories about themselves."[466] It would pose as much of an epistemological obstacle[467] to discount all such representations as it would to fixate only on them to the exclusion of other sources such as the equilibrating insights of legal anthropology.

2.3 Culture, Religion and Identity

> In Canada, where our own research was conducted, First Nations and other Aboriginal youth reportedly take their own lives at rates that are said to be higher than that of any culturally identifiable group in the world, and these rates are closely matched by their aboriginal counterparts throughout the Americas and beyond. (…) How does it happen that death is the preferred alternative for so many Aboriginal youth? (…) As our research will show, whole Aboriginal communities that have succeeded, against mounting odds, in rehabilitating their badly savaged cultures, not only apparently salvage their past and harness their future but, along the way, also manage to successfully insulate their youth from the risk of suicide.[468]

---

[464] *Cf* Lenore Keeshig-Tobias: "The most we can hope for is that we are paraphrased correctly." As cited by Lischke & McNab, "Introduction", *supra* note 388 at 1.

[465] See Clifford, *Returns*, *supra* note 81 at 16.

[466] Lischke & McNab, "Introduction", *supra* note 388 at 5.

[467] On Gaston Bachelard's notion of an epistemological obstacle as a hindrance to acquiring knowledge, see Gaudreault-DesBiens, *Critique identitaire*, *supra* note 1 at 67–79.

[468] Chandler et al, *supra* note 402 at 3.

2.3.1 The Importance of Cultural Continuity for Indigenous Identity

Buggey observes as follows in respect of Canada's Indigenous peoples:

> The cosmological and mythological associations of sacred places and the continuing cultural relationships to the spirits and power of these places characterize many landscapes important to Aboriginal people in Canada. Traditional knowledge relates contemporary cultures directly to traditional places. Social structure, economic activity, language, rituals, and spiritual beliefs preserve cultural memory through intangible traditions related to place. Seeing places as markers of identity requires looking at them through the worldview and experience of the peoples associated with them.[469]

Dennis and Alice Bartels provide a good illustration of how the Newfoundland Mi'gmaq have managed to reconstruct their culture in the quest to revitalize their community language and culture.[470] The following elements have *inter alia* been implemented: the construction of a sweat lodge; teaching of the Mi'gmaq language, as well as traditional songs and dances at elementary school level; and the hosting of a number of powwows; a commercial outlet for the sale of traditional clothing and craft items.[471] These activities are said to fulfill a twin role: they both publically demonstrate Mi'gmaq ethnicity and protect Miawpukek culture from outside appropriation.[472]

In what is possibly the most graphic illustration of the importance of cultural continuity for purposes of Indigenous identity –both on the individual and collective level–[473] Chandler et al have conducted a six-year study pertaining to the impact of cultural continuity markers on adolescent

---

[469] Buggey, *supra* note 143 at 19–20.

[470] Dennis Bartels & Alice Bartels, "Mi'gmaq Lives: Aboriginal Identity in Newfoundland" in Lischke & McNab, *supra* note 16, 249.

[471] *Ibid* at 259.

[472] *Ibid.*

[473] Chandler et al, *supra* note 402 at 62. They argue that "continuity" counts among those constructs that "possess a sufficient core of common meaning (…) to allow for a measure of conceptual movement back and forth across traditional disciplinary lines" (*ibid*).

suicide rates among 196 First Nation communities (bands) of British Columbia.[474] Significantly, they found that even though the Native suicide rates are much higher than the average for the total population,[475] and the adolescent rates are nearly five times those of adolescents in general,[476] being First Nations does not in itself constitute a risk factor:[477] over half of the bands studied (111 of 196) had not experienced a single suicide over the six year-period of the study.[478] There accordingly was a "wide variability" in suicide rates among the communities observed.[479] When breaking down the data in Tribal Council[480] terms, six out of 29 groups had not suffered any adolescent suicides over the course of the study,[481] and if considered in terms of linguistic groups, five out of eleven had been suicide-free.[482] They did, however, find a strong correlation between suicidal vulnerability among bands where the youth did not feel rooted in the past, or had become disconnected from the future to the point of indifference.[483] Importantly, their data supports their initial hypothesis that "communities that have worked successfully to promote a measure of 'cultural continuity' linking their own traditional past and building collective future might also enjoy especially low levels of suicide among their youth."[484]

Suicide axiomatically constitutes the utter annihilation of identity. Chandler et al characterize adolescent suicide as "a kind of coal-miner's canary",[485] a warning system that identity formation

---

474 Collectively these bands account for 29 Tribal Councils and 16 distinct linguistic families: *ibid* at 63.

475 Estimates of the ratio vary. In the case of the study performed, it was more than three times higher: *ibid* at 69.

476 *Ibid.*

477 *Ibid.*

478 *Ibid.*

479 *Ibid* at 71.

480 The Tribal Councils represent "cultural/political alliances" that may reflect common history or language, or for political or economic reasons. Every band belongs to a Tribal Council: *ibid* at 68.

481 *Ibid* at 70.

482 *Ibid.* They also broke down the data in terms of population density and geographic location but concluded that "[T]he correlation between youth suicide and this measure of crowding was essentially zero": *ibid.*

483 *Ibid* at 74-75.

484 *Ibid* at 62.

485 *Ibid* at 64. The consistently skewed suicide rates among Indigenous (as opposed to non-Indigenous) peoples would appear to confirm this: in British Columbia, where Chandler et al performed their study, BC Vital Statistics indicated

processes are going horribly astray.[486] In Canadian Indigenous communities, identities are formed against a background of

> centuries worth of […] cultural 'untraining' and spoliation that, for many, have both rendered their own traditional norms and values irrelevant […] and severely truncated their notions of future 'feasibility', effectively dissolving what Freemen (1984) called the fabric of the self and culture.[487]

Given the effectiveness with which their pre-contact cultures have been destroyed, the authors see little point in doing "'then and now' comparisons".[488] Instead, they look toward measures intended to preserve and reconstruct the past, as well as those directed at controlling their future.[489] They therefore seek not to identify what kinds of traditional culture and knowledge still exist, but rather to what extent each of the communities has managed to survive "the sustained history of acculturative practices that threaten its very cultural existence."[490] The study in question considered six concrete, measurable marker variables of cultural continuity: (1) land claims;[491] (2) self-government;[492] (3) education;[493] (4) police and fire protection services;[494] (5) health services;[495] and

---

age-standardized mortality rates of 8.3 times higher for male and 20 times higher for female Aboriginal youth: *ibid* at 53–54. In early March 2016 Pimicikamak (Cross Lake) Cree Nation in northern Manitoba called a state of emergency following 6 suicides in less than 3 months, and 140 attempted suicides within the scope of just 2 weeks, many of them youths: see Jillian Kestler-D'Amours, "Canada and the Aboriginal Mental Health Crisis" (22 March 2016) *Al Jazeera*, online: < http://www.aljazeera.com/indepth/features/2016/03/canada-aboriginal-mental-health-crisis-160317100523366.html>.

[486] Chandler et al, "Personal Persistence", *supra* note 402 at 64.

[487] *Ibid.*

[488] *Ibid* at 65.

[489] *Ibid.*

[490] *Ibid* at 66.

[491] They distinguished between communities who had been engaged in a lengthy process to claim back their traditional lands from the federal and provincial governments and those with more recent claims, as the intention with the first two markers was to measure "a long legal struggle for dominion over one's own place and person": *ibid.*

[492] Here they looked for "the establishment of recognized institutions of self-government", a phenomenon that is much less frequently observed in Canada (particularly in western Canada) than in the United States: *ibid* at 72.

[493] The criterion was whether most of the band's children attended a band-administered school: *ibid.*

[494] They measured the degree to which these services were community-owned or controlled: *ibid.*

[495] The extent to which the community controlled these was measured, rather than their location: *ibid.*

(6) cultural facilities.[496] Their findings are significant in terms of "relative risk reduction" associated with these six markers of cultural continuity: (1) land claims: 41%; (2) self-government: 85%; (3) education: 52%; (4) police/fire: 20%; (5) health: 29%; (6) cultural facilities: 23%.[497] Calculated cumulatively, communities that had all of these markers in place had zero suicide rates, while those with no such markers peaked at 137.5 suicides per 100,000 people.[498] This analysis leads the authors to the following conclusion:

> The point that we take from these analyses is just this: The cases of youth suicides we observed were not randomly distributed across the nearly 200 separate communities that make up the First Nations population. Rather, variability in youth suicide rates can be better understood when viewed in light of the efforts these communities had made to preserve and promote their Native culture and to regain control over key aspects of their communal lives.[499]

While noting noted the key role that sacred sites play in ensuring cultural survival, Yefimenko has pointed out that they are confronted with significant obstacles in the form of socio-political, theoretical and methodological problems.[500] These include the increasing generational knowledge divide occasioned by modern lifestyle changes, as well as the fact that Indigenous communities either do not have recognized rights to the use, management and protection of their sacred sites, or these are difficult to implement.[501]

2.3.2 Indigenous Culture and Religion

The return of Blue Lake marked the first instance where a tribe had successfully lobbied the United States Congress for the return of their holy land expressly on the basis of their deep-held religious

---

[496] The criterion was whether they had a communal venue that was "specifically designed or reserved for cultural activities": *ibid* at 73.

[497] *Ibid* at 74.

[498] *Ibid.*

[499] *Ibid.* A second wave of data collection over the period 1993-2000 exhibited exactly the same pattern: *ibid.*

[500] Yefimenko, *supra* note 104 at 159, also see CAFF Technical Report No 11, *supra* note 104, c 2 at 1.

[501] *Ibid.*

beliefs vested in that land and the devastating consequences that not being able to practice their religion held for their cultural survival.[502] It illustrates well, then, the link between culture and religion.

Blue Lake[503] formed part of 48,000 acres of mountain land that was returned to the Pueblo of Taos in terms a Public Law signed into effect by President Nixon on December 15, 1970,[504] some 15 years after the first bill to that end had been defeated in Congress.[505] The Pueblo of Taos had been dispossessed of the land in question in 1906 by the Roosevelt Administration to create a federal park, Carson National Forest.[506] They had been lobbying for the land's return ever since, and a promised amount of compensation for loss of reservation land had failed to materialize.[507] The Indian Claims Commission (ICC) approved a reduced claim of 130,000 acres in 1965 but as the ICC's jurisdiction was limited to the award of monetary damages, the Pueblo of Taos has staunchly refused to accept this monetary award.[508] An Act of Congress thus became their sole potential avenue of redress.[509]

---

[502] See Frank Waters, "Foreword" in Gordon-McCutchan, *supra* note 18, vii at xiii.

[503] Known to the Taos as "Ma-wha-lo": Keegan, *supra* note 18 at 13.

[504] Pub L No 91-550 (1970). Note, however, that while Pub L No 91-550 determines that "[t]he lands held in trust pursuant to this section shall be part of the Pueblo de Taos Reservation" it contains an important proviso: it may only ever be put to "traditional" use and "shall remain forever wild and shall be maintained as a wilderness" (s 4(b)). Blue Lake as such is not mentioned in the Public Law's text.

[505] See Bodine, *supra* note 15 at 27.

[506] Proclaimed in terms of 34 Stat 3262 (1906) under the *General Land Law Revision Act* of 1891, commonly called the *Creative Act* of 1891, which provided for the setting aside of forest reserves. Gordon-McCutchan, *supra* note 18 argues that the original intent was to safeguard Blue Lake and its surrounding watershed against gold prospecting (at 9-11) and that the Taos' problems with the US Forest Service only developed around 1909, when the Forest Service supervisor rejected the exclusive use request that they had lodged in respect of the area five years earlier on the basis that it was 'immaterial' (at 12).

[507] An amount of $297,648 was awarded by the Pueblo Lands Board in 1926 as compensation for loss of the land constituting the town of Taos. The Pueblo of Taos offered to waive the compensation in return for Blue Lake and ended up with neither money nor land: see Bodine, *supra* note 15 at 26. Gordon-McCutcheon, *supra* note 18 refers to this as the Lands Board's "double-cross" (at 18). For details on the Land Board's award, see *ibid* at 27-28.

[508] Bodine, *supra* note 15 at 27. For details on the Indian Claims Commission preparation and award, see Gordon-McCutchan, *supra* note 18 at 75-83.

[509] *Ibid* 83.

The Pueblo of Taos would not settle for compensation specifically because of the sacred nature of the land in question.[510] The Taos, however, experienced grave difficulties in conveying to the Senate Subcommittee the nature of their attachment to the land in terms that the Committee could relate to.[511] Ultimately it would take five House Bills, fifteen years and an explanatory letter by a professor of anthropology, John J Bodine, read into the Senate Congressional Record in full.[512] Bodine, who had intimate knowledge of the Taos Pueblo,[513] later recalled his part in the eventually successful lobbying process as follows:

> I emphasized, first, that control of the entire region, not just Blue Lake, was vital to the correct functioning of Taos religion since Blue Lake was but one of many "shrines" in the area and all were necessary. Second, the total ecology of the area must be undisturbed because of the use made of many plants and other environmental features in religious ritual. Ecological imbalance could lead to their disappearance and hence, imperfection in religious performance. Moreover, the very presence of non-Indians, even if they observed nothing of ritual, constituted potential contamination. But perhaps the most important statement was based on an understanding of the delicate interplay of the social institutions which go to make up Taos culture. Functionally speaking, damage to one, *e.g.*, religion, would in turn lead to the weakening of others, *e.g.*, the political system. In sum, the disappearance of Taos religion could lead to the dissolution of Taos culture.[514]

---

[510] In this, they were consistent. See *ibid* at 18 in respect of the 1926 Public Lands Board award; at 27 in respect of the 1931 hearings of the Senate committee on Indian Affairs; and at 83 in respect of the 1965 Indian Claims Commission ruling.

[511] Gordon-McCutchan, *supra* note 18 at 209 refers to this as a "problem of cultural 'translation'".

[512] *Ibid* at 209.

[513] See *ibid* at 192.

[514] Bodine, *supra* note 15 at 30. Also see Gordon-McCutchan, *supra* note 18 at 58. This did not, however, mean an easy victory for the Taos. Despite the fact that they enjoyed inter-ecumenical support in their struggle (*ibid* at 90-91; 128; 133); that public opinion (*ibid* at 94; 136-137; 171), the press (*ibid* at 91-93; 96; 137-138; 171; 185; 187), and the media (*ibid* at 94) favoured them; that theirs had become the *cause célèbre* of the National Congress of American Indians (NCAI) (*ibid* at 181; 194-195); and that the House of Representatives had passed HR 471 (*ibid* at 172-193), it took a massive lobbying effort to accomplish passage of the bill in the Senate (*ibid* at 172-177; 195-205) — as well as a good dose of political expediency to have President Nixon support and ultimately sign it (*ibid* 178-181; 185-186). This is not to say that President Nixon was unsympathetic to the Indian cause — simply that he faced some tough political choices and potentially harsh consequences in making them.

2.3.3 The Identitary Role of Sacred Sites in Indigenous Culture and Religion

When it comes to the identitary role that sacred sites play in Indigenous culture and religion, the Black Hills (*Paha Sapa*) battle of the Sioux Nation is instructive. The 1980 judgment in *United States v Sioux Nation*[515] represented the culmination of a 60-year legal battle between three Sioux groups[516] and the Federal United States Government. At issue was the Black Hills of the Western Dakota Territory that the Sioux Nation held under the Fort Laramie Treaty of 1868. The US Government unilaterally took these lands from them pursuant to the 1875 Black Hills gold rush,[517] a measure now held by the Supreme Court to constitute a "taking" contrary to the Fifth Amendment of the US Constitution.[518] The Court awarded a principal compensatory amount of $17.1 million, as well as interest fixed at 5% per annum dating from 1877, a total of around $106 million at the time.[519] The Sioux's coordinating council affirmed their position two weeks later that "they would not accept money in exchange for Black Hills", for the Black Hills, "[c]alled *Paha Sapa* in Lakota […] have a sacred role in Sioux culture, and accepting money in exchange for them was seen as a rejection of that tradition."[520]

While Richmond Clow confirms the identitary role that the Black Hills claim has played in shaping the Sioux culture, his view is not based on the ancient roots of the Black Hills' holiness for the Sioux: he argues that despite the fact that "the elusive but sacred nature of the Black Hills claim to

---

[515] 448 US 337, 413 (1980) Blackmun J [*Sioux Nation*].

[516] The Teton, Yanktonai and Santee co-signers of the Fort Laramie treaty of 1868 – hereafter jointly referred to as "the Sioux Nation". The treaty was also signed by the Northern Araphoe and the Northern Cheyenne Bands, but the latter two are not relevant for purposes of the present discussion as they did not hold in common Black Hills, which is the sacred site in question. See Richmond L Clow, "A New Look at Indian Land Suits: The Sioux Nation's Black Hills Claim as a Case for Tribal Symbolism", (1983) 28:102 Part 1 Plains Anthropologist 315.

[517] The Black Hills' cession was formally approved by Congress by the Act of February 28, 1877 (US Statutes 1877): see *ibid* at 316.

[518] See Anderson et al, *supra* note 386 at 168.

[519] *Ibid* at 222; Clow, *supra* note 516 at 321. By 2009, accumulated interest had increased the amount to $900 million: Anderson et al, *ibid* at 229.

[520] Anderson et al, *supra* note 386 at 228–229.

the Sioux is of recent origin",[521] it has "attained the status of a tribal symbol to the Sioux",[522] one that has "come to symbolize a sense of identity for a contemporary tribal population."[523] In fact, his detailed historical analysis of the claim's evolution clearly demonstrates that the first Black Hills Claim (1920-1943) constituted purely of a demand for monetary compensation, with no mention of return of the land being made.[524] After the claim was rejected by the US Court of Claims in June 1942 for lack of jurisdiction, a second claim was filed with the Indian Claims Commission in 1946, where it would be the subject matter of a further 30 year legal battle.[525] Although there were two factions (traditionalist and progressive) and a leadership battle at the time of filing of the second claim, Clow argues that both groups were *ad idem* on the identity of the counsel to represent them and the monetary nature of the compensation to be claimed.[526] It was only by the 1960s that the position changed, with the traditionalists now arguing that they wanted restitution of the land based on the fact that the Sioux had never consented to the Black Hills cession of 1877 – a point of view bolstered by recent events where other tribes had managed to obtain the return of their lands.[527]

Clow alludes here to two events in particular: the return of Blue Lake to the New Mexico Pueblo of Taos, and the Maine Indian land claims.[528] The legal basis for the restitution of land in these two instances could not have been more different.

We have already contemplated the return of Blue Lake to the Taos.[529] "Maine Indian land claims" refers to the *Maine Indian Claims Settlement Act* of October 10, 1980[530] that provided for the creation

---

[521] Clow, *supra* note 516 at 315.

[522] *Ibid.*

[523] *Ibid.*

[524] *Ibid* at 319.

[525] See *ibid* at 320-322.

[526] *Ibid* at 321.

[527] *Ibid.*

[528] *Ibid.*

[529] See above at 2.3.2 ("Indigenous Culture and Religion").

[530] codified at: 25 USC § 1724 — Maine Indian Claims Settlement and Land Acquisition Funds in the United States Treasury.

of a "Maine Indian Claims Settlement Fund" of $27,000,000[531] and a "Maine Indian Land Acquisition Fund" of $54,500,000[532] respectively, primarily to the benefit of the Passamaquoddy Tribe and the Penobscot Nation. The Act was passed to give effect to a 1975 First Circuit Court declaratory order that the *Indian Nonintercourse Act* applied to the Passamaquoddy Tribe even though it was not a "federally recognized tribe"[533], thus establishing a trust relationship between the Tribe and the United States.[534]

2.4 Indigenous Paradigms

> If Aboriginal culture had an architectonic idea I would say that it was a belief that all living people, clan by clan, or lineage by lineage, were linked patrilineally with ancestral beings by inherent and imperishable bonds through territories and totems which were either the handiwork or part of the continuing being of the ancestors themselves. This belief was held in faith, not as an 'official truth' or dogma, but as part of a body of patent truth about the universe that no one in his right mind would have thought of trying to bring to the bar of proof. The faith was self-authenticating. The very existence of the clans or clan-like groups, the physical features of the countryside, the world of animate and inanimate things, were held to make the truth, as received, visible.[535]

---

[531] 25 USC § 1724 (a).

[532] 25 USC § 1724 (c).

[533] See below at 3.4.5 on federal recognition of tribes in US law.

[534] *Joint Tribal Council of the Passamaquoddy Tribe v Morton*, 388 F Supp 649 (D Me 1975) aff'd, 528 F2d 370 (1st Cir 1975).

[535] Stanner, "Aspects", *supra* note 385 at 1.

2.4.1 Indigenous Conceptions of Time

"Cultural translation is always uneven, always betrayed", says James Clifford.[536] He suggests that it is not necessary to reconcile paradoxical elements inherent in the different conceptions of time and history that Indigenous and non-indigenous people have: what is important, is that one is realistic about it, and that one does not discount Indigenous historical practices, for the capacity to make a difference historically is linked with the ability to claim a unique future.[537]

2.4.1.1 North America: Native American and First Nations Traditions

Basso points to fundamental conceptual differences in the approaches of Apache and Western historians, which result in an Apache audience experiencing western historians' work as "dense, turgid, and lacking in utility".[538] In Western thought, history progresses in a linear fashion,[539] follows a chronological sequence[540] and has a beginning and an end.[541] People and events are important.[542]

---

[536] Clifford, *Returns*, *supra* note 81 at 48. Also see Blu, *supra* note 457 at 201 on Ilongot and Apache storytelling, and the difficulties inherent in unmasking the implicit assumptions on which such storytellers insert meaningful place names into their stories as an integrative part of the story, linked with the propensity of the Western ear to skip over such lists to "the 'meatier' parts".

[537] Clifford, *Returns*, *supra* note 81 at 49.

[538] Basso, *Wisdom*, *supra* note 31 at 31–32. See in this regard the discussion at 2.4.2.1 ("A Sense of Place") below

[539] Dickason, "Many Faces", *supra* note 31 at 117.

[540] Karl Hele, "The Whirlwind of History: Parallel Nineteenth-Century Perspectives on 'Are They Savage?'" in Lischke & McNab, *supra* note 16, 149 at 149.

[541] Dickason, "Many Faces", *supra* note 31 at 118. At 120 she suggests that a better representation might be that of a spiral (still with a beginning and an end), given the fact that Western history is constantly being reinterpreted in the light of new knowledge. For a different take on Western history, see Dockstator, *supra* note 189 at 99. He proposes a Western conception of "imaginary Indians" predicated on three premises: homogeneity, imminent danger of extinction and duality (good/bad).

[542] Dickason, "Many Faces", *supra* note 31 at 118; Hele, *supra* note 540 at 150–151.

Indigenous history, to the contrary, is cyclical,[543] embedded in ritual and myth,[544] and it attaches importance to places and relationships.[545] Olive Patricia Dickason explains as follows:

> Aboriginal peoples took a different path: they traced their histories in myths that tell of their development as human beings through their relationship with the spiritual powers and with their land –place was of prime importance– as well as with all its varied forms of life. The Aboriginal conception of time as a web of recurring cycles spanning the present, past, and future, did not give importance to chronology; rather, its mythic thought focussed on how people related to the natural world that sustained them, to the human world that provided societal context, and to the spiritual world that gave meaning to it all. (…) myths were flexible in a way that eludes the literate tradition that fixes the word in print.[546]

Indigenous historians accordingly treat history as a living document, an inherent difference in approach associated with the fact that the Indigenous notion of history is a flexible one that does not know space and time limitations like Western history.[547] Because of its oral[548] and mythical nature, storytelling, rituals[549] and symbolic records such as wampum belts, petroglyphs and rock paintings play a cardinal role.[550] These symbolize rather than report, something that can pose a

---

[543] Dickason, "Many Faces", *supra* note 31 at 118. Hele, *supra* note 540 at 149 argues that "the true nature of Aboriginal perceptions of history is better explained as a whirlwind" in that a "more complex understanding of Aboriginal conceptualizations allows not only an escape from circular determinism, but gives us tools for comprehending the past within a new context" so that "the past, present, and future reside together, yet they come before and after one another as the whirlwind spins history."

[544] Dickason, "Many Faces", *supra* note 31 at 118.

[545] *Ibid.*

[546] *Ibid.*

[547] Lischke & McNab, "Introduction", *supra* note 388 at 10. Also see Hele, *supra* note 540 at 149–151; John A Grim, "Indigenous Lifeways and Knowing the World" in Philip Clayton, ed, *The Oxford Handbook of Religion and Science* (Oxford: Oxford University Press, 2009) 87 at 95–100.

[548] On the oral history movement, see Winona Wheeler, "Social Relations of Indigenous Oral Histories" in Lischke & McNab, *supra* note 16, 189 at 190ff.

[549] Dickason observes that rituals are responsible for the commemoration and perpetuation of both mythic beliefs and historic events, thereby reinforcing a sense of identity and community solidarity: "Many Faces", *supra* note 31 at 118. She points out that Western historians may have a more "removed and impersonal" approach, but that they share this common goal of identity and community solidarity: *ibid* at 119.

[550] See *ibid* at 118–119. Consider, e.g., the fact set in the famous Canadian *Delgamuukw* case, where the means of proving aboriginal title included special oral histories in the form of the *adaawk* and *kungax*, described by the trial judge as, "sacred 'official' litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House", physically represented by totem poles, crests and blankets and whose importance were highlighted by the fact that they were "repeated, performed and authenticated at important feasts", all of which indicated that they were "of

challenge for the non-Indigenous, Western-educated historian.[551] On the other hand, Western historians' increasing openness to consider (subordinate to official sources) those deriving from other fields such as Indigenous studies, anthropology, linguistics, archaeology and oral traditions has meant that it is now possible to address many gaps that were created by Western history's erstwhile rather rigid insistence on official sources.[552] Wheeler cautions in this regard against attempts to demythologize these narratives[553] and Dickason observes that storytelling techniques such as conflation[554] and the collapsing and telescoping of time are at work.[555] Documentation of such stories –for instance by recording them– is a contentious topic.[556]

2.4.1.2 Australia: Aboriginal Traditions

So important are myths and rites in the context of the Australian Aboriginal belief system that anthropologists and other religious observers initially refused to recognize it as a religious practice, placing it firmly in the category of magic.[557] Charlesworth observes that the attitude prior to the 1950s was "a melancholy mixture of neglect, condescension and misunderstanding",[558] all of which

---

integral importance to the distinctive cultures" of First Nations in question: *Delgamuukw v British Columbia* [1997] 3 SCR 1010 Lamer CJ [*Delgamuukw*] para 93–94.

551 Dickason, "Many Faces", *supra* note 31 at 119.

552 *Ibid* at 120. She points out that when it comes to cosmographies and travelogues (specifically in the Canadian context), it is crucial to bear in mind the author's "cultural baggage": *ibid* at 122.

553 Wheeler, "Social Relations", *supra* note 548 at 197–202.

554 "the blending of two events into one": Dickason, "Many Faces", *supra* note 31 at 121.

555 Whereby remote events are "brought forward" and "events that occurred in the recent past (are) put into the distant past": *ibid* at 121.

556 *Cf* Wheeler, "Social Relations", *supra* note 548 at 196: "So when historians have no relationship with the storyteller, or lack the lived experience, or have no personal investment in the histories they study, or do not understand the nature, quality, and role of Indigenous oral histories, it is no surprise that our oral histories become de-spiritualized, sanitized, amputated. The stories and teachings do not die when they are recorded on tape; rather, it is the way they are treated by historians that kills them. Undeniably, historians are most comfortable working in isolation with documents".

557 See Max Charlesworth, "Introduction", *supra* note 416 at 1–2; Max Charlesworth, "Introduction" in Max Charlesworth, ed, *Religious Business: Essays on Australian Aboriginal Spirituality* xiii [Charlesworth, "Religious Business"] at xiv.

558 Charlesworth, "Introduction", *supra* note 416 at 1.

made for a discipline characterized by negligence, distortion and trivialization.[559] A notable exception was Emile Durkheim, who famously published *Les formes élémentaires de la vie religieuse: le système totémique en Australie* on "totemism" in 1912.[560] While Durkheim treated Aboriginal religion seriously, he worked with the flawed assumption that a simple social structure has as corollary a simple religious life.[561] Aboriginal religious life is, in fact, exceptionally rich and complex.[562] It also diverges from Durkheim's central tenets in two aspects that are of key importance for purposes of grasping Aboriginal conceptions of time, space and the sacred: first, their religion does not lend itself to division into the sacred/profane dichotomy that is core to Durkheim's work;[563] second, it inverts the supposition that religion is a function of society.[564] It has, to the contrary, been argued that "the Aborigines deliberately chose a simple technology and style of economic life so that they could devote themselves to the elaboration of a rich and intricate social and religious life."[565]

---

[559] *Ibid* at 2. Also see Charlesworth, "Religious Business", *supra* note 557 at xiv–xv.

[560] See Charlesworth, "Introduction", *supra* note 416 at 2–3; Charlesworth, "Religious Business", *supra* note 557 at xiv. He defines "totemism" as: "the religious identification of a group with a species of fauna or flora or with parts of the land" (Charlesworth, "Introduction", *ibid* at 3). Also see Berndt on totems as mythic symbols: Ronald M Berndt, "A Profile of Good and Bad in Aboriginal Religion" in Charlesworth, *Religious Business*, *supra* note 557 at 24 [Berndt, "Good and Bad"] at 27.

[561] See Charlesworth, "Introduction", *supra* note 416 at 3.

[562] See Charlesworth, "Introduction", *supra* note 416 at 3–4; Charlesworth, "Religious Business", *supra* note 557 at xix.

[563] Charlesworth, "Introduction", *supra* note 416 at 4. Also see Rosemary Crumlin, "Aboriginal Spirituality: Land as Holder of Story and Myth in Recent Aboriginal Art" in Charlesworth, *Religious Business*, *supra* note 557, 94 [Crumlin, "Aboriginal Spirituality"] at 101; Berndt, "Good and Bad", *supra* note 560 at 28 and 39. Aboriginal religion, to Berndt, was and remains "a total way of life", one that is focused on physical and spiritual survival. The Aboriginal peoples of Australia therefore do not separate the transcendental from day-to-day living (at 39).

[564] Charlesworth, "Introduction", *supra* note 416 at 4. He notes that while anthropologists have been obliged to acknowledge the primacy and significance of religion in Aboriginal life, few internal perspectives have been forthcoming, a fact that he ascribes to their failure to set aside personal predispositions of religion as "an infantile illusion" or "the opium of the masses", something that has resulted in the emphasis being placed on the "rational and pragmatic aspects of Aboriginal religion in a neo-Durkheimian way" (*ibid* at 15). An additional factor relates to the fact that knowledge of secret-sacred matters is generally restricted. Even where observers are allowed to participate in secret-sacred ceremonies, publication of details thereof would entail a breach of trust with their Aboriginal confidants and would "expose them to ritual danger" (*ibid* at 15–16). See Berndt, "Good and Bad", *supra* note 560 at 37 and also see below at 2.4.3.4 ("Secrecy about the Sacred").

[565] Charlesworth, "Introduction", *supra* note 416 at 5.

It is consequently not possible to appreciate Aboriginal conceptions of time (or space) in isolation from the remainder of their religious belief systems,[566] nor without seriously challenging one's usual Western paradigms of thought.[567] I should emphasize at this point that there is no single discrete "Aboriginal belief system". Aboriginal communities have never made up a homogenous group and there is great diversity in the belief systems of the different peoples,[568] as is evidenced by the slightly ironic fact that the sole *lingua franca* in Australia is English.[569]

Despite these vastly different belief systems, they share certain transversal conceptions, notably the *Dreaming*[570] and the *Rainbow Serpent*,[571] both of core importance for present purposes. Though

---

566 See *ibid* at 6.

567 See *ibid* at 7 and 15. This would be an opportune point at which to recall the Gadamerian concepts of "prejudice" (*Vorurteil*) and "pre-understanding" (*Vorentwurf*), since I am advocating a hermeneutic approach (on the explicit understanding that "text" in the following extract can also be oral). To recap, "The methodology of the comparatist, who approaches a text with a distinct 'pre-understanding' of meaning is to confront her 'prejudices' with the 'horizon of the text' and to adjust her initial 'pre-understandings' until such time as she experiences a 'fusion of horizons'. In order to reach the eventual Heideggerian 'circle of understanding' she performs a contextual integration in terms of which the portion is related to the whole, and the whole to the portion.": extracted from 1.5.2.3.1 above ("The Cultural Approach").

568 Despite various efforts in that regard, no convenient convincing classification into groups has yet been possible. See Charlesworth, "Introduction", *supra* note 416 at 7–9. He refers to "500 Aboriginal peoples" and "200 Aboriginal languages" that, while belonging to the same linguistic family, are "as distinct as Hindi and English in the Indo-European family." (*ibid* at 7). Their belief systems, so he argues, are as distinct as their languages… (*ibid* at 9). Also see Charlesworth, "Religious Business", *supra* note 557 at xvii–xviii.

569 To be precise, the most commonly spoken language (at last in the North) appears to be North Australian Kriol, an English-based creole that is also the Aboriginal youth's mother tongue: see Deborah Bird Rose, "Ned Kelly Died for Our Sins" in Charlesworth, *Religious Business*, *supra* note 557, 103 [Rose, "Ned Kelly"] at 108 on the language identities of the Yarralin people. She notes that the older people are also fluent in a variety of Aboriginal languages.

570 See Charlesworth, "Introduction", *supra* note 416 at 9; Charlesworth, "Religious Business", *supra* note 557 at xix–xx; Diane Bell, "Aboriginal Women and the Religious Experience" in Max Charlesworth, ed, *Religious Business: Essays on Australian Aboriginal Spirituality* (Cambridge: Cambridge University Press, 1998) 46 [D Bell, "Aboriginal Women"] at 51. The various forms of the Dreaming constitute Australia's "creation" stories, that is, stories seeking to explain how and why the world is what it is. See Kenneth Maddock, "Introduction: The Foundations of Aboriginal Religious Life" in Charlesworth, *Religious Business*, *supra* note 557, 23 at 23. Also see Stanner, "Aspects", *supra* note 385 at 6–8. He points out that Aboriginal myths postulate the pre-existence of some independent entity prior to the creation as told by the various Dreaming narratives, but that they do not seek to explain this (at 8). Ronald Berndt explains that the notion of the Dreaming "provide[s] a charter for the whole of human existence" in that it establishes a triad of relationships: between people themselves; between people and nature; and between people and the divine: Berndt, "Good and Bad", *supra* note 560 at 26.

571 See Charlesworth, "Religious Business", *supra* note 557; Berndt, "Good and Bad", *supra* note 560 at 33. For a detailed discussion, see LR Hiatt, "Swallowing and Regurgitation in Australian Myth and Rite" in Charlesworth, *Religious Business*, *supra* note 557, 31. Importantly, the fact that it is a recurrent symbol among various Aboriginal peoples does not make it a universal one (*ibid* at 37). For instance, some regard the Serpent as being "unequivocally male", whilst bisexuality is

transversal, these conceptions are far from uniform:[572] these are plurivocal terms that each has several distinct yet connected senses.[573]

Insofar as the "Dreaming" or "Dreamtime" is concerned, the first (and difficult) point to grasp is that this is a Western term, originally conceived of in an effort to translate an Aboriginal spiritual reality for which no neat, translatable-into-a-Western-paradigm concept exists in the various Aboriginal cultures.[574] It has since been appropriated by Aboriginal peoples across Australia and is in common use,[575] making it an ostensibly successful instance of cross-cultural translation.[576] To illustrate: Spencer and Gillian originally employed it to translate the Aranda-speaking people's term "*alcheringa*" or "*altjiranga*", which refers to the time when the ancestor spirits formed the physical world and simultaneously determined the "Law", or the prescribed way of life.[577] It is plurivocal in that it has at least four different (though connected) meanings:

> First, it is a narrative mythical account of the foundation and shaping of the entire world by the ancestor heroes who are uncreated and eternal. **Second, "the Dreaming" refers to the embodiment of the spiritual power of the ancestor heroes in the land, in certain sites, and in species of fauna and flora, so that this power is available to people today. Indeed, one might say that for the Aboriginal his land is a kind of religious icon, since it both *represents* the power of the Dreamtime beings and also effects and transmits that power.** Third, "the Dreaming" denotes the general way of life or "Law" – moral and social precepts, ritual and ceremonial practices, etc– based upon these mythical foundations. **Fourth, "the Dreaming" may refer to the personal "way" or vocation**

---

a "recurrent feature" among other groups (*ibid* at 47). It is generally associated with fertility (at 33) and appears to frequently play an important role in male initiation rites (see e.g. *ibid* at 39–45).

572 Thus Maddock observes that in some areas the Rainbow Serpent (or its equivalent) is "a species and not an individual" – for instance the Karadjeri speak of many *bulaing* and the Dalabon of many *bolung*: see Kenneth Maddock, "The World-Creative Powers" in Charlesworth et al, *Religion*, *supra* note 152 at 95.

573 See Charlesworth, "Introduction", *supra* note 416 at 9; Maddock, "Powers", *supra* note 572 at 86.

574 See Charlesworth, "Introduction", *supra* note 416 at 9.

575 See *ibid*.

576 See the discussion below at 2.4.3.1 ("Issues of Cultural Cross-Translation") for instances where this process is less accomplished.

577 See Charlesworth, "Introduction", *supra* note 416 at 9. The phrase "*altjuranga ngambakala*" means, *inter alia*, "to see or dream eternal things". He provides two further examples: the Karadjiri people of the Kimberleys in north-western Australia employ the term "*djugurba*" for the stretch of time when the ancestor spirits shaped the physical features of the world and laid down the Law, as does the Murngin people of the Western Desert with the term "*wongar*". These terms also mean "dreaming". Also see D Bell, "Aboriginal Women", *supra* note 570 at 51.

> **that an individual Aboriginal might have** by virtue of his membership of a clan, or **by virtue of his spirit-conception relating him to particular sites**.[578]

The second point of importance is that the Dreaming exists as much in the present as in the past.[579] It therefore presupposes a flexible conception of time, in contradistinction to the linear Western notion of past-present-future.[580] Ronald Berndt speaks in this context of a "living mythology", noting that it is not so much a celebration of the past as an expression of the present, and that it is responsive to changing social conditions.[581] It therefore concerns the "sacred-past-in-the-present".[582]

Indeed, the Aboriginal conception of the past itself differs remarkably from the Western notion. Kenneth Maddock describes it as consisting of "a series of layers", to wit:

> the period within which memory runs (including the transmitted memory of the parental and perhaps grandparental generations); a period of uncertain depth about which nothing is really known (except that life is assumed to have been much the same as in the more recent time); a creative period (commonly called the "Dreamtime" or simply "the Dreaming"); and beyond that something formless and uneventful.[583]

The fourth major way in which Aboriginal notions of time differ, demonstrates that these religions are neither static nor have they been exempt of Western influence. Traditionally, the future dimension seemed to be completely absent from these religions, but in a clear instance of syncretism

---

[578] Charlesworth, "Introduction", *supra* note 416 at 9–10. The emphasis in bold is mine.

[579] See *ibid* at 10; D Bell, "Aboriginal Women", *supra* note 570 at 51. Deborah Bird Rose cites here Stanner's use of the term "everywhen" and notes that the Yarralin people distinguish between Dreaming life and ordinary life: while ordinary life follows the regular temporal sequence of beginnings and endings that we are familiar with, Dreaming exists all the time. In Dreaming geography, so she argues, time sequence is replaced by spatial locus. See Rose, "Ned Kelly", *supra* note 569 at 109–112.

[580] Elkin has described it as " not a 'horizontal' line extending back chronologically through a series of pasts, but rather a 'vertical' line in which the past underlies and is within the present.": Elkin, "Elements of Australian Aboriginal Philosophy" (1969) 40 Oceania at 93, cited by Charlesworth, "Introduction", *supra* note 416 at 10.

[581] Berndt, "Good and Bad", *supra* note 560 at 27–28.

[582] *Ibid* at 36.

[583] Maddock, "Foundations", *supra* note 570 at 24.

some such religions have started incorporating apocalyptic Christian ideas and grafting them onto traditional notions.[584]

The fact that Indigenous conceptions of the past vary from Western ones is important in the context of this thesis. Clifford points out in respect of author Deborah Bird Rose's work that "the temporal movement toward ancestors, totemic Dreaming, and the earth is not a return to the past"[585] but is rather situated in what he describes as "an expanded present", where the present simultaneously reaches back into the past and forward into the future.[586] He thus cautions that while it is "difficult to avoid [using …] concepts embedded in a Western historical ontology" we must do so carefully, knowing that they are just "bridges to something else."[587]

2.4.1.3 Aotearoa New Zealand: Māori Traditions

Hirini Matunga argues in this regard that different cultures do not have the same perception of the past and asks, "Who owns the past?"[588] In the Aotearoa New Zealand context, different understandings of time play an important role in cultural schisms insofar as sacred sites (*wahi tapu*) are concerned. Contrary to linear Western notions of time, the Maori —

> see themselves as part of a living history, a continuum which reaches back through their *whakapapa* (genealogy), *tupuna* (ancestors) and through time, to the creator. Dotted along the way are events, people, places, objects that create a whole, which is the Maori heritage and

---

[584] See Charlesworth, "Religious Business", *supra* note 557 at xix; Maddock, "Foundations", *supra* note 570 at 26. Charlesworth, "Introduction", *supra* note 416 at 18 n 10 cites in this regard the example of Christ's 1963 appearance to people in the Wonajagu territory in the form of Jinimin, advising them that Aboriginals and non-Aboriginals should share equally in the land as they were the same, but that this did not relieve Aboriginals of the duty to follow the traditional Law. For a more detailed discussion, see Peter Willis, "Riders in the Chariot: Aboriginal Conversion to Christianity in Remote Australia" in Charlesworth, *Religious Business*, *supra* note 557, 120. Rosemary Crumlin presents an interesting perspective on the art of "'two-way"' Warmun people of Turtle Creek in Western Australia, that is, they are "traditional Aboriginal but […] also Christian": see Crumlin, "Aboriginal Spirituality", *supra* note 563 at 99–101.

[585] Clifford, *Returns*, *supra* note 81 at 26.

[586] *Ibid* at 27.

[587] *Ibid.*

[588] Matunga, *supra* note 19 at 218.

> identity. Whether the events occurred last year or 300 years ago may be intrinsically irrelevant.[589]

Time also takes on a practical dimension in the context of the Māori, in that a clear process of cultural disintegration and concerted cultural reconstitution has marked their history.[590] Understanding –and, more importantly, correctly interpreting– Māori sacred site protection endeavours are therefore necessarily accompanied by an insight into and understanding of Māori and Aotearoa New Zealand history. While this statement may seem trite at first glance, I will seek to demonstrate the special significance of this disintegration/reconstitution in the Aotearoa New Zealand context in the discussion that follows.

As a starting point, I offer twelve general observations that will form the basis of the discussion to follow in the remainder of this Chapter regarding the Māori: (1) historically there was great tribal diversity – even inter-tribal hostility and outright warfare– so "the Māori" as a nation is a recent construct;[591] (2) in contrast to the other Indigenous peoples studied in this project, the concept of "the Māori" is not rejected by the Indigenous peoples in question as being a reductive colonial notion: it has been actively embraced as part of Indigenous mobilization efforts;[592] (3) this does not mean that the Māori now form a single homogenous group: there still is much internal diversity and dissent;[593] (4) such diversity may be along tribal lines, or could result from other factors such as urban migration;[594] (5) the tribe is the main unit of social organization and "encapsulates all of the important features of identity: it establishes a position in relation to others through kinship, links to ancestral land and status as tangata whenua";[595] (6) but with increased urbanization new

---

589 *Ibid* at 219.

590 This is the general picture sketched by Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440.

591 See the discussion at 2.4.3.2.3 below ("Translation and Universalization: Aotearoa New Zealand: Māori Traditions").

592 See *ibid.*

593 See *ibid.*

594 See *ibid.*

595 Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440. See the discussion at 2.4.2.1.3 below ("A Sense of Place: Aotearoa New Zealand: Māori Traditions").

tribes have formed in a 'pantribal' movement; (7) as in the other three countries, colonial assimilation efforts took the form of Christianization attempts and what I would term a 'civilization-through-education' model founded on Christian values;[596] (8) unlike the other countries' Indigenous populations, the various Māori tribes actively sought out education –because it would assist them in trading and give them an edge over other tribes– and did not resist Christianisation efforts, which they did not understand to be irreconcilable with their own traditions;[597] (9) consequently a large proportion of Māori belong to a variety of Christian denominations, but also follow traditional customs and traditions;[598] (10) the 'sacred site' conversation in Aotearoa New Zealand is therefore not couched in terms of religion, but rather customs, traditions and culture;[599] (11) although there are dissenting voices, the majority consensus appears to be that Māori customs, traditions and culture are dynamic and that it would not be desirable to revert to a 'pure' original manifestation thereof;[600] (12) interestingly, re-tribalization as a political movement involves a conception of the *iwi* as tribe that is far more stereotypical and rigid that the traditional notion of an *iwi* used to be.[601]

Insofar as Māori history is concerned, four analytically distinct periods come into play: the pre-European era; the colonial period up to 1900; a neo-colonial period up to 1970; and the post 1970 era of indigenous mobilization and post-colonialism.[602] Of particular interest for present purposes is the post 1970s period. It saw the rise of Māori political rights movements, and a conscious identification strategy with being Māori and tribal in the face of growing urbanization.[603] Maaka and Fleras ascribe the consequent re-tribalization process to the "intrusive global market economy",[604]

---

596 See the discussion at 2.4.3.3.3 below ("The Role of Ritual: Aotearoa New Zealand: Māori Traditions").

597 See *ibid.*

598 See *ibid.*

599 See *ibid.*

600 See *ibid.*

601 See *ibid.*

602 Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440 at 72.

603 See *ibid.*

604 *Ibid* at 73. Graham Harvey's vignette entitled "Forests and Landslides" provides a glimpse of the pernicious effects that "glocalization" can have for such tribes: Graham Harvey, "Performing Identity and Entertaining Guests in the

observing that "tribes have increasingly resembled corporate agents within the context of neo-tribal capitalism."[605] Tribal status has been further reinforced by the settlement of substantial tribally centered treaty claims from 1995 onwards.[606]

2.4.2 Indigenous Conceptions of Space

2.4.2.1 A Sense of Place

> As vibrantly felt as it is imagined, sense of place asserts itself at varying levels of mental and emotional intensity. Whether it is lived in memory or experienced on the spot, the strength of its impact is commensurate with the richness of its contents, with the range and diversity of symbolic associations that swim within its reach and move it on its course. In its more ordinary moments (…) sense of place stays within the sphere of its own familiar attractions, prompting individuals to dwell on themselves in terms of themselves, as private persons with private lives to ponder. But in its fuller manifestations this separatist stance gives way to thoughts of membership in social groups, of participation in activities that transcend the concerns of particular people, of close involvements by whole communities and their enduring traditions. Experienced in this way (…) sense of place may gather unto itself a potent religious force, especially if one considers the root of the word in *religare*, which is "to bind or fasten fast." Fueled by sentiments of inclusion, belonging, and connectedness to the past, sense of place roots individuals in the social and cultural soils from which they have sprung together, holding them there in the grip of a shared identity, a localized version of selfhood.[607]

Maori Diaspora" in Graham Harvey & Charles D Thompson Jr, eds, *Indigenous Diasporas and Dislocations* (Aldershot, England: Ashgate, 2005) 121 [Harvey, "Maori Diaspora"] at 122–123.

[605] *Ibid.*

[606] See Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440 at 73–74 on ways in which Government supported this "move towards tribal organisations". The most important of these came with the extension of legal identity to tribes in the form of the *Runanga Iwi Act 1990* (NZ), 125/1990.

[607] Basso, *Wisdom*, *supra* note 31 at 145-146.

Depending on the discipline concerned, the notion of "place" may be employed in the context of fields such as sociology ("topistics"[608]), psychology (" a social psychology of place"[609]), humanist geography ("space and place"[610]), anthropology[611] (various terms include: "an anthropology of landscape"[612], "space and place"[613], "a sense of place"[614] and "a sense of being in a place"[615]), applied

---

608 Thornton, *supra* note 10 at 5, citing EV Walter (1988).

609 Thornton, *supra* note 10 at xi, with reference to the work of Altman and Low (1992), as well as Stedman (2002).

610 In their exhaustive work, *Key Thinkers on Space and* Place, Hubbard and Kitchin provide the following definition of "sense of place": "A central concept in humanist geography, intended to describe the particular ways in which human beings invest their surroundings with meaning. Sense of place is seen [to] be an elusive concept […]": "Glossary" in Phil Hubbard & Rob Kitchin, eds, *Key Thinkers on Space and Place*, 2nd ed (Los Angeles: Sage, 2011) at 499. Two humanist geographers featured are David Ley, for whom "space has history as well as a location and, above all, space has a range of meanings for the communities who live there" (Paul Rodaway, "David Ley" in Hubbard & Kitchin, *ibid*, 286 at 288) and Yi-Fu Tuan, whose work focussed on the "more existential, experiential and holistic concept of the intimate connection of people and places, culture and geography, and the relationship to nature or 'geopiety'" (Paul Rodaway, "Yi-Fu Tuan" in Hubbard & Kitchin, *ibid*, 426 at 427). Also see Luise Hercus & Jane Simpson, "Indigenous Placenames: An Introduction" in Luise Hercus, Flavia Hodges & Jane Simpson, eds, *The Land is a Map: Placenames of Indigenous Origin in Australia*, 2nd ed (Canberra, ACT: ANU E Press, 2009) 1; David Wilkens, "The Concept of Place Among the Arrernte" in Hercus, Hodges & Simpson, *ibid*, 24; Luise Hercus, "Is It Really a Placename?" in Hercus, Hodges & Simpson, *ibid*, 63; Franca Tamisari, "Names and Naming: Speaking Forms into Place" in Hercus, Hodges & Simpson, *ibid*, 87; Edward Ryan, "Blown to Witewitekalk: Placenames and Cultural Landscapes in North-West Victoria" in Hercus, Hodges & Simpson, *ibid*, 157; Paul Monaghan, " 'What Name?': The Recording of Indigenous Placenames in the Western Desert of South Australia" in Hercus, Hodges & Simpson, *ibid*, 202; Rob Amery & Georgina Yambo Williams, "Reclaiming through Renaming: The Reinstatement of Kaurna Toponyms in Adelaide and the Adelaide Plains" in Hercus, Hodges & Simpson, *ibid*, 255; Committee for Geographical Names in Australasia, "Guidelines for the Recording and Use of Aboriginal and Torres Strait Islander Placenames" in Hercus, Hodges & Simpson, *ibid*, 277.

611 See e.g. Yasmine Musharbash, "Nic's Gift: Turning Ethnographic Data into Knowledge" in Yasmine Musharbash & Marcus Barber, *Ethnography & The Production of Anthropological Knowledge: Essays in Honour of Nicolas Peterson* (Canberra, ACT: ANU E Press, 2011) 1; Ian Keen, "The Language of Property: Analyses of Yolgnu Relations to Country" in Yasmine Musharbash & Marcus Barber, *Ethnography & The Production of Anthropological Knowledge: Essays in Honour of Nicolas Peterson* (Canberra, ACT: ANU E Press, 2011) 101.

612 Thornton, *supra* note 10 at xi, with reference to the work of Hirsch and O'Hanlon (1995), in addition to Bender and Winer (2001).

613 Thornton, *supra* note 10 at xi, in a nod to the work of Low and Lawrence-Zúñiga (2003).

614 Basso, *Wisdom*, *supra* note 31 at xiii. He notes, "If place-making is a way of constructing the past, a venerable means of *doing* human history, it is also a way of constructing social traditions and, in the process, personal and social identities. We *are*, in a sense, the place-worlds we imagine." (*ibid* at 7). Places accordingly represent the very epitome of social constructs (*ibid* at 74).

615 Thornton, *supra* note 10 at 6. He defines "place" as: "a framed space that is meaningful to a person or group over time" (*ibid* at 10) and further describes three component parts to this definition: space (*ibid* at 11–16), time (*ibid* at 16–22) and experience (at *ibid* 22–29).

linguistics,[616] archaeology,[617] history[618] and ecology.[619] Thus, anthropologist and archaeologist PJ Ucko argues that significant sites constitute a part of the landscape.[620] Landscapes, then, are human

---

[616] See e.g. Jim Smith, "New Insights into Gundungurra Place Naming" in Harold Koch & Luise Hercus, eds, *Aboriginal Placenames: Naming and Re-Naming the Australian Landscape* (Canberra, ACT: ANU E Press, 2009) 87; Harold Koch, "The Methodology of Reconstructing Indigenous Placenames. Australian Capital Territory and South-Eastern New South Wales" in Koch & Hercus, *supra* note 610, 115; Laura Kostanski, "Toponymic Books and the Representation of Indigenous Identities" in Koch & Hercus, *ibid*, 175; Ian Clark, "Reconstruction of Aboriginal Microtoponymy in Western and Central Victoria: Case Studies from Tower Hill, the Hopkins River, and Lake Boga" in Harold Koch & Luise Hercus, eds, *Aboriginal Placenames: Naming and Re-Naming the Australian Landscape* (Canberra, ACT: ANU E Press, 2009) 207; Ian D Clark, Luise Hercus, & Laura Kostanski, " Introduction: Indigenous and Minority Placenames — Australian and International Perspectives" in Ian D Clark, Luise Hercus, & Laura Kostanski, eds, *Indigenous and Minority Placenames: Australian and International Perspectives* (Canberra, ACT: ANU E Press, 2014) 1; David Nash, "The Diminutive Suffix *–dool* in Placenames of Central North NSW" in Clark, Hercus, & Kostanski, *ibid*, 38; Jim Smith, "Illuminating the Cave Names of Gundungurra Country" in Clark, Hercus, & Kostanski, *ibid*, 83; Murray Garde, "Doing Things with Toponyms: The Pragmatics of Placenames in Western Arnhem Land" in Clark, Hercus, & Kostanski, *ibid*, 97; Rob Amery & Vincent (Jack) Kanya Busckskin, "Pinning Down Kaurna Names: Linguistic Issues Arising in the Development of the Kaurna Place Names Database" in Clark, Hercus, & Kostanski, *ibid*, 187; Ian D Clark, "Dissonance Surrounding the Aboriginal Origin of a Selection of Placenames in Victoria, Australia: Lessons in Lexical Ambiguity" in Clark, Hercus, & Kostanski, *ibid*, 251; Kaisa Rautio Helander, "Sámi Placenames, Power Relations and Representation" in Clark, Hercus, & Kostanski, *ibid*, 325.

[617] See e.g. Ludomir R Lozny, "Place, Historical Ecology and Cultural Landscape: New Directions for Applied Archaeology" in Ludomir R Lozny, ed, *Landscapes Under Pressure: Theory and Practice of Cultural Heritage Research and Preservation*, new ed, (New York: Springer, 2008) 15; Päivi Maaranen, "Landscape Archaeology and Management of Ancient Cultural Heritage Sites: Some Notes Based on Finnish Experience" in Hannes Palang & Gary Fry, eds, *Landscape Interfaces: Cultural Heritage in Changing Landscapes* (Dordrecht: Springer, 2003) 255; Graham Fairclough, "'The Long Chain': Archaeology, Historical Landscape Characterization and Time Depth in the Landscape" in Palang & Fry, *ibid*, 295; Åsa Ferrier & Richard Cosgrove, "Aboriginal Exploitation of Toxic Nuts as a Late-Holocene Subsistence Strategy in Australia's Tropical Rainforests" in Simon G Haberle & Bruno David, eds, *Peopled Landscapes: Archaeological and Biographic Approaches to Landscapes* (Canberra, ACT: ANU E Press, 2012) 103; Lesley Head & Joachim Regnéll, "Nature, Culture and Time: Contested Landscapes Among Environmental Managers in Skåne, Southern Sweden" in Haberle & David, *ibid*, 221; Harry Lourandos et al, "An Early-Holocene Aboriginal Coastal Landscape at Cape Duquesne, Southwest Victoria, Australia" in Haberle & David, *ibid*, 65; Timothy Insoll, Benjamin W Kankpeyeng & Samuel N Nkumbaan, "Fragmentary Ancestors? Medicine, Bodies, and Personhood in a Koma Mound, Northern Ghana" in Kathryn Rountree, Christine Morris & Alan AD Peatfield, eds, *Archaeology of Spiritualties* (New York: Springer, 2012) 25; Christine S VanPool & Todd L VanPool, "Breath and Being: Contextualizing Object Persons at Paquimé, Chihuahua, Mexico" in Rountree, Morris & Peatfield, *ibid*, 87; John E Kelly & James A Brown, "In Search of Cosmic Power: Contextualizing Spiritual Journeys Between Cahokia and the St Francois Mountains" in Rountree, Morris & Peatfield, *ibid*, 107; Victor Paz, "Accessing Past Mythologies through Material Culture and the Landscape in the Philippines" in Rountree, Morris & Peatfield, *ibid*, 133; Tõnno Jonuks, "From Holy Hiis to Sacred Stone: Diverse and Dynamic Meanings of Estonian Holy Sites" in Rountree, Morris & Peatfield, *ibid*, 163; Lucy Goodison, "'Nature', the Minoans and Embodied Spiritualities" in Rountree, Morris & Peatfield, *ibid*, 207; Alan AD Peatfield & Christine Morris, "Dynamic Spirituality on Minoan Peak Sanctuaries" in Rountree, Morris & Peatfield, *ibid*, 227; Anna Simandiraki-Grimshaw, "Dusk at the Palace: Exploring Minoan Spiritualities" in Rountree, Morris & Peatfield, *ibid*, 247.

[618] See e.g. Ann McGrath, "Deep Histories in Time, or Crossing the Great Divide?" in Ann McGrath & Mary Anne Jebb, eds, *Long History, Deep Time: Deepening Histories of Place* (Canberra, ACT: ANU E Press, 2015) 1; Diana James, "Tjukurpa Time" in McGrath & Jebb, *ibid*, 33; Rob Paton, "The Mutability of Time and Space as a Means of Healing

constructs that are constituted either through physical human actions or by "human ascription to it of mythological creation".[621] Stuart Kirsch thus argues that it causes a sense of "spatial disorientation" for Indigenous peoples where landscape transformation occasions a loss of place that used to anchor their memories.[622] It is clear that Clifford considers such "landedness, or the power of place",[623] as he terms it, to be a fundamental characteristic of Indigenous identification — one that manifests in different ways according to lifestyle, habitat and urbanity[624] and that may be of differing degrees of intensity.[625] At the base, though, it is there, even among those "exiled from ancestral places":[626] "a yearning, an active memory of land."[627]

History in an Australian Aboriginal Community" in McGrath & Jebb, *ibid*, 67; Jeanine Leane, "Historyless People" in McGrath & Jebb, *ibid*, 151; Harry Allen, "The Past in the Present" in McGrath & Jebb, *ibid*, 171.

619 See e.g. Fikret Berkes, *Sacred Ecology: Traditional Ecological Knowledge and Resource Management* (Philadelphia, PA: Taylor & Francis, 1999); Roy C Dudgeon & Fikret Berkes, "Local Understandings of the Land: Traditional Ecological Knowledge and Indigenous Knowledge" in Helaine Selin, ed, *Nature Across Cultures: Views of Nature and the Environment in Non-Western Cultures* (Dordrecht: Springer, 2003) 75; Richard Stoffle, Rebecca Toupal & Nieves Zedeño, "Landscape, Nature, and Culture: A Diachronic Model of Human-Nature Adaptations" in Selin, *ibid*, 97; Mary Evelyn Tucker, "Worldviews and Ecology" in Selin, *ibid*, 115; Graham Parkes, "Winds, Waters, and Earth Energies: *Fengshui* and Awareness of Place" in Selin, *ibid*, 185; JL Kohen, "Knowing Country: Indigenous Australians and the Land" in Selin, *ibid*, 229; Annie L Booth, "We Are the Land: Native American Views of Nature" in Selin, *ibid*, 329; Marcus Barber, "'Nothing Ever Changes': Historical Ecology, Causality and Climate Change in Arnhem Land, Australia" in Yasmine Musharbash & Marcus Barber, *Ethnography & The Production of Anthropological Knowledge: Essays in Honour of Nicolas Peterson* (Canberra, ACT: ANU E Press, 2011) 89; Hannes Palang & Gary Fry, "Landscape Interfaces" in Palang & Fry, *supra* note 617, 1; Denis Cosgrove, "Landscape: Ecology and Semiosis" in Palang & Fry, *ibid*, 15; Margot Cantwell & Chad W Adams, "An Aboriginal Planning Initiative: Sacred Knowledge and Landscape Suitability Analysis" in Palang & Fry, *ibid*, 163.

620 Ucko, *supra* note 20 at xviii.

621 *Ibid.*

622 Kirsch, *supra* note 320 at 187. The specific context in which he writes is the reaction of Papua New Guinea's Yonggom's people to environmental impacts occasioned by the Ok Tedi copper and gold mine.

623 Clifford, *Returns*, *supra* note 81 at 63.

624 Clifford questions the Manichaean presumption that Indigenous people necessarily fall into a traditional or a modernist camp, arguing that they should not be forced to choose (*ibid* at 53). He gives the example of the Pacific Islanders and asks, given that they used to inhabit vast spaces with their canoes: why is it any different if they now do so with airplanes and the web? See *ibid* at 56.

625 *Ibid* at 63.

626 *Ibid.*

627 *Ibid.*

2.4.2.1.1 North America: Native American and First Nations Traditions

It is to that "active memory of the land" that Peter Nabokov alludes when he asks, "even if some religious traditions are self-conscious re-creations by contemporary mixed-bloods yearning to repair and repatriate their tattered pasts, how could any self-respecting American Indian not begin with the ground beneath his feet?"[628] He argues that when it comes to sacred sites, conversations are loaded, and sacred landscapes, in the New World as in the Old, are both culturally constructed and historically sensitive.[629] They also are reflective of the political and cultural contexts in which they are situated.[630] Finally –and importantly– Native American history is mostly interpreted through mythical thought, which shapes it in accordance with both culture and situation.[631]

Basso has sketched important links between the way in which the Western Apache conceptualize places and their own identity:

> Whenever Apaches describe the land (…) they take steps to constitute it in relation to themselves. Which is simply to observe that in acts of speech, mundane and otherwise, Apache fashion images and understandings of the land that are accepted as credible accounts of what it actually is, why it is significant, and how it impinges on the daily lives of men and women.[632]

Having subsequently constructed an argument that this is an auto-referential relationship (Apaches' conceptions of land influence their conceptions of themselves, and *vice versa*) he argues that it gives cultural meaning to and thus is at the base of the community's social life.[633]

---

[628] Peter Nabokov, *A Forest of Time: American Indian Ways of History* (Cambridge: Cambridge University Press, 2002) [Nabokov, *Forest of Time*] at 147.

[629] *Ibid* at 146–147.

[630] *Ibid* at 147.

[631] *Ibid.*

[632] Basso, *Wisdom*, *supra* note 31 at 40.

[633] *Ibid* at 66. He argues that a "cultural construction of the environment" is called for, one that of necessity must be capable of construing metaphors (at 68). This means that "[i]f anthropology stands to benefit from an approach to cultural ecology that attends more closely to the symbolic forms with which human environments are perceived and

In the same way, Thornton has observed that social and physical geography are intertwined in the Tlingit sense of place.[634] The Tlingit have a special term for places "that take on sacred status as possessions: *at.ó* (literally 'owned things')."[635] Narratives of place are transmitted orally from one generation to the next, which means that physical places are central to their oral tradition.[636] Consequently, physical loss of such places potentially holds serious impacts for them culturally[637] and spiritually[638] speaking. Basso detects the same dangers in the context of the Western Apache: he argues that "geographical features have served the people for centuries as indispensable mnemonic pegs on which to hang the moral teachings of their history."[639]

---

rendered significant, so, too, there is a need for an expanded view of linguistic competence in which beliefs about the world occupy a central place." (at 69).

634 Thornton, *supra* note 10 at xi.

635 *Ibid* at 29. In addition to geographical places, *at.óow* comprise physical and symbolic resources that the Tlingit "identify with as emblematic (and chronotopic) of their being and relation to specific environs.": *ibid.*

636 *Ibid* at 30. As is the case with the Western Apache, the Tlingit are extremely precise about physical locations, while dates are often imprecise and generally regarded as unimportant: *ibid.* On the Western Apache, see Basso, *Wisdom*, *supra* note 31 at 31 and at 51: "while Apache storytellers agree that historical tales are 'about' the events recounted in the tales, they also emphasize that the tales are 'about' the sites at which the events take place." A story thus is not worth telling if it does not feature a place (*ibid* at 87). Cf Mulk *supra* note 152 at 122 on Saami pre-Christian religion: "Both religion and religious practices were deeply rooted in space, not, as with Christianity, in linear time."

637 Thornton, *supra* note 10 at 191. He also refers here to the problems that the Indigenous peoples of Australia have experienced in this context. These impacts often take the form of health crises, especially in the case of communities who "have been *forcibly* removed from their land and forbidden to speak their languages, structure their social life, harvest their foods, and practice their rituals." (*ibid* at 192). See above at 2.3.1 ("The Importance of Cultural Continuity for Indigenous Identity") for a discussion on suicide among Canada's West Coast First Nations. Thornton records with reference to suicidal Innu youth in the Labrador community of Davis Inlet that displacement has resulted in "dependency, despondency, and despair." (*ibid* at 193). Also see Theodoratus & LaPena, *supra* note 114 at 21; Mohs, *supra* note 13 at 187 on the social problems (including suicide, poverty and unemployment) that beset the Sto:lo First Nations of the Fraser Valley.

638 Carmichael, Hubert & Reeves, *supra* note 14 at 5. They point out that for both Native Americans and Australian Aboriginal groups land is rendered sacred by mythical past events.

639 Basso, *Wisdom*, *supra* note 31 at 62. Also see *ibid* at 63–63 where he cites from the published works of modern Native American writers such as Leslie M Silko (pueblo of Laguna in New Mexico) and N Scott Momaday (Kiowa) and refers to others such as "Vine Deloria, Jr (Standing Rock Sioux), Simon Ortiz (Acoma), Joy Harjo (Creek), and the cultural anthropologist Alfonso Ortiz (San Juan Pueblo [who] have [all] written with skill and insight about the moral dimensions of Native American conceptions of the land." Perhaps the most vivid example here is the experience of the Arctic Nenets people, who had no written language: the destruction of their sacred sites –and the decimation of their shamans– wrought devastation on their historic memory and culture: See Ovsyannikov & Terebikhin, *supra* note 152 at 59. Their survival as a community is credited to the fact that "traditional values and structures re-emerged, and because of the preservation of those cultural monuments which by some miracle had survived, and still retain their sacred importance." (*ibid* at 60). The Saami appear to have had a similar experience under the "[p]ersistent and intense

If we consider the example of Tlingit sacred places, Thornton emphasizes that they are rendered sacred through a combination of the Tlingits' interaction with the land and "some innate 'power' of place"[640] and he argues that this renders them "fundamental components of identity and (…) worthy of protection, stewardship and honor".[641] However, it should not be interpreted to mean that all Tlingit experience place in the same way: indeed he cautions that individual place experience is necessarily unique and therefore "to speak about a Tlingit's sense of being in relation to a place is not to suggest a monolithic image tied to a single geographic landscape."[642] This is an important point, for the dangers of essentialization and reductionism seem omnipresent insofar as perceptions of and studies relating to Indigenous peoples are concerned.[643] Thus Karen Blu cautions against simplistic understandings of space.[644]

In the context of sacred sites, I find particular resonance in Nabokov's concept of "sacred geography.[645] A study of the sacred geography adhered to by an Indigenous community provides a good indication of the way in which they conceive of and organize their natural world.[646] Thus "the spiritual significance of landscape and place has less to do with geography and geology *per se* than

---

Christian missionary activity" that started in the 17th century and comprised "the destruction of items connected with the Saami religion, such as burning of the shamans' drums", which leaves them with "remnants of the old Saami religion" in the form of knowledge of some sacred sites, burial places, myths and legends — "kept alive by their connection to the landscape": Mulk *supra* note 152 at 122.

640 Thornton, *supra* note 10 at 170. This interactive aspect is dealt with in more detail below at 2.4.2.2 ("The Link Between Land and Religion").

641 Thornton, *supra* note 10 at 170. This is of importance in the context of 2.3.1 ("The Importance of Cultural Continuity for Indigenous Identity" below.

642 Thornton, *supra* note 10 at 6.

643 See below at 2.2.1 ("Romanticization, Reductionism and Essentialization").

644 She states, "Too many studies of American Indians have assumed that neatly bounded, geographically distinct peoples with similarly distinctive cultures inhabit clearly definable territories": Blu, *supra* note 457 at 198. This takes on a further dimension when one considers the checkerboard nature of "Indian country" due to the United States allotment legislation — see below at 5.5.3 ("Tribal, Federal or Private Land")

645 Peter Nabokov, "Unto These Mountains: Toward the Study of Sacred Geography" 10 *New Scholar* 479 [Nabokov, "Unto These Mountains"] 479.

646 Nicholas J Saunders, "At the Mouth of the Obsidian Cave: Deity and Place in Aztec Religion" in Carmichael et al, *supra* note 13, 172 at 172.

with the architecture of religious thought."[647] For instance, to the Sto:lo (Coast Salish) First Nations, their tradition is embodied by the river and its resources and their past, present and future heritage are closely associated with the river.[648] Consequently most of their sacred sites are linked to it.[649]

Theodoratus and LaPena offer a good starting point when it comes to the "powerful places" of the Native American peoples, alluded to in 2.4.2.1 above:

> At the centre of the Native American religious system is the affirmation that spiritual power is infused throughout the environment in general, as well as at interconnected special places, and that knowledgeable people are participants in that power. Thus some special locations are imbued with benevolent sacred qualities which assist people in having good health, good luck and energy. Other locations are imbued with malevolent forces capable of aiding in injurious acts.[650]

This is not to say that all Native American cosmologies are similar in scope. For instance, while the landscape as a whole has a sacred dimension for the Wintu,[651] the Mescalero Apache's belief in discrete sacred sites is a "fundamental"[652] of their traditions.

---

[647] Saunders, *supra* note 646 at 173.

[648] Mohs, *supra* note 13 at 188.

[649] *Ibid* at 188 and 191.

[650] Theodoratus & LaPena, *supra* note 114 at 22. Mulk *supra* note 152 at 122 records that natural powers were not considered to be malevolent by the pre-Christian Saami, but that they "could be dangerous if one did not maintain a good relationship with them."

[651] Theodoratus & LaPena, *supra* note 114 at 22.

[652] Carmichael, *supra* note 119 at 89.

2.4.2.1.2 Australia: Aboriginal Traditions

> Australian Aboriginal religion is a nontheistic religion based on the sacred and sacramental character of the land, and it requires a considerable effort of mind and imagination for a European to come to grips with it.[653]

While the Dreaming occupies a key position in the Aboriginal conception of time (as discussed at 2.4.1.2 above), it is also core to their sense of place, especially insofar as sacred sites are concerned: where land, sites, objects and activities are connected with the Dreaming they are deemed to incarnate the spiritual power of the Dreaming and therefore they are considered to be sacred.[654] This has two important implications: first, knowledge about them may be restricted to certain groups (e.g. "men's business", "women's business"), denoting their secret character ("secret-sacred"), and, second, such sites are regarded as being "set apart" and potentially dangerous to those who do not have access rights.[655]

Nancy Munn writes of the Central Desert Pitjantjatjara that the landowners' rights (mostly exercised by men) involve control of ancestral transformations,[656] as well as associated songs and rituals.[657] The ancestral transformations accordingly constitute a specific group of people's homeland, with the country containing both sacred stones lodged in caves and crevices and sacred boards that have been marked by designs, as well as ordinary stones that may constitute ancestral transformations.[658] No-one may interfere with these without the landowners' consent.[659] Significantly, the homeland's importance is not economic in nature but it is rather "a symbol of stability, a spatial and temporal

---

[653] Charlesworth, "Religion", *supra* note 416 at 7.

[654] See Charlesworth, "Religion", *supra* note 416 at 10; Berndt, *supra* note 560 at 27.

[655] See Charlesworth, "Religion", *supra* note 416 at 11. The "secret-sacred" aspect is dealt with below at 2.4.3.4 ("Secrecy about the Sacred").

[656] Ancestral transformations (*burgari*) entail ancestors changing from mobile beings to permanent landscape features and thus becoming part of the country: see Nancy D Munn, "The Transformation of Subjects into Objects in Walbiri and Pitjantjatjara Myth" in Charlesworth et al, *Religion*, *supra* note 152, 57 at 66.

[657] *Ibid* at 63.

[658] See *ibid.*

[659] See *ibid.*

anchorage conceptualized in terms of specific place-names and the originating ancestors bound within it."[660]

Indeed, Munn's description of the Pitjantjatjara's sense of place invokes Nabokov's concept of *sacred geography*:

> In the imaginations of both Walbiri and Pitjantjatjara, the country consists of a network of places joined by various ancestral routes, as well as by routes over which Aborigines travel in hunting and g[a]thering. The spatial order is parcelled out into discrete sites consisting of defined topographical features, and having identifying names: the sites are owned by different patrilineal groups and in this sense geographical space is socially segmented. This world of forms (a visually defined, named and socially segmented order) laid down by ancestral beings, mediates the relationship between the untrammelled creativity of ancestors and the dependent receptivity of living human beings who care for the ancestral products.[661]

Diane Bell argues that Aboriginal women have been especially hard-hit by the alienation of their land, since it disempowered them as foragers and marginalized them politically in the male-dominated "frontier society" at the same time as depriving them of the identitary value of their land.[662]

2.4.2.1.3 Aotearoa New Zealand: Māori Traditions

The Māori identify themselves as "*Ngā Tangata Whenua Aotearoa"*, or "original occupants of New Zealand".[663] Significantly, "*tangata whenua*" means "people of the land", "people of this place", "Indigenous" or "local".[664] The word "*whenua*" itself bears the twin meaning of "land" or "placenta" — fitting, since "Each buried placenta intimately and immediately mediates between a family

---

[660] See *ibid.*

[661] *Ibid* at 65.

[662] See D Bell, "Aboriginal Women", *supra* note 570 at 65.

[663] Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440 at 66.

[664] See Harvey, Māori Diaspora, *supra* note 604 at 122, 126.

member's human and ecological location, their family and their land. (…) People whose placentas are buried in a particular locality are part of that place, that land, that ecology."[665]

An understanding of the polemic surrounding the *Treaty of Waitangi* is foundational to understanding the Māori sense of place. In a nutshell, the *Treaty* has three versions: English text, Māori text, and English translation of the Māori text.[666] There are two main problems for present purposes: first, neither version of the text is more authoritative than the other; second, the texts vary as to what the parties meant to transfer.[667] On the English version, the Māori transferred "all the rights and powers of **Sovereignty**" to the English Crown and retained "full, exclusive, and undisturbed **possession** of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually **possess** so long as it is their wish and desire to retain same in their **possession**";[668] on the English translation of the Māori version, the Māori transferred "complete **government** [*kāwanatanga*] over their land" to the English Crown and retained "the unqualified **exercise of their chieftainship** [*rangatiratanga*] over their lands, villages and all their treasures [*taonga*]."[669]

Maaka and Fleras argue that the question of the transfer of sovereignty depends on whether the *Treaty* is interpreted to constitute a political contract or a political compact.[670] In the former case it is conceivable that sovereignty was transferred as an act of political expediency that benefitted both

---

[665] *Ibid* at 121–122. As noted in 2.4.1.3 above ("Indigenous Conceptions of Time: Aotearoa New Zealand: Māori Traditions"), the tribe, which forms the main Māori unit of social organization, is linked to ancestral land and establishes a community's status as *tangata whenua*. See *ibid* at 80.

[666] See *ibid* at 69–70 and Roger Maaka & Augie Fleras, "Sovereignty Lost, Tino Rangatiratanga Reclaimed, Self-Determination Secured, Partnership Forged?" in Roger Maaka & Augie Fleras, *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (Dunedin, New Zealand: University of Otago Press, 2005) 98 [Maaka & Fleras, "Sovereignty Lost"] at 107.

[667] See Maaka & Fleras, "Sovereignty Lost", *supra* note 666 at 107.

[668] See *ibid*.

[669] English language translation of the Māori version by Sir Hugh Kawharu. See *ibid* at 109.

[670] They observe that even the English version "more closely resembled North American treaties of friendship, forging an alliance between allies against a common foe": *ibid* at 106.

parties;[671] in the latter scenario it would not have been possible to transfer sovereignty, as "sovereignty could not be transferred under a political covenant".[672]

The above discrepancy touches on a number of dimensions of the present research: questions such as who is entitled to control disputed land, and who is entitled to control any natural resources found on that land. A question also arises in my mind as to the special protections that the Māori clearly sought to extend to their *taonga* — a concept that encompasses *inter alia* sacred sites.

Perhaps the strongest evidence of the importance that the Māori attached to their land is to be found in the so-called "Māori Wars" of the 1860s, which were "fought over land as well as mana and sovereignty".[673] They have never ceased protesting these losses that saw Māori land ownership shrink to less than 6% of New Zealand's territory by the 1930s:[674] the Māori Wars were succeeded by a guerrilla warfare phase, by appeals to both Parliament and the Courts for assistance in defending their property and customary rights, and finally by political activism in the 1970s that took such forms as the King Movement, Rua Kenana and the Young Māori Party.[675] Here, again, loss of land was a key issue motivating their self-determination aspirations.[676] In 1975 the Waitangi Tribunal was created to address alleged breaches of the *Treaty of Waitangi*.[677] Whereas early cases before it were mostly concerned with historical grievances relating to instances where the Crown was alleged to have wronged the Māori, the Tribunal now increasingly addresses natural resource claims.[678]

---

[671] *Ibid* at 108. Even if this were the case, the Crown "eventually took more than it may have been entitled to", so they argue, for it proceeded to incorporate even the tribes who had not signed the *Treaty* into its governance: *ibid* at 111.

[672] *Ibid* at 109.

[673] *Ibid* at 113. "*Mana*" is a hard-to-translate concept that refers to various forms of authority, or prestige and power.

[674] See *ibid* at 119. They argue that the land losses, in conjunction with the Māori population decline, "had a destabilising effect of Māori culture and society": *ibid* at 118.

[675] See *ibid* at 118–119.

[676] See *ibid* at 124–125.

[677] On the Waitangi Tribunal, see generally *ibid* at 146–153.

[678] See *ibid* at 149.

2.4.2.2 The Link Between Land and Religion

The religions of many Indigenous peoples are thus closely bonded to the land.[679] The notion that there is a link between tribal religions and the land should not be taken as a gross generalization: the distinction lies in the details of why such a link exists for the tribe under consideration and what its religious practices in respect of that site entail.[680]

Followers of cosmotheistic religions ascribe a "human-like life force"[681] to the natural world, considering its various parts –animals, plants, rocks– to be "conscious and wilful",[682] and therefore to be dealt with in a respectful manner.[683]

2.4.2.2.1 North America: Native American and First Nations Traditions

Nabokov confirms that mythical thought worked to sanctify much of the landscape inhabited by Native American peoples.[684] One telling example is the fact that prominent environmental landmarks have become their spiritual points of reference.[685] He refers here to natural landmarks such as Blue Lake for the Taos people, and four sacred peaks in Arizona for the Navajo.[686]

He also notes that there was a paradigmatic clash at the spiritual level with the arrival of the settlers: the Native Americans were not opposed to Christianity at the outset, for they did not consider that one form of spiritual practice excluded the possibility of practising another; the Christians were

---

679 Theodoratus & LaPena, *supra* note 114 at 21 on the Wintu; Mulk *supra* note 152 at 127 on the pre-Christian Saami; Matunga, *supra* note 19 at 220 on the Maori; Buggey, *supra* note 143 at 22 on the Indigenous Peoples of Canada. The latter authors observe that "land" is understood broadly to include water, sky and earth (*ibid*).

680 Nabokov, "Unto These Mountains, *supra* note 645 at 486.

681 Carmichael, Hubert & Reeves, *supra* note 14 at 6.

682 *Ibid.*

683 *Ibid.*

684 Peter Nabokov, "Bearers of the Cross" in Nabokov, *Native American Testimony*, *supra* note 11, 49 [Nabokov, "Bearers"] at 50.

685 *Ibid.*

686 *Ibid.*

horrified by the pagan worship that they encountered.[687] LaDuke confirms this,[688] and adds another layer of paradigmatic complexity: broadly defined, Judeo-Christian faiths are commemorative, while Native American spiritual practices are affirmation-based.[689] This conceptual schism goes some way towards explaining the ineffectiveness of the United States sacred sites-related legislation. For instance, affirmation-based spiritual practices are centered on ceremonial practice, for purposes of which particular herbs and natural materials are required — the *American Indian Religious Freedom Act* (among its other deficits) does not make provision for the harvesting of these.[690] A third paradigmatic difference relates to the treatment of natural resources: Judeo-Christian society treats these as being exploitable[691] and has an "immense appetite" for their consumption;[692] in terms of the Native American paradigm these form part of the land, and what goes for the land goes for the resources that it harbours.[693] It appears to me that a fourth distinction would be apposite: Judeo-Christian religion is "self-contained" and "self-sufficient" — independent, in a way that Native American traditions are absolutely not: thus Buggey notes in the context of the Indigenous peoples of Canada —

> The interrelationships of people, animals, and spirits –as well as kinship and language attachments to place– are spiritual, mental, and emotional aspects of living with a particular environment. (…) The inter-connectedness of all aspects of human life with the living landscape –in social and spiritual relationships as much as in harvesting– continuously through time roots Aboriginal cultures in the land.[694]

---

[687] *Ibid* at 51.

[688] See Winona LaDuke, "Recovering the Sacred: The Power of Naming and Claiming" (Toronto: Between the Lines, 2005) [LaDuke, *Sacred*] at 11–12.

[689] *Ibid* at 13.

[690] See *ibid* at 13.

[691] See *supra* note 33 — the text and the sources cited.

[692] LaDuke, *Sacred*, *supra* note 688 at 14.

[693] *Ibid* at 12.

[694] Buggey, *supra* note 143 at 20. Also see LaDuke, *Sacred*, *supra* note 688 at 12 on Native American spiritual traditions, confirming that it is not just a belief system, but an integral way of life.

Gordon-McCutchan provides a good illustration of land that simultaneously fulfills a spiritual and a profane purpose.[695] With reference to the 50,000 acres area around the Taos Pueblo's most holy site, Blue Lake, he explains that the watershed served for both drinking and irrigation purposes while it also formed the core of their worship, spiritually speaking.[696] He also clarifies the symbiotic relationship between the Taos and their land, outlining how irreconcilable philosophical differences about land and its uses lay at the root of a 65-year wrangle between the United States Forest Service and the Taos Pueblo in respect of the area in question:

> Central to Forest Service Policy is the concept of "multiple use." According to this principle, the forests under its jurisdiction are for recreational purposes, for the production of resources, and for grazing. In providing for these uses, the Forest Service has the authority to stock lakes with fish, to cut roads and trails, to authorize mineral extraction and timbering, to manipulate vegetation to improve water yield, and to issue grazing permits. Central to the Taos Indians' way of life is the belief that in the beginning Mother Nature imparted to their ancestors proper and perpetual modes of behavior. Departure from these established patterns is considered sacrilegious. A key tenet of the ancestors was the interrelationship of the people and the land. The people, through their prayers and religious ceremonies, give homage to and fructify the land. The land, in turn, nourishes and sustains the people. Land and people, therefore, are joined in a sacred, symbiotic bond; and any alteration of the land directly threatens this bond. For this reason, the Indians look upon preservation of their wilderness as a sacred obligation. It is easy to understand how this belief came inevitably into conflict with the Forest Service policy of multiple use, which permitted timbering, cutting roads, and manipulating the vegetation.[697]

2.4.2.2.2 Australia: Aboriginal Traditions

> I would suggest that the [notion of ancestral] transformation asserts the inalienable rights of ancestral landowners (they are contained within the country) at the same time that it expresses the transmission of control from the ancestors to the heirs (the object world or country is disengaged from the ancestor's mortal person, and the latter disappears).
>
> In this view, the ancestral acts of transformation expressed in mythic form the devolution of rights over the country which occurs at death. The type

---

[695] Also see Mohs, *supra* note 13 at 188 on the role that the river plays in Sto:lo tradition.

[696] Gordon-McCutchan, *supra* note 18 at 9.

[697] *Ibid* at 12-13.

> of inheritance they epitomize is one through which the deceased and the heirs are perpetually bound together within a vital social relationship. (…)
>
> Because of the nature of this "inheritance", alienation of any part of the country from the rightful heirs is a violation of the essence of the moral order. It is a *desecration*, not merely a theft.[698]

Given that the Australian Aboriginal religious traditions are land-based rather than theistic,[699] the link between land and religion is a vital one.[700] In terms of the broad narrative, the ancestors shaped the land during the Dreamtime[701] and laid down the traditional Law for the various Aboriginal peoples who also inherited the land, becoming the traditional landowners thereof.[702] In terms of the Law an unbreakable bond forms between the ancestors, the land in question and the rightful heirs thereof.[703] This bond entails that the land can never be alienated by the heirs or by another[704] — it will even withstand attempted spoliation by act of war.[705] This explains why the doctrine of discovery has been described as being "simply inconceivable" to the Aboriginal peoples of Australia. The resultant dispossession of Aboriginal lands has been at the root of sustained clashes between Aboriginal peoples and white pastoralists and miners[706] and has been classed as a

---

[698] Munn, "Transformation", *supra* note 656 at 68.

[699] See Charlesworth, "Religion", *supra* note 416 at 7. He explains that these are founded on the "sacred and sacramental character of the land." Also see Charlesworth, "Religious Business", *supra* note 557 at xix–xx, where he refers to fellow author Tony Swain's concept of Aboriginal religions as being "'geosophical' in that spiritual power and wisdom is linked to places" (at xx).

[700] Willis, "Chariot", *supra* note 584 at 126–127.

[701] In doing so, they "left tangible expressions of themselves throughout the countryside", which places "contain something of their spiritual essence" and accordingly become *loci* for ritual action: Berndt, "Good and Bad" *supra* note 560 at 27.

[702] See Willis, "Chariot", *supra* note 584 at 127.

[703] See Munn, "Transformation", *supra* note 656 at 62; Rose, "Ned Kelly", *supra* note 569 at 110; Stanner, "Aspects", *supra* note 385 at 2, 9. However, Stanner cautions that to speak here of the land "owning" the Aboriginal people in question –as some are apt to do– amounts to a return to animism (*ibid*, at 21).

[704] See Munn, "Transformation", *supra* note 656 at 62.

[705] See Warner, *supra* note 152 at 126.

[706] Charlesworth, "Religious Business", *supra* note 557 at xxiii. Also see Berndt, "Good and Bad", *supra* note 560 at 41–42.

"deliberate and thoughtless erosion of the Aborigines' emotional and affective life, an erosion which was even more far-reaching[707] significant to their welfare than the senseless killings and maltreatment which have marked the greater part of their contact with Europeans."

The ancestors accordingly play a key role in the triad ancestors-land-heirs.[708] Munn has illustrated the importance of transformation and ritual in this regard in the myths of the Walbiri and Pitjantjatjara peoples of the Central and Western deserts: essentially ancestral acts of transformation make the heirs into the inalienable owners of the land,[709] while rituals such as their pertinent initiation rituals enable their sons to enter into the intergenerational chain of transmission where each man first is an *heir* and then a *donor* (and thus "ancestor-like").[710] When he dies, he relinquishes his claim to the land and it becomes the duty of his patrilineal descendants and heirs to take care of it and to guard over the ancestral relics.[711]

Crucially, individual consciousness and identity are anchored in land.[712] Munn identifies two such identity formants: the individual's ancestral land (Pitjantjatjara and Walbiri people)[713] and his birthplace (Pitjantjatjara)[714] or presumed place of conception (Walbiri people).[715] Insofar as the

---

[707] Berndt, "Good and Bad" *supra* note 560 at 39.

[708] Ancestors may be wholly or partly human and could be of either gender. Among some groups ancestors are predominantly male: see e.g. Munn, "Transformation", *supra* note 656 at 59–60. The ancestors created the land and named their physical creations — and these names are commonly considered to be the ancestor's proper names (*ibid* at 59).

[709] See Munn, "Transformation", *supra* note 656 at 62, 63, 68. These unbreakable bonds with the land then also solidify the heirs' social identities *vis-à-vis* the ancestors (*ibid* at 62).

[710] See *ibid* at 70–71.

[711] See *ibid* at 68.

[712] See *ibid* at 60.

[713] See *ibid.*

[714] See *ibid* at 62–63.

[715] See *ibid* at 65.

ancestral land is concerned, this also serves the collective identity function of linking him to his community.[716]

For the Murngin people of Northern Arnhem Land clan territory is always centered around a sacred "waterhole",[717] which could take the form of a spring, native well, small lake, river or even the ocean.[718] The waterhole is "the most important unifying concept in the whole of clan ideology"[719] as it provides the foundation for the spiritual unity of clan life[720] and it forms and integral part of the clan's culture.[721]

2.4.2.2.3 Aotearoa New Zealand: Māori Traditions

> From the ancient Maori period to the present time we realize the importance of linking with the oneness of all things. When we are in perfect harmony we are in tune with Mother Earth and creation. We can indeed become the stars, the trees, the coral reefs, the dolphins, the sun, the moon and anything we need to become to help the process of healing, be it with people, with other living things, with our Earth Mother and with other planets and galaxies.[722]

With regards to Aotearoa New Zealand, Matunga observes that conflicts relating to land and natural resources are directly linked to colonization.[723] As noted previously, there is a fundamental conflict between the English and Māori versions of the *Treaty of Waitangi*, Aotearoa New Zealand's

---

[716] See *ibid* at 77.

[717] See Warner, *supra* note 705 at 125. Not all waterholes on the clan's territory are considered sacred: *narra* wells are both totemic and sacred, while *garma* wells totemic but not sacred. Usually only the former are taboo to women and uninitiated men (*ibid* at 128). Knowledge of the names of sacred places (and other aspects of sacred tribal life) are restricted to initiated men (*ibid* at 133).

[718] See *ibid* at 127–128.

[719] See *ibid* at 127.

[720] See *ibid*. The clan consists of around 50 people (*ibid* at 126).

[721] See *ibid*.

[722] Rangimarie Turuki Pere, "A Celebration of Maori Sacred and Spiritual Wisdom" in Julian Kunnie & Nomalungelo I Goduka, eds, *Indigenous Peoples' Wisdom and Power: Affirming Our Knowledge through Narratives* (Hants, England: Aldershot, 2006) 143 [Pere, "Celebration"] at 156.

[723] Matunga, *supra* note 19 at 217–218.

foundational document. Matunga argues that the English version grants sovereignty to the British Crown, whereas the Maori text explicitly guaranteed that the Maori would retain it.[724] While the debate on honouring the *Treaty of Waitangi* is still raging on, natural resources have largely fallen into the hands of the Crown and/or the private sector.[725]

Insofar as colonization is concerned, Bocking notes that its most enduring image is one of "imperial superiority: the assumption of explorers, missionaries, colonial scientists, and administrators that it was their task to use their more advanced attitudes and knowledge to 'civilize' the more primitive colonies."[726]

2.4.3 Indigenous Conceptions of the Sacred

> Thus the deities themselves are brought into the harsh light of a court of law, and paraded for the public scrutiny of unbelievers.[727]

2.4.3.1 Issues of Cultural Cross-Translation

> I have been exposed to some of the similarities and differences that exist between *Pakehatanga*, or Western institutions, and *Tuhoetanga-Tuhoe*, the Maori basic philosophy. In the former everything falls under some form of classification such as a department, a subject area or some framework that has clearly defined boundaries. Coordination between areas has to be deliberately provided for and arranged. In the latter, according to Maori basic philosophy, nothing exists in isolation or in clearly demarcated bounds. Instead, all things merge into each other and therefore need to be understood in relation to each other and within the context of the whole.[728]

---

[724] *Ibid* at 218.

[725] *Ibid* at 217–218.

[726] Bocking, *supra* note 16 at 217.

[727] Berndt, "Good and Bad", *supra* note 560 at 43.

[728] Matunga, *supra* note 19 at 217.

2.4.3.1.1 North America: Native American and First Nations Traditions

One potential solution is offered by Buggey, who cites the example of Canada's Haida Gwaii and their homeland, the Gwaii Haanas. She notes that Canada's heritage protection mechanism reflects the UNESCO "associative cultural landscape" concept[729] and that this was sufficiently flexible *in casu* to cater for both the preservationist agenda of the State authorities (i.e., retaining the biodiversity of a wilderness) while protecting it as a cultural landscape that is "rich with the historical and spiritual evidences of [the Haida Gwaii's] centuries-long occupation".[730] However, both on provincial and at the federal level the authorities tend to follow "an archaeological rather than a cultural landscape approach to the commemoration of Aboriginal heritage and have not designated places as Aboriginal cultural landscapes."[731] There has been some recognition of the fact that certain sites have "cultural landscape values"[732] but in various parts of the country such values have primarily been identified through the "traditional scholarly disciplines of archaeology, history, or art history."[733] Thus the sites have traditionally been verified and delineated through archaeological methods, with site value being determined by "such established criteria as the exceptional or outstanding example of a culture",[734] their "historical significance as defined by Canadian national history",[735] "because of their cultural expression as art",[736] or "for their culture history,[737] which was analyzed through archaeological evidence, not through cultural associations."[738] Nonetheless, there

---

[729] Buggey, *supra* note 143 at 21–22. On the UNESCO regime, see below at 3.3.2.2.2 ("Cultural Heritage Rights").

[730] Buggey, *supra* note 143 at 22.

[731] *Ibid.*

[732] *Ibid.* Examples furnished by her include: Writing-on-Stone Provincial Park (Alberta) and White Mountain on Lake Mistassini (Quebec).

[733] *Ibid.*

[734] *Ibid.*

[735] *Ibid* at 23. As example she cites Batoche, listed for its role in the North West Rebellion/Resistance of 1885.

[736] *Ibid.* Examples furnished by her include the Peterborough petroglyphs (Ontario), Nan Sdins (Haida village in British Columbia).

[737] *Ibid.* Examples cited include Port au Choix (Newfoundland) and Debert/Belmont (Nova Scotia).

[738] *Ibid.*

has been a movement towards "ensur[ing] the participation of associated living communities in the identification of perspectives and values, as well as in the management of cultural landscapes."[739]

2.4.3.1.2 Australia: Aboriginal Traditions

In the Preface I touched on difficulties that arise within the context of heritage legislation that seeks to "preserve" sacred sites and Indigenous peoples whose notion of the sacred may include interacting with the land.[740] Hubert identifies one such problem with regards to Australian Aboriginal sites: "the well-being of the people is dependent on the maintenance of their sites".[741] This "maintenance" involves both physical and spiritual interactions with the site in order to "car[e] for the spirit housed at it"[742] and/or "keep alive the dreaming powers trapped within"[743] it, the spirit or dreaming powers will die, leaving the actual site a shell. Concomitantly, "all those who share physical features and spiritual connections with it are then also thought to die."[744]

I have already mentioned that the concept of *the Dreaming* or *the Dreamtime* was a Western construction that was subsequently appropriated for Aboriginal use — ostensibly a successful incidence of cross-cultural translation.[745] The second potential paradigmatic difficulty that I wish to highlight is associated with the use of the term *the Dreaming* or *the Dreamtime* to convey to Western (legal) minds what Charlesworth terms "the most real and concrete and fundamental aspect of Aboriginal life."[746] The actual sense of the word *Dreaming* is directly inverse to its usual meaning of

---

[739] *Ibid.*

[740] See *supra* at note 20.

[741] Hubert, *supra* note 31 at 15.

[742] H Payne, *Singing a Sister's Rites: Women's Rites in the Musgrave Ranges* (PhD Thesis: University of Auckland, 1988) at 72, cited in Hubert, *supra* note 31 at 16.

[743] Payne, *supra* note 742 at 72.

[744] *Ibid.*

[745] See above at 2.4.1.2 ("Indigenous Conceptions of Time: Australia: Aboriginal Traditions").

[746] Charlesworth, "Religion", *supra* note 416 at 11.

'illusion', 'reverie' or 'fantasy'.[747] Charlesworth accordingly cautions that insight into the Aboriginal religious world is precluded unless we "purge our minds of Western preconceptions."[748]

I have already alluded to a third paradigmatic difference: while Western (and particular legal) thinking likes to neatly classify concepts into categories, the Aboriginal traditions do not appear to make clear-cut distinctions between dualities that very much form part of our Western frame of reference: I have already pointed out the one relating to the sacred/the profane; another is nature/culture and –part of that– human/animal. These three are linked: if human and animal spirits/souls are essentially the same[749] because of the fact that nature and culture are intimately integrated rather than having a parallel place,[750] and if the sacred is not distinguished from the profane,[751] it clearly makes for a more holistic approach to spirituality than the traditional Western one. Providing this kind of breakdown might potentially aid the uninitiated Western jurist to take a more internal view of, and thus appreciate, Aboriginal legal traditions than might be the case where she is simply briefed by an expert that a given Aboriginal religious tradition is holistic in nature.

Finally, in discussing Elkin's work, Berndt provides a good illustration of the dangers inherent in translating concepts in terms that are relatable to our own experience and thus familiar[752] –

---

[747] See *ibid*.

[748] *Ibid*. Maddock, "Foundations", *supra* note 570 at 26 observes that insiders and outsiders are likely to hold different views in this regard.

[749] With the possibility of reincarnation also thrown into the mix: see *ibid* at 25; Maddock, "Powers", *supra* note 572 at 100.

[750] See Maddock, "Foundations", *supra* note 570 at 25; Maddock, "Powers", *supra* note 572 at 85.

[751] See Charlesworth, "Religion", *supra* note 416 at 4.

[752] See Berndt, "Good and Bad" *supra* note 560 at 24–25. In a similar vein he furthermore cautions against the drawing of biblical parallels with Aboriginal Australia, given that the realities are so vastly different (*ibid*, at 29); also see Charlesworth, "Religious Business", *supra* note 557 at xix–xx. A third example is taken from Bralgu myths where a new spirit is "killed" because his nasal septum has not been pierced: Berndt cautions against interpretations involving punishment for doing wrong unto others — this is simply punishment for failing to conform to a cultural norm: see *ibid* at 35–36. In a similar vein, Stanner has criticized Elkin for attempting to demonstrate that "Aboriginal thinkers [had] wrestled with most of the perennial philosophical problems" by drawing parallels with pre-Socratic philosophers such as Thales and Heraclitus, modern ones including Leibnitz, Kant and Bergson, and even making some analogies with Hindu thought: see Stanner, "Aspects", *supra* note 385 at 19–23.

something he characterizes as a common rationalizing device–:[753] whereas Elkin drew a conceptual distinction between religion and everyday living –a dichotomy that we have seen does not exist in Aboriginal thinking– [754]"his philosophical approach led him to think in mystical terms, a kind of oversanctification of belief and ritual",[755] which, in turn, has opened up his work to criticism.[756]

2.4.3.1.3 Aotearoa New Zealand: Māori Traditions

Pere emphasizes the great importance of Māori language skills in their traditional culture, for a number of reasons: first, oratorical skills are highly prized in the *Marae*;[757] second, the language functions at hidden and symbolic level insofar as Māori legends, proverbs, history and stories are concerned, meaning that only a native speaker can truly unlock these;[758] last, "[t]wo-thirds of [their] communication in Māori is completely abstract, to the point that people who learn [their] language fluently may learn only about ordinary meanings but not sacred meanings."[759]

Māori concepts appear to pose particular translation challenges, as is evident from the polemic surrounding the three versions of the *Treaty of Waitangi* (English text, Māori text, and English translation of the Māori text).[760] While political expediency may have played a role in the different linguistic versions of the treaty,[761] the fact remains that some of the Māori concepts remain difficult

---

753 Berndt, "Good and Bad" *supra* note 560 at 24.

754 See above at 2.4.1.2 ("Indigenous Conceptions of Time: Australia: Aboriginal Traditions").

755 Berndt, "Good and Bad" *supra* note 560 at 25.

756 See *ibid.*

757 See Pere, "Celebration", *supra* note 722 at 147. The *Marae* are the sacred courtyards in front of the Meeting Houses: see below at 2.4.3.3.3 ("The Role of Ritual: Aotearoa New Zealand: Māori Traditions").

758 See *ibid* at 153.

759 *Ibid* at 155.

760 See Maaka & Fleras, "Sovereignty Lost", *supra* note 666 at 97–100.

761 See *ibid* at 106.

to translate to this day because of embedded cultural differences. A prime example is the notion of *rangatiratanga* rights, such as envisaged in Article Two of the *Treaty*.[762]

There are other culturally loaded terms such as *tapū*, *mana*, *taonga,* for purposes of which a simple translation does not suffice, necessitating a conceptual explanation.

There also are deceptively accessible terms that are regularly translated with an apparently simple English substitute — and that turn out to have quite a different meaning when their surface is scratched. Good examples here are the concepts *iwi* and *hapū*, usually translated somewhat inadequately as "tribe" and "sub-tribe" respectively. Although it is true that an *iwi* may unite a number of *hapū*, it is misleading to think of these concepts in such simple structural terms. Here, one needs to appreciate the way in which the usage of these terms has evolved historically. Maaka and Fleras explain as follows:

> Prior to the arrival of Europeans, Māori lived tribally. Tribes can be seen as a related group of people whose defining principle of identity and organisation is based on descent from a common ancestor (whakapapa or genealogy) rather than kinship *per se* (ethnicity). Māori society was organised in tribes that were the key social, economic and political units of Māoridom [….] There were two forms of tribe: the hapū and the iwi. Political autonomy lay with the hapū, which was the dominant and functional form of social organisation. Iwi was the conceptual overarching identity that could be used to bind related hapū as the occasion warranted (….)[763]

In the colonial era, so they argue, the *iwi* evolved to assume the external political functions of the *hapū*, while the *hapū* retained a significant role in local affairs.[764] The neo-colonial era saw a detribalization move in favour of supra-Māori organizations that emphasized the importance of "being Māori".[765] Finally, the post-colonial era has seen a re-tribalization movement accompanied by the politics of indigeneity that once again "promoted the tribe as vehicle for Māori self-

---

[762] See *ibid* at 101–103.

[763] Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440 at 72.

[764] *Ibid* at 72.

[765] *Ibid.*

determination",[766] a process that has been cemented by the settlement of a number of large, tribally centred *Treaty* claims from 1995 onwards.[767] It culminated with the institutionalization of the *iwi* as a tribe with a legal identity through the enactment of the *Rūnanga Iwi Act 1990*.[768] But this seemingly neat legislative solution did not mean that the *hapū* have ceased to exist, or that the governance issues between the *iwi* and the *hapū* have been resolved.[769] Consequently it has been argued that Māori leaders through their identity politics, as well as Government, with the *Rūnanga Iwi Act 1990*, have created a stereotype that has effectively subordinated *hapū* rights to those of the *iwi*.[770] This is problematic, so Maaka and Fleras argue, because "[f]or the majority of tribes, tino rangatiratanga as self-determination means an emphasis on the local control of local resources".[771]

2.4.3.2 Translation and Universalization

> The interpretative process is an authoritative act. The summaries it produces, no matter how seemingly limited to arenas of academic debate, can spill down from the ivory tower, to back up legal precedents and scholarship-legislation linkages which often unwittingly authorize controlling interpretations over their data.[772]

2.4.3.2.1 North America: Native American and First Nations Traditions

In a scathing book review of Eastern folk religion Dr W Y Even-Wentz' posthumously published work, *Cuchama and Sacred Mountains*, Californian Scholar Peter Nabokov's main bone of contention is the underlying assumption of universalism between Eastern and Western shamanic traditions that links together Tecate Peak in San Diego ("Cuchama") with a variety of sacred mountains associated

---

[766] *Ibid* at 73.

[767] *Ibid.*

[768] See *ibid* at 73–77. The *Rūnanga Iwi Act 1990* was short-lived: it was repealed by the *Rūnanga Iwi Repeal Act 1991* (NZ), 34/1991.

[769] See *ibid* at 77.

[770] *Ibid.*

[771] *Ibid* at 78.

[772] Nabokov, "Unto These Mountains", *supra* note 645 at 483.

with religious systems hailing from all over the world, notably from Asia.[773] Nabokov stringently objects to the inherently reductive methodology,[774] of which Evans-Wentz' book is but one example.[775] Essentially, so he argues, all tribal experience is condensed into a single North American Native tradition that "den[ies] tribal cosmology and sovereignty through a sort of back-handed homage to what is presumed to be the one, true Indian spirit."[776] This concern thus refers back to the reductive notion of "the Indian" as discussed in 2.2.1 above ("Romanticization, Reductionism and Essentialization").

But to Nabokov this also is an issue of power:[777] assimilating the essence of what distinguishes one tribal culture from another into a type of universalized whole that ignores their individual cosmologies effectively deprives them of their cultural identities, amounting to a form of "academic colonialism".[778] Before any type of (even regional) comparison can be attempted, he reasons, it is necessary to determine what distinguishes each such sacred site from the others through a meticulous engagement with all of its "mythological, historical, ethnographic, economic, sociological and geographic data"[779] — whether obtained through exhaustive fieldwork or research contact, and to do so within the context of "native theories".[780]

---

[773] *Ibid* at 480.

[774] *Cf ibid* at 483: "In the case of Evans-Wentz' views on the shared significance of sacred places, the interpretative process might uncharitably be construed as a new mode of conquest, a post-colonial raid on defenseless tribal traditions under the banner of Jungian depth psychology, apparently justified by the overwhelming need to brew a democratized religiosity which, like all dominating points of view, claims prior validity by virtue of having existed from the beginning of time."

[775] He also criticizes the work of Frank Waters, co-editor of the book, (*ibid* at 482) and J Donald Hughes (at 488).

[776] *Ibid* at 481–483. Similarly, Berndt & Roughsey caution in respect of Australian Aboriginal religions: "it is important to remember that Aboriginal religious systems varied considerably, and we must look to the local in specific circumstances. In other words, what is secret-sacred in one Aboriginal society is not necessarily secret-sacred in another": RM Berndt & D Roughsey, *On the Question of the Secret-Sacred Dimensions Vis-à-Vis Traditional Australian Aboriginal Life*, Unpublished Report to Council of the AIAS (18 September 1975) at 3–5, cited in Ucko, *supra* note 20 at xv.

[777] Nabokov, "Unto These Mountains", *supra* note 645 at 483.

[778] *Ibid* at 485.

[779] *Ibid* at 484.

[780] *Ibid* at 486.

This is particularly crucial when it comes to sacred sites, he opines, for experts are called upon to testify in court cases[781] where precedents are set on the basis of the way in which they translate Indigenous concepts and terminology into language accessible to judge and jury.[782] In this process it becomes a seductive shortcut to rely on synthesizing concepts[783] that equate tribal religions to non-tribal universalistic faiths such as Christianity, Hinduism and Buddhism despite their disparate structures.[784] The consequences for Native American tribes are real: "what gets concocted in academia, or in the consciousness of a seeker-scholar hunting for the common denominator to mystical experience, acquires lasting legal and political muscle."[785]

From a strategic-legal point of view, such universalising translations are downright dangerous, especially where they borrow religious concepts that may be familiar to the presiding actors but bear no relation to the tribal religion in question. For example, pleading the analogy of a "church" in respect of a sacred site has proven disastrous both in Canada[786] and the United States.[787] This approach is fatal, for it fails to convey to the court one of the most basic characteristics of a sacred Indigenous site: the practice of the Indigenous religion is of necessity tied to the land in question. Whereas in Western culture it is quite feasible to deconsecrate a church and found one elsewhere, this is fundamentally impossible where a site is sacred because it is a mountain that hosts a creational

---

[781] *Ibid* at 484 notes that North American sacred sites are particularly threatened by "energy conglomerates, recreational commercialism, National Park planners, multiple-use environmentalists, wildlife protectors, and timbering interests". It is worth pointing out that his article dates back to 1986. Thirty years later his list remains valid, with the addition of "extractive industries and nuclear waste storage".

[782] *Ibid*.

[783] He specifically refers here to concepts stemming from Mircea Eliade's integrative writing, including notions such as "cosmic renewal, the universality of the regeneration of time, and sacred domains organized through a center-and-periphery model": *ibid*. Eliade, too, is charged with "anecdotal scholarship" and "reification", albeit in a more "refined and scholarly" way: *ibid*.

[784] *Ibid* at 484–485.

[785] *Ibid* at 484.

[786] See *supra* note 21 on the unsuccessful litigation strategy of the Tlowitsis-Mumtagila in *Tlowitsis Nation*.

[787] *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439 (1988) [*Lyng*].

spirit, a physical site that constitutes a portal between this world and the spiritual one, or a rock that serves a symbolic purpose for the cultural identity of an Indigenous community.

A second strategic-legal reason why universalization of Indigenous traditions is not a good idea is the prudence of the courts when faced by the eventuality of a "floodgate of claims".[788] Not only does such an assimilation not do justice to the religious tribal tradition in question, it creates a very real risk for the tribe of an unfavourable ruling because of the operation of the doctrine of precedent in the common law countries. In other words, the more general the ruling that the court is asked to make, the broader the potential precedent that will be set, and the less likely the claim is to succeed.[789]

2.4.3.2.2 Australia: Aboriginal Traditions

> A number of scholars have posed the question: why have Australian Aborigines not developed cargo cults with the same intensity and flamboyance as their Melanesian neighbours? The question seems to imply that Aborigines ought to have responded to European invasion in the same way as Melanesians. Stated so baldly, the immediate response is: why should they?[790]

Much of what has been said at 2.4.3.2.1 above ("Translation and Universalization: North America: Native American and First Nations Traditions") also holds true for Australia's Aborigines. But I would like to highlight two ways in particular in which the Aborigines have been subjected to

---

[788] This is not limited to the courts. See Bodine, *supra* note 15 at 28-30 on the insistence of the Senate subcommittee that the Pueblo of Taos' claim to their sacred shrine at Blue Lake be "singular" or "unique" in the context of the hearings of HR 471. Their objections included that the case was indistinguishable from the land claims for religious and ceremonial use made by various other tribes and that granting the claim would establish a precedent with the potential impact that up to 90% of the US could be claimed by Native American people: *ibid.* at 29. This "dangerous precedent" line of argument was already pursued by the Forest Service in 1966 when the first such legislative attempt took the form of S 3085: see Gordon-McCutchan, *supra* note 18 at 100.

[789] *Cf* Nabokov, "Unto These Mountains", *supra* note 645 at 489 for a complementary anthropological take: "Multiple models, probably derived for bio-cultural regions, would be vastly more advantageous to both the courtroom and the classroom than pious generalities (…)."

[790] Rose, "Ned Kelly", *supra* note 569 at 105.

universalized treatment in the sphere of the sacred, and the harmful ways in which these have impacted on them. I will then shift gears and raise an epistemological issue.

I have already alluded to the first point:[791] bar a few notable exceptions such as Durkheim, the scholarly treatment of Aboriginal spirituality up to the 1950s was to dismiss it as being too primitive to constitute a religion and to situate it in the sphere of magic. Even Durkheim, for all the sincerity of his approach, wrongly supposed that a simple societal structure had as corollary a simple religious life. The upshot of all this was that the astonishing depth and complexity, as well as the rich diversity that characterizes Aboriginal religions,[792] was misunderstood and undervalued for a long time. Herein lies the rub: as we have seen,[793] Australian religion is non-theistic and land-based — in fact, specific Aboriginal groups are irrevocably bonded with particular tracts of land. With the dispossession of land, familial disintegration and syncretism[794] that has taken place, and bearing in mind the oral nature of their traditions and the loss of language transmission that accompanies familial disintegration — how much of this rich, complex, diverse religious knowledge has been irrevocably lost?

The second point concerns the sacred and the role of women in Aboriginal religious traditions. Generations of anthropologists –including several prominent female anthropologists–[795] have published studies on Australian Aboriginal society that emphasize patriarchal societal attitudes and minimize the place of women in sacred rituals,[796] sometimes to the extent of denying that they play any role at all in the religious life of Aboriginal communities.[797] Diane Bell, perhaps more than any

---

[791] See above at 2.4.1.2 ("Indigenous Conceptions of Time: Australia: Aboriginal Traditions").

[792] See Berndt, "Good and Bad", *supra* note 560 at 26. He also notes the impact of identity politics in recent years in playing down the intrinsic differences between the various "independent sociocultural constellations" spread out across the continent (*ibid*). Also see Stanner, "Aspects", *supra* note 385 at 1–2, 11; Charlesworth, "Religious Business", *supra* note 557 at xviii and xviii.

[793] See above at 2.4.2.2 ("The Link Between Land and Religion: Australia: Aboriginal Traditions").

[794] See *supra* note 584 in this regard.

[795] See D Bell, "Aboriginal Women", *supra* note 570 at 54–59. These include Ursula McConnel and Nancy Munn.

[796] See *ibid* at 48–50 and 55–59.

[797] E.g., Bern has posited that the women's rituals are of importance only for the women in question: see *ibid* at 50.

other Australian scholar, has illustrated in her work just how ill-conceived this is[798] and how much these wrong perceptions have served to further disempower women.[799]

Which brings us to the epistemological dimension of the discussion. In a subtle and layered analysis, Religious Studies scholar Tony Swain considers the prickly topic of comparative Aboriginal religious studies coupled with the fact that the influence of the illustrious Aboriginal scholar, WEH Stanner, has been largely confined to Australia.[800] He commences with a brief historical overview[801] and then critically considers the four main approaches that have been followed in respect to the study of Aboriginal religions in Australia: positivism,[802] objectivism,[803] phenomenology[804] and ontology.[805] Positivism is quickly discarded, mostly because it embraces social causality.[806] Lévi-Straus' objectivist approach fails because, so Swain argues, it has "an *a priori* idealist structure which (…) is imposed upon rather than grows out of, a specific ethnographic context."[807] Of particular importance for the purposes of this section is Swain's critique of Mircea Eliade's phenomenological philosophy,[808] as well as his exposé of Stanner's pragmatic ontological approach.

Insofar as Eliade is concerned, Swain's critique mainly centers on five points: (1) Eliade is not an Aboriginal scholar but a historian of religion who strongly advocates comparative methodology and

---

[798] See D Bell, "Aboriginal Women", *supra* note 570 at 50–53. Her research has indicated that in ritual women focus on their tripartite role as "nurturers of people, land and relationships." (*ibid*, at 50). Also see Charlesworth, "Religious Business", *supra* note 557 at xviii.

[799] D Bell, "Aboriginal Women", *supra* note 570 at 56–57 emphasizes that the "Man Equals Culture" paradigm is inherently pernicious: for instance, "if religion is defined as the sacred domain controlled by men, then it is difficult to document the activities of women as anything but profane." (at 56).

[800] Swain, *supra* note 187.

[801] See *ibid* at 83.

[802] See *ibid* at 73–76.

[803] See *ibid* at 76–80.

[804] See *ibid* at 80–84.

[805] See *ibid* at 84–87.

[806] See *ibid* at 76.

[807] *Ibid* at 84.

[808] Swain points out that Eliade has not always been in agreement with this classification of his work: see *ibid* at 81.

therefore considers specific religious manifestations to constitute part of a universal system of religious structures and symbols.[809] (2) Eliade's scheme thus depends on the correlation between the essential meaning of general and specific symbols. But how could someone rooted in a different historic tradition grasp the essence of the completely alien Aboriginal worldview that is not founded in history? (3) While Eliade claims to be clarifying Aborigines' cultural conceptions,[810] his starting position demonstrates the use of "archetypal and trans-cultural" meanings,[811] so that "the archetypal forms he identifies reveal more of his own ontology than that of the people he studies."[812] (4) He is a "partisan of essentialism"[813] and he deludes himself by thinking that he can avoid this through a process of empathy,[814] which means that he does not manage intersubjective intuition and consequently cannot claim knowledge of subjective meanings.[815] (5) There is a major schism between phenomenological theory –grasping an intended meaning– and Aboriginal reality,[816] as "in this sense, Aborigines do not understand their own religion."[817]

It is clear from the above that Swain's main objection against Eliade's phenomenology lies in the universalizing treatment that he applies to Aboriginal traditions that he does not even know all that well.[818] Therein lies the major difference with the ontological approach[819] practised by WEH

---

[809] See *ibid.*

[810] See *ibid* at 81–82.

[811] *Ibid* at 82.

[812] *Ibid* at 83.

[813] *Ibid.*

[814] See *ibid.*

[815] See *ibid.*

[816] See *ibid.*

[817] *Ibid.*

[818] *Cf ibid* at 81: "In [Eliade's book on Aboriginal religion], each of the chapter headings correspond to one of his comparative studies — for example, those on sacred time and space, initiation and shamanism. Some parts are even lifted verbatim from those previous works." Gordon Lynch's critique of Eliade's work points to another potential schism: the sacred/profane dichotomy that characterizes his thinking: see Gordon Lynch, "Ontological and Durkheimian Theories of the Sacred" in Gordon Lynch, *The Sacred in the Modern World: A Cultural Sociological Approach* (Oxford: Oxford University Press, 2012) 9 [Lynch, "The Sacred"] at 11.

[819] By which Swain specifically intends "the 'rules' of a particular conceptual system": see Swain, *supra* note 187 at 85. He builds on Peter Winch's approach, in terms of which anthropologist have a dialectical task, namely to "somehow

Stanner:[820] in essence, Stanner's main concern is with the meaning of a particular tradition for a specific Aboriginal community and not the construction of some overarching religious scheme. Stanner, Swain argues, "displays a faithfulness to what is unique in Aboriginal religion as it exists for Aborigines."[821] That is the very antithesis of the universalization endeavour.

2.4.3.2.3 Aotearoa New Zealand: Māori Traditions

In *The Politics of Indigeneity*, Maaka and Fleras illustrate that the notion of the Māori as one unified nation is misleading, both in its traditional version[822] and in the stereotypical one that is presently embraced by the Aotearoa New Zealand government and the leaders of Māori national organizations alike.[823] In neither instance is the 'Māori-as-nation' concept completely denuded of truth, but this universalization of Māori identity is simplistic and reductive on both counts.

Insofar as the traditional conception is concerned, Maaka and Fleras argue that, "Māori are culturally distinct peoples with a shared history, language and tradition whose distinctiveness has been politicized for purposes of entitlements."[824] In the pre-contact period, Māori society was characterized by its tribal constitution:[825] although tribes spoke a common language, they utilized different dialects and inter-tribal competition and warfare was common. There thus was no 'Māori nation' to speak of — as noted earlier, the notion of 'the Māori' as a nation is a recent construct

---

bring [his] subject's concept of apprehensibility into relation with [his] own, and hence create a new unit of intelligibility.": *ibid* at 86. But see Lynch who appears to characterize Eliade's philosophy as being both phenomenological (at 11) and ontological (in the reductionist, universalizing sense of the word — at 12–13) in putting forward his own case for a cultural sociological approach (13–15).

820 Swain notably praises Stanner's ability to sidestep both "causal sociological reductionism" and "an unjustifiable subjectivism": see Swain, *supra* note 187 at 87.

821 *Ibid* at 89.

822 Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440 at 70.

823 *Ibid* at 66.

824 *Ibid* at 66.

825 See *ibid* at 72.

that can be tied back to the identity politics employed in the post-colonialist period that started around 1970.[826]

However, the Māori do not reject this concept out of hand as being a reductive colonial notion: their motivations may range from expediency to pragmatism, but they have a "legendary" history of rallying behind a common cause.[827] They still are no homogenous group: there is much internal diversity and dissent that prevents a single voice from speaking for them.[828] Such diversity may be along tribal lines, or could result from other factors such as urban migration.

Māori tribal groups (*hapū* or *iwi*) are traditionally organized on the basis of descent (*whakapapa*) rather than kinship as such (ethnicity), which also distinguishes them from the other Indigenous peoples studied.[829].

Insofar as urbanization is concerned,[830] it does not necessarily mean de-tribalization: matters are complicated by the twin facts that some Māori claim dual tribal (*iwi* or *hapū*) status, and that *iwi* in the modern sense are sometimes uncoupled from the notion of genealogy (*whakapapa*), either in the form of *hapū* that disassociate themselves from *iwi* or because of urban organizations that claim *iwi* status.[831] There furthermore are Māori national organisations that are either 'multi-tribal' –i.e., they represent a number of tribes– or 'pan-Māori' –i.e., they are constituted on the basis of Māori ethnicity.[832] Their mandates are not a matter of national Māori consensus, however.[833]

---

826 See *ibid* at 70.

827 *Ibid* at 65.

828 See *ibid* at 73.

829 See *ibid* at 72.

830 On urban Māori, see *ibid* at 80–81.

831 See *ibid* at 66–72.

832 See *ibid* at 82–83.

833 See *ibid* at 83.

As noted previously, re-tribalization as a political movement involves a conception of the *iwi* as tribe that is far more stereotypical and rigid that the traditional notion of an *iwi* used to be.[834] Maaka and Fleras point out that this stereotyped conception is embraced by government and Māori leadership alike.[835] Part of the stereotyping involves the subordination of *hapū* to *iwi* in a much more rigid hierarchy than used to be the norm, with the associated consequence that the *iwi* now fulfils the political function that used to be the domain of the *hapū*.[836] Then there is the not insignificant irony that the *iwi* never had the opportunity to "evolve as a social system to meet the needs of Māori in the contemporary situation",[837] much to the government's present frustration when clearly mandated voices speaking for the Māori community are hard to find.[838]

The Māori differ, therefore, from the Indigenous populations of the other jurisdictions studied, in at least nine important ways: (1) although the exact timeframe is not known, their settlement of New Zealand took place much later than that of the other jurisdictions, and it is known that the territory was not uninhabited at the time; (2) the fact that they have a common language, even if there are/were different dialects; (3) they share a common mythology and Polynesian ancestry, though tribal mythology has certainly evolved in different directions since; (4) their embrace of literacy and educational opportunities for their children, even if this was done for pragmatic reasons relating to economy and status — it would thus appear that the Native Schools, while still undertaken with an assimilationist agenda, caused less structural damage in New Zealand than was the case in North America and Australia; (5) their relative openness to Christianity and consequent large-scale conversion (although this did not completely displace their customs, traditions and culture); (6) the relatively large percentage of Indigenous people when measured against the remainder of the population; (7) the great strides that they have made with the protection and

---

834 See *ibid* at 77–78.

835 *Ibid* at 77–78.

836 *Ibid* at 78. See *ibid* at 79 for a more detailed discussion on the traditional roles of the *hapū* and the *iwi*.

837 *Ibid*.

838 *Ibid*. In order to fully appreciate their point, however, knowledge of and insight into the second and third of the analytically distinct periods identified above is required (i.e., the history of the colonial and neo-colonial periods in Aotearoa New Zealand).

promotion of their language, especially on an institutional level; (8) the fact that they have political representation in Parliament; (9) although it cannot issue judgments that are binding on the government, they have the Waitangi Tribunal as a permanent body that has been very influential in obtaining large-scale financial settlements for Māori people from the government, thereby addressing alleged breaches of the *Treaty of Waitangi*.

2.4.3.3 The Role of Ritual

Nabokov describes rituals as "remarkable forms of expression [with] the compulsive power to focus human action in repeated performances using highly-condensed symbols."[839] Symbolic actions, in turn, are important, for they form part of that which "can give to culture the ideological muscle it needs to reproduce itself."[840] Following this line of thinking, the practice of ritual rites becomes one of the ways in which a minority culture may seek to validate and reinforce –even reconstitute– itself. Where such ritual practices of necessity involve a particular sacred site, loss of the site may therefore also mean loss of the ritual practice in question, implying a cultural weakening.[841] For instance, in the United States case study discussed in Chapter 5, one of the Winnemem Wintu tribe's threatened sacred sites is "Puberty Rock", a rock that forms an integral part of the tribe's puberty ceremony.

---

[839] Peter Nabokov, "Red Herring or Real Turkey: The Race for an American Founding Rite" in Regina Bendix & Rosemary Lévy Lumwalt, eds, *Folklore Interpreted — Essays in Honor of Alan Dundes* 93 [Nabokov, "Red Herring"] at 95.

[840] *Ibid* at 96.

[841] See e.g. Mulk *supra* note 152 at 130 on the devastating impact that the Swedish church had on the pre-Christian Saami religion in northern Sweden.

2.4.3.3.1 North America: Native American and First Nations Traditions

Sacred sites are often the *loci* of ritual practices.[842] For instance, in Sto:lo tradition,

> Ceremonial activities included: *smíla* dancing in great ceremonial longhouses, first salmon ceremonies, the *sxwó:yxwey* masked-dance, sun ceremonies, and traditional burnings (*yéqw*) for the ancestors (*syewá:l*). Over time, a few traditional beliefs and ceremonial practices – such as the once regular sun (*syó:qwem*) ceremonies– have fallen from use. Most, however, have been maintained to the present day, in spite of various negative acculturation processes over the past 150 years. [843]

These "negative acculturation processes" have included banning the potlatch, the *sxwó:yxwey* masked-dance and the Sto:lo winter dance ceremonial during the period 1884–1951.[844]

Buggey observes, with reference to the Indigenous people of Canada generally, that "[u]ses and activities, from harvesting and social gatherings to rituals and ceremonies, are core expressions of relation to the land."[845]

2.4.3.3.2 Australia: Aboriginal Traditions

As pointed out in 2.4.1.2 above ("Indigenous Conceptions of Time: Australia: Aboriginal Traditions"), ritual has a pivotal function in the Aboriginal traditions: not only does it provide a bridge for access to the Dreamtime's ancestor spirits and thus entry into the spiritual world, but the person performing the ritual is transformed into the ancestor spirit in question.[846] Therefore, a

---

[842] See e.g. Broadbent & Edvinger, *supra* note 23 at 329 on the bear ritual, which forms a core part of Saami religion.

[843] Mohs, *supra* note 13 at 189.

[844] *Ibid* at 200.

[845] Buggey, *supra* note 143 at 20.

[846] See Charlesworth, "Religion", *supra* note 416 at 10; and see Munn, "Transformation", *supra* note 656 at 65–75 on the Central Desert Pitjantjatjara and Walbiri peoples' notions of transformation.

person performing a ritual involving a rock kangaroo "believes that he assumes or is absorbed into the very essence of the rock kangaroo as it exists in the Dreaming."[847]

One important paradigmatic difference with Western thinking can be tied back to this transformative power of ritual: an Aboriginal tradition such as the Yolgnu people of north-east Arnhem Land value ceremonial knowledge not so much for the sake of the objective content thereof[848] –though they do not seek to minimize or dispute it–[849] but because of its secret-sacred nature[850] and for its transformative power.[851] Initiation ceremonies offer a concrete illustration in this regard: through ritual practice the boy is *turned into* a young man — he is not simply *taught* how to be a young man.[852] Among the Walbiri and the Pitjantjatjara the transformative power of these initiation ceremonies have important identitary consequences in that the initiates are permanently bonded with the ancestors and thus with the land.[853] Charlesworth accordingly concludes that Aboriginal religions correspond closer to the concept of an orthopraxy than that of an orthodoxy.[854]

In the Aboriginal traditions, the maintenance duties of traditional owners are ritual-bound. Here Robert Tonkinson cites the example that human increase rites need to be performed at specific sites so as to ensure continued animal and plant fertility.[855]

---

[847] Charlesworth, "Religion", *supra* note 416 at 10. Also see Stanner, "Aspects", *supra* note 385 at 9.

[848] This content essentially amounts to a manifestation of the ancestral law: see Charlesworth, "Religion", *supra* note 416 at 12.

[849] See *ibid* at 11–12.

[850] See Berndt, "Good and Bad", *supra* note 560 at 28 and the discussion on "secret-sacred" at 2.4.3.4.2 below ("Secrecy about the Sacred: Australia: Aboriginal Traditions").

[851] See Charlesworth, "Religion", *supra* note 416 at 12.

[852] See *ibid*; Stanner, "Aspects", *supra* note 385 at 7.

[853] See Munn, "Transformation", *supra* note 656 at 78.

[854] Charlesworth, "Religion", *supra* note 416 at 12.

[855] Tonkinson explains that the Dreamtime ancestor spirits left behind an inexhaustible supply of the animal and plant spirits of the species in question inside each of these places and that such spirits await the appropriate human signal to emerge abundantly in the countryside: see Robert Tonkinson, "Semen Versus Spirit-Child in a Western Desert Culture" in Charlesworth et al, *Religion*, *supra* note 152,107 at 116.

Stanner points out that no consensus exists yet on the different types of Aboriginal rituals, and that no satisfactory nomenclature has so far been found for the rites in question.[856] The commonly agreed (though unsatisfactory) 4 categories are made up of: (1) "commemorative" or "historical" rites; (2) "increase" rites; (3) "initiation" rites; and (4) "death and mortuary" rites.[857]

2.4.3.3.3 Aotearoa New Zealand: Māori Traditions

As we have already seen, the Māori have Christianized to a large degree, but without sacrificing their own customs and traditions. Consequently, the 'sacred site' conversation in Aotearoa New Zealand is couched in terms of customs, traditions and culture rather than religion. It also is striking how vibrant and dynamic these customs and traditions are.[858]

Pere groups the principles of what she calls "The Māori Way" into 4 main categories: (1) the *Marae* (sacred courtyard in front of meeting house); (2) the Meeting House; (3) the *Whare Kai* (eating house); and (4) other sacred sites, spaces and principles.[859] We will briefly look at each of these.

The *Marae* fulfills a core identitary role in Māori culture.[860] It is "sacred to the living and (…) a memorial to those who have passed on to the spirit world."[861] In this courtyard assemblies are held where oratory skills and social etiquette are prized and Māori values and philosophy reaffirmed.[862]

---

[856] See Stanner, "Aspects", *supra* note 385 at 11.

[857] See *ibid* at 11–14 for a detailed discussion and critique. In respect of initiation rites, in particular, he cautions that practices easily denounced as "bizarre savageries" (at 14) need to be understood in their social context (at 14) and bearing in mind the spectrum ranging from the imposition of physical ordeals on initiates as preparatory tests to the invitation of their adult clansmen to "submit to ordeals as meritorious acts of ascetism and self-mortification" (at 15). Also see Rose, "Ned Kelly", *supra* note 569 at 128 — she specifically distinguishes "travelling ceremonies" from those that constitute part of the group's daily routine.

[858] See Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440 at 81–83. They conclude that Māori identities are "multi-layered and multi-textured" (at 81–82).

[859] See Pere, "Celebration", *supra* note 722 at 147–148.

[860] *Ibid* at 147.

[861] *Ibid.*

[862] *Ibid.*

As an institution it "fosters identity, self-respect, pride and social control."[863] Across all Māori communities it is therefore a sacred space where formal encounters are held specific purposes.[864] The exact procedures and formalities involved differ among the various communities.[865] Many *Marae* have a graveside (*urupa*) in their close vicinity.[866]

Various terms are used for the Meeting House, including *tipuna whare* and *whare nui*.[867] Together with the *Marae*, it serves as focal point for the community.[868] As a rule it is ornately carved so as to symbolically represent the ancestors and usually also named after them.[869] Whereas the welcome on the *Marae* could take the form of verbal battle,[870] the atmosphere of the Meeting House must remain one of peace and people inside are expected to interact accordingly.[871] It is *tapu* (sacred), meaning that no food or drinks may be consumed inside.[872]

The appropriate place for food and drink consumption is the *Whare Kai* (Eating House), which is not *tapu*.[873] Food (*noa*) is considered to be "a common element" by the Māori — the very opposite of *tapu*.[874]

---

[863] *Ibid.*

[864] *Ibid.*

[865] *Ibid.*

[866] See *ibid* at 148.

[867] See *ibid* at 147.

[868] See *ibid.*

[869] See *ibid* at 147–148.

[870] *Ibid* at 147.

[871] *Ibid* at 148.

[872] See *ibid.*

[873] See *ibid.*

[874] See *ibid.*

Other important rituals include *whakapapa* (the reciting of things in sequence, including genealogy);[875] *the reo* (oral communication skills);[876] and *aroha* (unconditional love).[877]

The need for conformance with correct ceremonial procedures is emphasized by Pere. She explains that even marginal errors are deemed to constitute ill omens that are the bearers of retribution.[878] Failure to comply with ancestral/spiritual customs or the omission of some of the ritual elements is therefore considered to constitute "a serious religio-cultural violation that would cause untold harm to the community."[879]

2.4.3.4 Secrecy about the Sacred

Two reasons are commonly advanced from a tribal point of view for the reluctance of tribes to divulge details of their sacred sites and underlying belief systems: ancestral and/or spiritual prohibitions,[880] and prior persecution for their religious beliefs.[881] A third one arises in the Australian Aboriginal context: knowledge of secret-sacred sites, objects and rituals is restricted to a limited group of people; beyond this group it is physically dangerous to access such knowledge and subject to serious punishments.[882]

---

[875] See *ibid* at 148–151.

[876] See *ibid* at 154–155.

[877] See *ibid* at 155–157.

[878] See *ibid* at 153.

[879] *Ibid.*

[880] E.g., Broadbent & Edvinger on the Saami *supra* note 23 at 319: "this would shame the sacred sites and weaken the power of their traditions".

[881] See e.g. Mulk *supra* note 152 at 130 on the Saami's experience: "Saami shamans were subjected to severe persecution as their activities were considered to be expressions of total heathenism and barbarism. The shamans were forced to hand over their drums for destruction and burning, and they were urged to cease their activities. Even the slightest transgression led to the death penalty." Also see Broadbent & Edvinger, *supra* note 23 at 319 on the Saami, as well as Mohs, *supra* note 13 at 200 on the negative attitudes with which the Sto:lo have been faced, and as a consequence of which Native Elders elect not to answer when asked about matters relating to their spirituality and their sacred places.

[882] See Charlesworth, "Religion", *supra* note 416 at 11 and the discussion at 2.4.3.3.2 ("Aboriginal Traditions") below.

2.4.3.4.1 North America: Native American and First Nations Traditions

In the case of the Taos Pueblo and Blue Lake, for instance, they were expressly forbidden from divulging tribal knowledge as doing so would have a weakening effect on it according to their ancestral teachings;[883] they also had specifically been subjected to religious persecution as part of Commissioner of Indian Affairs, Charles Burke's, campaign to eradicate their religion, which started in 1921.[884]

Nicole Price has put forward a third dimension, one that perhaps is becoming increasingly problematic: tourism and desecration.[885] She notes in the context of the United States —

> When a sacred site is part of a federal, state or local property, it usually becomes the tourist attraction for the area. This may be the reason why Native American Indians are reluctant to discuss or identify areas of importance.[886]

Reeves observes in this context that sacred sites are particularly targeted by two groups: Native Americans who are in the process of reviving their religion, and "non-Native people, particularly those practising 'New Age' religions".[887] He deplores the associated ecological damage and

---

[883] Gordon-McCutchan, *supra* note 18 at 13. The need for religious privacy was one of the key aspects of their claim: there was an absolute need for them to conduct their ceremonies out of sight of third parties in order to guard the secrecy of their rituals: *ibid* at 20-22.

[884] Gordon-McCutchan, *supra* note 18 at 16. He notes in this regard: "The campaign against Taos was particularly ugly. Commissioner Burke personally went to Taos, invaded the Tribal Council Chamber, and denounced the tribal elders as 'half-animal' for their religious beliefs. He insisted that the council renounce their ancient religion 'within a year.'" (*ibid*).

[885] Nicole Price, *supra* note 18 at 259. Yefimenko, *supra* note 104 at 166 fittingly refers to "ethnotourism": also see Technical Report No 11, *The Conservation Value of Sacred Sites of Indigenous Peoples of the Arctic: Report on the State of Sacred Sites and Sanctuaries* (Conservation of Arctic Flora and Fauna, 2004) [CAFF Technical Report No 11 *supra* note 104, c 2 at 5.

[886] Nicole Price, *supra* note 18 at 263.

[887] Reeves, *supra* note 27 at 288.

vandalism of sacrificial offerings that took place on the Blackfeet Reservation's sacred mountain, Ninaistákis[888] — damage that he ascribes to both non-Native and non-traditional Native visitors.[889]

2.4.3.4.2 Australia: Aboriginal Traditions

We already touched on the "secret-sacred" dimension of land at 2.4.2.1.2 above ("A Sense of Place: Australia: Aboriginal Traditions"): in essence, knowledge of sacred sites, objects and rituals is often restricted to particular groups to the exclusion of others (such as "men's business",[890] which is restricted to initiated men and excludes women and children; or "women's business",[891] where knowledge is limited to adult women, to the exclusion of men and children).[892] It is important to bear in mind that a secret-sacred site is off-limits to those who are not supposed to have knowledge of it, with potentially dangerous and severe consequences attached to breach of the prohibition.[893] The secrecy of a site may be of a temporary nature (while restricted rituals are being performed) or it may be permanently secret-sacred and off-limits for all beyond a restricted group.[894] Sometimes it is secret-sacred because it contains sacred objects, or drawings that are not intended for the eyes of the uninitiated;[895] at other occasions it is the *interpretations* attached to particular objects or symbolic drawings that render them sacred, as well as secret, and that limit knowledge of them to groups with the right to hold such knowledge (such as groups of a given gender, age group or a

---

[888] Reeves, *supra* note 27 at 284.

[889] Reeves, *supra* note 27 at 285.

[890] E.g., the Walbiri male initiation rites discussed by Munn, "Transformation", *supra* note 656 at 72–75: it is impressed upon the boy that these rites may never be revealed to women, just like they have as a consequence the disengagement of his childhood identification with his mother (at 75).

[891] See, e.g. Munn, "Transformation", *supra* note 656 at 72 on female initiation rites among the Walbiri. In Tonkinson, "Semen", *supra* note 855 at 110 we find the example of "danger words" such as "menstruation and pregnancy" that "might be alright for women to talk about with one another, but are definitely not 'men's business'", and accordingly constitute "'bad talk' which could cause 'big trouble' for the camp" at Jigalong on the Gibson Desert fringe in Western Australia.

[892] See Charlesworth, "Religion", *supra* note 416 at 11.

[893] See Charlesworth, "Religion", *supra* note 416 at 11; Berndt, "Good and Bad", *supra* note 560 at 37. The latter speaks of "divine punishment" for the "breaking of a taboo." (*ibid*).

[894] See Charlesworth, "Religion", *supra* note 416 at 11.

[895] See Charlesworth, "Religion", *supra* note 416 at 11.

particular totemic group).[896] Outsiders have no way of identifying the secret-sacred nature of these sites, objects and rituals and thus such punishment appears to be entirely objectively associated with the fact that they are violating the mysteries by transgressing into the secret-sacred domain.[897] Again, this is a difficult paradigm for the Western (legal) mind that almost automatically links punishment to the notion of subjective fault or "guilt". Interestingly, Berndt argues that the Aboriginal land struggle combined with a genuine commitment to traditional religion has served to turn "secret-sacred" classifications more rigid:[898] thus he notes that women are being excluded much more openly, while rituals that used to be "open" or even "ordinarily sacred" are now deemed to be "secret-sacred" and thus restricted.[899]

2.4.3.4.3 Aotearoa New Zealand: Māori Traditions

Pere emphasizes the secret aspect of Māori teachings, arguing that they have been passed down in symbolic form over generations in order to protect them.[900] As an elder (*Tohuna*) she has access to these ancient wisdom traditions but is limited in what she can share, their contents not being public knowledge.[901] She may, however, relate her personal experiences in that regard.[902]

---

[896] See Charlesworth, "Religion", *supra* note 416 at 11.

[897] See Charlesworth, "Religion", *supra* note 416 at 11. This makes reporting on these both unlikely and complicated.

[898] See Berndt, "Good and Bad", *supra* note 560 at 42.

[899] Berndt, "Good and Bad", *supra* note 560 at 42.

[900] They originated in the Māori ancestral home of Hawaiki: Pere, "Celebration", *supra* note 722 at 144.

[901] *Ibid* at 146.

[902] *Ibid*. She argues that versions recorded by European writers prior to the publication of her first work in 1990 constitute "European versions of [their] traditions and teachings", adaptations which were made with the objective of avoiding European interference with traditional Māori wisdom: *ibid* at 156.

2.5 Summary

The objective of this Chapter has been to gain an enriched understanding of the issues at stake for Indigenous peoples when it comes to Indigenous sacred sites and natural resource development projects.

I commenced by introducing three key themes as *fil conducteur* to this thesis: (1) romanticization, reductionism and essentialization, (2) identity politics and (3) issues of authenticity and representation. I also explained that they would be addressed from various angles: first, from the vantage point of Indigenous peoples in the context of this Chapter 2; next, from the international law perspective in Chapter 3.; and finally, from that of black letter law in Chapters 4 thru 7.

I then considered issues relating to culture, religion and identity, more specifically: the importance of cultural continuity for Indigenous identity, the link between Indigenous culture and religion and the identitary role of sacred sites in Indigenous culture and religion. This section has illustrated that there are strong links between culture, religion and identity for Indigenous peoples, that cultural continuity is vital for purposes of maintaining Indigenous identity –though cultural continuity by no means excludes dynamism and evolution or advocates fossilization of that culture– and that sacred sites have an important identitary role to play in communities where the cultures are sometimes fragmented and in need of reconstitution.

I then examined various Indigenous paradigms with a view to enriching my grasp of the sacred site problematic at hand. To do so, I grouped these paradigms into three main categories: Indigenous conceptions of time, space and the sacred. Because there is so much diversity between different Indigenous groups and because I intend to craft context-sensitive protective frameworks, it was important to me to take a closer look at each of the Indigenous communities in question (the Native North Americans, Aboriginal Australians and the Aotearoa New Zealand Māori). Even so, the fact of intra community diversity has run like a golden thread through the conversation.

Due to the great variance between different Indigenous peoples, it is not possible to deal with Indigenous paradigms in a holistic, universalist manner. I have accordingly elected to discuss Indigenous paradigms in the context of the four jurisdictions studied. Although this approach inevitably still metes out some universalizing treatment to the Indigenous peoples who are present

in each such jurisdiction, it is arguably done in a less arbitrary manner due to the existence of territorial links and because it is done for a rational purpose, namely legal certainty. Exactly what this means will become clearer as we progress.

Chapter 3: Looking Towards International Law

> [I]ndigenous conceptualization of their cultures and its protection cannot be reconciled with the predominant view in international law and national legal systems of cultural manifestations as individuated property. It is only with an appreciation of indigenous understanding of their culture as holistic, symbiotic, communal and intergenerational that a clearer assessment of the nature and extent of losses sustained by indigenous peoples can be made. It is to understand that monetary compensation for dispossession of heritage which is not property, but is integral to its cultural and spiritual integrity, is inconceivable. It is to understand also that restitution of part must be accompanied by restitution of the whole, including land. For many settler states such concepts and claims, especially pertaining to land) confront not only the existing legal, political, social and economic orders but the history and identity that these nations have constructed for themselves.[903]

3.1 Introduction

As outlined in Chapter 1, this Chapter should not be read as placing the research's central focus somewhere between national and international law. Its core focus is, and remains, the positive law of the four national systems compared –Canada, the United States, Australia and New Zealand. I do not, for instance, consider potential public international law remedies such as reparations under the UN Commission for Human Rights' *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*[904] for the destruction of sacred sites.[905] Rather, I include this section on international law in recognition of its steady headway in making its presence felt worldwide in

---

[903] Ana F Vrdoljak, "Reparations for Cultural Loss" in Federico Lenzerini, ed, *Reparations for Indigenous Peoples: International and Comparative Perspectives*, (Oxford: Oxford University Press, 2008) 197 at 227.

[904] Commission on Human Rights, Res 2005/53 (19 April 2005 signature date).

[905] See Dinah Shelton, "Reparations for Indigenous Peoples: The Present Value of Past Wrongs" in Lenzerini, *supra* note 903, 47 [Shelton, Reparations"] at 65–66.

the age of globalization.[906] As such, it provides an important building brick for purposes of the context-sensitive legal frameworks that Chapter 8 seeks to craft.

This Chapter unfolds in three main parts. It commences by considering potential impediments to sacred site protection in international law, namely the doctrine of State sovereignty and the principle of permanent sovereignty over natural resources. Next, it considers two possible angles from which sacred site protection might be approached under international law, depending on where one wishes to place the emphasis: Indigenous rights protection (*Indigenous* sacred sites) or cultural rights protection (Indigenous *sacred sites*). This is followed by an analysis of the latest international sacred sites jurisprudence, a judgment rendered at the end of May 2017 by the African Court on Human and Peoples' Rights. The final part of the Chapter considers a practical question that needs to be answered in respect of each of the four jurisdictions for purposes of the context-sensitive frameworks to be constructed in Chapter 8: what is the position in each such jurisdiction insofar as the domestic implementation of international law is concerned?

3.2 Potential Impediments

3.2.1 Introduction

"Sovereignty", M Rafiqul Islam tells us, "represents the authority and competence of states in relation to matters within their domains."[907] For roughly 300 years, from the Westphalian Treaty (1648) to the foundation of the United Nations after World War II (1945) States were completely

---

[906] M Rafiqul Islam, *International Law: Current Concepts and Future Directions* (Chatwood, NSW: LexisNexis Butterworths Australia, 2014) at 123 speaks in this context of the "intensely interdependent world". He proceeds to highlight three specific ways in which the two systems intersect: "International law is a legitimate influence on national law as an interpretative tool for statutes, as a catalyst for the development of the common law and administrative law, and as an aid to judiciary" (*ibid*). All three of these senses are of interest in the present context.

[907] *Ibid* at 193. He lists as examples of expressions of sovereignty the following: "sovereign equality; political independence; territorial integrity and political unity; exclusive jurisdiction over a defined territory; freedom from external intervention (and a duty of non-intervention); freedom to choose and pursue political, economic, social, and cultural systems; and dependence on obligations arising from international law and treaties based on the consent of states" (*ibid*).

sovereign and international law proceeded on a contractual basis between them — treaties were voluntary agreements.[908] The founding of the United Nations placed a public power above its Member States and thus limited their sovereignty.[909] Subsequently other powerful international actors also emerged,[910] including the World Trade Organization (WTO) and, to an extent, the International Monetary Fund (IMF).[911] As well, the norms of *ius cogens* bind States irrespective of consent under public international law.[912]

---

[908] See Dieter Grimm, "Types of Constitutions" in Rosenfeld & Sajó, *supra* note 276, 98 at 130; Islam, *supra* note 906 at 194.

[909] Grimm, *supra* note 908 at 130. But see Shaw, *supra* note 313, who argues that states are all in a horizontal relationship and are not subject to a higher authority.

[910] Space limitations preclude a discussion of this important dimension. As a starting point, see Waltina Scheumann & Oliver Hensengerth, "Dams and Norms: Current Practices and the State of the Debate" in Waltina Scheumann & Oliver Hensengerth, eds, *Evolution of Dam Policies: Evidence from the Big Hydropower States*, electronic ed (Berlin: Springer-Verlag, 2014) c 1; Oliver Hensengerth, "Between Local and Global Norms: Hydropower Policy Reform in China" in Scheumann & Hensengerth, *ibid*, c 3; Nirmalaya Choudhury, "Towards Responsible Hydropower Development through Contentious Multi-Stakeholder Negotiations: The Case of India" in Scheumann & Hensengerth, *ibid*, c 4; Sara Eichert, "NGOs as Strategic Actors in the Promotion of Sustainable Dam Development" in Scheumann & Hensengerth, *ibid*, c 6; Andreas Atzl, "Transnational NGO Networks Campaign Against the Ilisu Dam, Turkey" in Scheumann & Hensengerth, *ibid*, c 7; Asit K Biswas, "Impacts of Large Dams: Issues, Opportunities and Constraints" in Cecilia Tortajada, Dogan Altinbilek & Asit K Biswas, eds, *Water Resources Development and Management: Impact of Large Dams: A Global Assessment*, electronic ed (Berlin: Springer-Verlag, 2012) c 1; Rita Cestti & RPS Malik, "Indirect Economic Impacts of Dams" in Tortajada, Altinbilek & Biswas, *ibid*, c 2; Thayer Scudder, "Resettlement Outcomes of Large Dams" in in Tortajada, Altinbilek & Biswas, *ibid*, c 3; Roger Gill & Morag Anderson, "Impacts of King River Power Development, Australia" in Tortajada, Altinbilek & Biswas, *ibid*, c 9; Hanna Werner, "Rivers, Dams and Landscapes: Engaging with the Modern on Contested Grounds" in Marcus Nüsser, ed, *Large Dams in Asia: Contested Environments Between Technological Hydroscapes and Social Resistance*, electronic ed (Dordrecht: Springer Science Media, 2014) c 7; Pu Wang, Sikui Dong & James P Lassoie, *The Large Dam Dilemma: An Exploration of the Impacts of Hydro Projects on People and the Environment in China*, electronic ed (Dordrecht: Springer Science & Business Media, 2014); John Taylor, *Indigenous People and the Pilbara Mining Boom: A Baseline for Regional Participation* (Canberra: ANU E-Press, 2005); Martin Brueckner et al, "Confronting the 'Resource Curse or Cure' Binary" in Martin Brueckner et al, eds, *Resource Curse or Cure? On the Sustainability of Development in Western Australia*, electronic ed (Berlin: Springer-Verlag, 2014) c 1; John Phillimore, "The Politics of Resource Development in Western Australia" in Brueckner et al, *ibid*, c 2; Martin Brueckner et al, "Curse or Cure? Revisiting State, Capital and Resources" in Brueckner et al, *ibid*, c 18; Suzana Sawyer & Edmund Terence Gomez, "Transnational Governmentality in the Context of Resource Extraction" in Suzana Sawyer & Edmund Terence Gomez, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State*, electronic ed, (London: Palgrave-Macmillan, 2012) 1; Jon Altman, "Indigenous Rights, Mining Corporations, and the Australian State" in Sawyer & Gomez, *ibid*, 46; Thomas Perreault, "Extracting Justice: Natural Gas, Indigenous Mobilization, and the Bolivian State" in Sawyer & Gomez, *ibid*, 75; Ben Naanen, "The Nigerian State, Multinational Oil Corporations, and the Indigenous Communities of the Niger Delta" in Sawyer & Gomez, *ibid*, 153.

[911] Grimm, *supra* note 908 at 130.

[912] *Ibid*. See below at 3.2.4 ("The Principle of Permanent Sovereignty Over Natural Resources") for an example of a doctrine that has arguably acquired the status of customary international law.

In order to discuss the rights of States to the development of natural resources located within their territorial boundaries, we need to consider first the role of the doctrine of discovery in the loss of Indigenous lands during the colonial period, and then the operation of the principle of permanent State sovereignty over natural resources (PSNR) that subsequently developed as a counter-reaction to colonialization. Finally, we will look at the interplay between PSNR and Indigenous self-determination rights.

3.2.2 Background: Colonialism and the Doctrine of Discovery

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.[913]

All four of the jurisdictions studied are erstwhile British colonies.[914] Traditionally, five means of acquiring territory have been recognized: occupation, prescription, cession, accretion[915] and conquest. Of these, only occupation, cession, and –to a very limited extent– conquest, are of pertinence in the present context.

---

[913] *Johnson v M'Intosh* 21 US (8 Wheat) 543 Marshall CJ, at 591–592.

[914] On the British colonies and their Indigenous subjects, see generally Julie Evans, Patricia Grimshaw, David Philips & Shurlee Swain, *Equal Subjects, Unequal Rights: Indigenous Peoples in British Settler Colonies, 1830–1910* (Manchester: Manchester University Press, 2003); R Miller, J Ruru, L Behrent & T Lindbergh, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010).

[915] Defined by Martin Dixon, Robert McCorquodale & Sarah Williams, *Cases & Materials on International Law*, 6th ed, (Oxford: Oxford University Press, 2016) at 247 as "the geographical addition of new territory".

Occupation is "the exercise of sovereignty (often initially by discovery) over previously unclaimed territory (*terra nullius*)."[916] This lies at the heart of colonialism: in Australia, for instance, the reasoning was advanced that the territory formed part of "the waste lands of the Colony"[917] –these constituting the territories of "backward peoples"–[918] and that their territory could accordingly be acquired through occupation (as opposed to cession or conquest).[919] Cession refers to territory being transferred from one sovereign to another, normally through a treaty.[920] Of importance here is the fact that a sovereign cannot transfer more rights than it possesses, a point emphasized by the United States Supreme Court in the Marshall trilogy of cases.[921] Conquest, finally, refers to the taking of a territory by force.[922]

Although Lowe describes international law as being "pragmatic" in that it does not seek to concern itself with "the mythical histories by which States first gained their territory", instead concentrating on the manner in which "sovereignty over territory changes hands",[923] the tenets of international law have played an important role first in the subjugation of Indigenous peoples the world over through the operation of the doctrine of discovery[924] – and subsequently in making progress towards the restoration of their land rights in the jurisprudence of both international and national

---

916 *Ibid* at 248.

917 See e.g. *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1, High Court of Australia [*Mabo*] at paras 25–27.

918 See *ibid* at para 33; Vrdoljak, *supra* note 903 at 197–198.

919 See *Mabo*, *supra* note 917 at para 24.

920 Dixon, McCorquodale & Williams, *supra* note 915 at 253.

921 *Johnson v McIntosh* [1823] USSC 22; (1823) 8 Wheat 543. Also see Dixon, McCorquodale & Williams, *supra* note 915 at 255. They argue that the impact of the right to self-determination here is that session of a territory now cannot occur without consulting its inhabitants: *ibid.*

922 *Ibid* at 256. They point out that this has been illegal in international law "at least since the signing of the United Nations Charter": *ibid.*

923 Lowe, *supra* note 942 at 245.

924 *Cf* R McCorquodale, "International Law, Boundaries and Imagination" in D Miller & S Hashmi, eds, *Boundaries and Justice* (2001), as extracted by Dixon, McCorquodale & Williams, *supra* note 915 at 245: "The current international legal system recreates and affirms the dispositions by colonial powers, it privileges certain voices and silences others, and it restricts the identities of individuals to those defined by state boundaries."

fora. One key judgment was that of the International Court of Justice (ICJ) in *Western Sahara*,[925] as it in turn influenced the reasoning of the Australian High Court in the seminal *Mabo* case.[926]

In *Western Sahara*, the ICJ described "*terra nullius*" as being "a legal term of art" that was a "cardinal condition of a valid 'occupation'".[927] Importantly, "territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terrae nullius*".[928] The Court then proceeded to hold that where sovereignty is acquired as a result of agreements with local rulers rather than unilaterally through occupation of *terrae nullius*, "such agreements with local rulers, whether or not considered as an actual 'cession' of the territory, were regarded as derivative roots of title, not original titles obtained by occupation of *terrae nullius*."[929]

In *Mabo*, Brennan J (Mason CJ and McHugh J concurring) distinguished between the capacity of municipal courts to rule on whether a territory has been acquired by the Crown and the consequences of such acquisition.[930] While the first is a matter for international law, municipal courts have jurisdiction in respect of the second question[931] – a matter for purposes of which "the common law has had to march in step with international law in order to provide the body of law to apply in a territory newly acquired by the Crown".[932] That being the case, a change in the international position must of necessity also be reflected in the development of the common law doctrine that is to accompany it.[933] *In casu*, the ICJ's examination of the *terra nullius* doctrine in *Western*

---

925 *Western Sahara Opinion* ICJ Rep 1975 12, International Court of Justice.

926 *Mabo*, *supra* note 917 at para 40.

927 *Western Sahara*, *supra* note 925, at para 79.

928 *Ibid*, at para 80.

929 *Ibid*, at para 80 [my emphasis].

930 *Mabo*, *supra* note 917 at para 32.

931 *Ibid.*

932 *Ibid.*

933 *Mabo*, *supra* note 917 at para 41.

Sahara Opinion meant that the common law position as reflected by *In re Southern Rhodesia*[934] was out of step in that –

> The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country (…) Whatever the justification advanced in earlier days for refusing to recognize the rights and interests of the land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. (…) The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[935]

Mabo is synonymous with the recognition of the doctrine of native title in Australia[936] and has led to substantial statutory changes there pertaining to Indigenous land rights.[937] It has furthermore been extensively cited in both Canada[938] and New Zealand,[939] as well as in other formerly colonial jurisdictions such as South Africa.[940]

The doctrine of discovery found application in three of the jurisdictions under consideration: the United States, Canada and Australia. One immediate consequence for these countries' Indigenous peoples was loss of control over and rights to that jurisdiction's natural resources. Thus Nabokov

---

[934] [1919] AC 211.

[935] *Mabo*, *supra* note 917 at para 42.

[936] See Islam, *supra* note 906 at 117.

[937] Dixon, McCorquodale & Williams, *supra* note 915 at 268. See the discussion below at 6.5.1.2 ("Native Title").

[938] Notably in *Delgamuukw*, *supra* note 550 at para 154 per Lamer CJ. This is the Canadian *locus classicus* insofar as the existence of aboriginal title *in principle* is concerned.

[939] E.g. in *Ngati Apa v Attorney-General* [2003] NZCA 117; [2003] 3 NZLR 643 [*Ngati Apa*] per Elias CJ at para 33. In this case, the common law doctrine of aboriginal title was fully revived in New Zealand.

[940] The seminal case holding that an Indigenous community had "common-law ownership" that equated to a "customary law interest" for purposes of the *Restitution of Land Rights Act*, Act 22 of 1994 is *Alexcor v Richtersveld Community* (CCT 19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC). This full-bench decision builds on both *Mabo* and *Delgamuukw*, *supra* note 550 at para 34.

argues, with reference to the United States, that Thanksgiving is a harmful myth that was constructed to legitimize the "usurpation" of Native American lands and natural resources and that its "legal codes protecting individual rights to life, liberty, private property and the pursuit of happiness were built upon this bedrock of illegal appropriation of Indian lands and continued denials of their religious and cultural rights."[941]

3.2.3 State Sovereignty

3.2.3.1 State Sovereignty as Principle of International Law

It is a fundamental principle of public international law that States are sovereign within their territorial boundaries,[942] the notion of a defined territory being core to the existence of the State.[943] The corollary of this is that they must respect one another's sovereignty and thus not interfere inside the sovereign domain of another State, and also that they must refrain from abusing their own sovereignty.[944] Islam refers to this as "sovereign responsibility" and postulates it as the counterbalance to state sovereignty – abuses of sovereignty, so he argues, have given rise to both the international human rights protection movement and the international standing that is afforded to self-determination rights in various instruments.[945]

---

[941] Peter Nabokov, "Red Herring or Real Turkey: The Race for an American Founding Rite" in Regina Bendix & Rosemary Lévy Lumwalt, eds, *Folklore Interpreted — Essays in Honor of Alan Dundes* 93 [Nabokov, "Red Herring"] at 107.

[942] See Dixon, McCorquodale & Williams, *supra* note 915 at 244. The authors relate State sovereignty to the principles of equality of States, territorial integrity and political independence as contained in Article 2 of the *United Nations Charter*. Lowe refers to State sovereignty as being "a knot of concepts centering on two inter-related ideas – the formal independence of decision-making of the State, and its freedom to exercise that independence in practice": V Lowe, *International Law* (2007), as extracted by Dixon, McCorquodale & Williams, *ibid* at 245.

[943] See Islam, *supra* note 906 at 165.

[944] See Dixon, McCorquodale & Williams, *supra* note 915 at 244; *Island of Palmas Case (The Netherlands v United States)* 2 RIAA 829 (1928), Huber, Sole Arbitrator; Islam, *supra* note 906 at 195.

[945] See Islam, *supra* note 906 at 196–197. Other limitations on sovereignty cited by him include those imposed by "international organizations; the growing body of human rights and humanitarian law; the impact of technology; multinational enterprises; cross-border crime prevention initiatives; and global environmentalism", because all of these create transcendental State obligations: *ibid* at 198. See *ibid* at 210–211 regarding the super structure that has been created by the major international financial and trade organizations such as the World Bank (WB), the International Monetary Fund (IMF) and the World Trade Organization (WTO) – this super structure transcends the national laws

However, sovereignty no longer appears to provide the undisputable basis for statehood that it once did.[946]

3.2.3.2 State Sovereignty and the Right to Self-Determination

Indigenous peoples' right to self-determination is an inherent right that comprises that they are free to determine their own cultural, social and economic development.[947] It has intertwined political and economic dimensions,[948] as is affirmed by the wording of article 1 of the *International Covenant on Civil and Political Rights (ICCPR)*[949] and the *International Covenant on Economic, Social and Cultural Rights (ICESR)*:[950]

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

---

of the Members. Also see *ibid* at 211–212 on the economic power wielded by multinational corporations (MNCs) – Islam argues that "[b]y virtue of their economic clout, they can acquire and exercise 'sovereignty in the institutionally coercive sense'".

946 *Cf ibid* at 124: The adherence to sovereignty as a philosophical foundation of statehood appears to be more a matter of political expediency than an unassailable *grundnorm*, a smokescreen than a burning issue."

947 Cathal Doyle & Jill Cariño, *Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector* trans by Simone Dreyfus-Gamelon (The Ecumenial Council for Corporate Responsibility (ECCR): Middelsex University School of Law, 2013) at 3. Also see Islam, *supra* note 906 at 171; Asbjørn Eide, "Ensuring Social and Economic Rights of National Minorities through the Work of the Advisory Committee on the Framework Convention" in Tove H Malloy & Ugo Caruso, eds, *Minorities, Their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities: Essays in Honour Of Rainer Hofmann* (Leiden: Martinus Nijhoff Publishers, 2013) 43; Ana Filipa Vrdoljak, "Self-Determination and Cultural Rights" in Francesco Francioni & Martin Scheinin, eds, *Cultural Human Rights* (Leiden: Martinus Nijhoff, 2008) 41; PG McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2005).

948 Sabine Lavorel, "Exploitation des ressources naturelles et droit des peoples à l'autodetermination économique" in Mihaela Ailincai & Sabine Lavorel, eds, *Exploitation des ressources naturelles et protection des droits de l'homme* (Paris: Éditions Pedone, 2013) 35 at 35–36.

949 *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (1966) [ICCPR].

950 *International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3* (1966) [ICESR].

The implication of this is that a people who is not by means to freely dispose of its economic resources is not by means to effectively govern itself.[951] Here it is important to bear in mind that the right to freely dispose of natural resources also encompasses the right not to dispose of them[952] – a decision that is more immediately pertinent in the context of the protection of Indigenous sacred sites.[953] It is for this reason, according to Lavorel, that the right to self-determination developed as corollary to the principle of permanent sovereignty over natural resources,[954] notably in the context of the developing countries that were moving away from their colonial past.[955] However, these two principles should not be conflated as they do not completely overlap.[956]

While the right to self-determination is now indisputably recognized as a core principle of international law,[957] its ambit is indeterminate in at least three ways: it is not clear who qualify as holders of the right,[958] its exact contents are unclear, and its ambit is uncertain.[959]

Lavorel identifies three situations where natural resource exploitation of a given area may fall foul of the right to self-determination: (1) exploitation of an occupied area such as the Palestinian territory, since the people are subjugated; (2) a sovereign state where exploitation is undertaken by

---

951 Lavorel, *supra* note 948 at 36. Also see Jérémie Gilbert, *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (Ardsley, NY: Transnational Publishers, 2006) at 195–224.

952 See Gilbert, *supra* note 951 at 219.

953 See e.g., Katherine Sinclair, "Untouched and Uninhabited: Conflicting Canadian Rhetoric on the Protection of the Environment and Advancing Northern Economies" in Thora Martina Herrmann & Thibault Martin, eds, *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic* (Switzerland: Springer International Publishing, 2016) c 12; Øyvind Ravna, "Recognition of Indigenous Lands Through the Norwegian 2005 Finnmark Act: An Important Example for Other Countries with Indigenous People?" in Herrmann & Martin, *ibid*, c 10.

954 But see Islam, *supra* note 906 at 196: he traces it more generally to the notion of sovereign responsibility.

955 Lavorel, *supra* note 948 at 36.

956 See *ibid* at 41.

957 *Ibid* at 37, with reference to *Timor oriental (Portugal c Australie)*, CIJ, 30 juin 1995, arrêt, *CIJ Rec 1995*, 102 § 29.

958 See Lavorel, *supra* note 948 at 42–47. She argues that the various Resolutions and Conventions tend to use "peoples" and "the State" interchangedly – when there can be a marked difference between them in practice.

959 See *ibid* at 37. According to Ben Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Oxford: Hart Publishing, 2016) at 55 the UN Human Rights Commission (HRC) has recognized since the late 1990s that the right to self-determination "applies to indigenous peoples, albeit not as extensively as it applies to the whole populations of colonial territories or independent countries." See *ibid* at 55–59 for specific applications in the context of Canada and Australia insofar as their approach to Indigenous land rights was concerned.

a company, foreign state or rebel group to the detriment of the sovereign state and its population; (3) a sovereign state where exploitation is undertaken to the detriment of either an Indigenous group against whom the state is discriminating, or against the whole of the state's population in the case of a corrupt government.[960]

Islam distinguishes between internal and external dimensions of self-determination rights.[961] In its internal dimension, self-determination serves as "a criterion of effective government and recognition, rather than statehood"[962] since it encompasses aspects such as the right to non-discrimination by influential groups or power-groupings.[963] It is in this context that the self-determination rights of minorities have become an important factor in the state sovereignty debate.

3.2.4 The Principle of Permanent Sovereignty over Natural Resources

In developing the concept of the "spatial independence" of peoples, Jane A Hofbauer closely links the right to self-determination to two main mechanisms: the principle of permanent sovereignty over natural resources (PSNR) and the principle of free, prior and informed consent (FPIC).[964]

The principle of permanent sovereignty over natural resources has its roots in the decolonialization process,[965] economic independence being a prerequisite for the effective exercise of self-

---

960 Lavorel, *supra* note 948 at 38–39.

961 Islam, *supra* note 906 at 215).

962 *Ibid* at 172.

963 *Ibid* at 171.

964 *Ibid* at 195. For a concrete illustration of what is at stake, see Leena Heinämäki, "Global Context – Arctic Importance: Free, Prior and Informed Consent, a New Paradigm in International Law Related to Indigenous Peoples" in Herrmann & Martin, *supra* note 953, ch 11.

965 I.e. in the context of the right to development – see e.g., UNGA Res 41/128, *Declaration on the Right to Development* (4 December 1986) 41 UNGAOR, Supp No 53 at 186, UN Doc A/41/53, Art 1(2): "The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources." See Hofbauer, *supra* note 77 at 197, 201–208; Özsu, "Mankind", *supra* note 40; Özsu, "Sovereignty". *supra* note 40; Jona Razzaque, "Resource Sovereignty in the Global Environmental Order" in Elena Blanco & Jona Razzaque, eds, *Natural Resources and the Green Economy: Redefining the Challenges for People, States and Corporations* (Leiden: Martinus Nijhoff, 2012) 81.

determination.[966] The implicit relationship between PSNR and the right to self-determination was recognized as follows in UNGA Resolution 1314 (XIII):

> the right of peoples and nations to self-determination as affirmed in the two draft Covenants completed by the Commission on Human Rights includes 'permanent sovereignty over their natural wealth and resources'.[967]

Although UN General Assembly Resolutions are non-binding, Hofbauer argues that by virtue of their number and constant repetition, they constitute a "prime example"[968] of "a strong *opinio iuris* that the principle of PSNR has been accepted as a norm of customary international law."[969]

There have been multiple UN General Assembly Resolutions on the topic of PSNR.[970] Of particular importance here are the following: the UN General Assembly Resolution 626 of 1952, entitled "Right to Exploit Freely Natural Wealth and Resources";[971] Resolution 2158 of 1966; Resolution 2016 of 1972; Resolution 3171 of 1973; Resolutions 3201,[972] 3202[973] and 3281[974] of 1974; Resolution 34/201 of 1979; and Resolution 35/7 of 1980.

In its traditional formulation PSNR reserves for States the possession, use and disposal of surface and sub-surface natural resources[975] – to the extent that they may even nationalize or expropriate

---

966 Hofbauer, *supra* note 77 at 196–197.

967 UNGA Res 1314 (XIII), *Recommendations Concerning International Respect for the Rights of Peoples and Nations to Self-Determination* (12 December 1958) 13 UNGAOR, Supp No 18 at 27, UN Doc A/4090 [UNGA 1314].

968 Hofbauer, *supra* note 77 at t 199.

969 *Ibid* at 200.

970 *Ibid* at 199–203.

971 UNGA Res 626 (VII), *Right to Exploit Freely Natural Wealth and Resources* (21 December of 1952,) [UNGA 626]. This was not the first UNGA Resolution to contain the PSNR principle: see Hofbauer, *supra* note 77 at 201, who cites UNGA Res 523 (VI), *Integrated Economic Development and Commercial Agreements* (12 January 1952) 6 UNGAOR, Supp No 20 at 20, UN Doc A/2119 [UNGA 523].

972 UNGA Res 3201 (S-VI) (1 May 1974) UN Doc A/Res/S-6/3201 [UNGA 3201].

973 UNGA Res 3202 (S-VI) (1 May 1974) UN Doc A/Res/S-6/3202 [UNGA 3202].

974 UNGA Res 3281 (XXIX) (12 December 1974) UN Doc A/Res/29/3281 [UNGA 3281].

975 On the State's corollary rights, see Hofbauer, *supra* note 77 at 209.

property belonging to both nationals and foreigners.[976] This means that the State's right of use supersedes land ownership rights;[977] the State may invalidate or renegotiate existing contractual agreements that relate to natural resources based on PSNR;[978] and the State may freely enter into national and international natural resource development contracts,[979] granting such investment protections as it deems fit.[980]

3.3 Avenues for Protection of Indigenous Sacred Sites

3.3.1 Preliminary Matters

3.3.1.1 Introduction

As has been noted previously, this thesis is concerned with the domestic implementation of international law rather than public international law as a discipline. More specifically, it touches on the domestic implementation of international law in Canada, the United States, Australia and New Zealand. A more detailed analysis of these systems will follow at 3.4 below ("The Domestic Implementation of International Law"), but for present purposes I note that they all follow a primarily dualist system that usually requires the incorporation of international law into national law by means of implementing legislation before it becomes enforceable by the municipal courts of the State in question. This has an immediate limiting impact on the discussion that follows, in that I

---

[976] *Ibid* at 202. Note that compensation is due, as per the provisions of UNGA Res 1803 (XVII), *Permanent Sovereignty Over Natural Resources*, 14 December 1962, 17 UNGAOR, Supp No 17 at 15, UN Doc A/5217, Art 1, para 4 [UNGA 1803]. For some cautionary tales on nationalization and secession driven by oil, see Stefano Casertano, *Our Land, Our Oil! Natural Resources, Local Nationalism, and Violent Secession* (Wiesbaden: Springer, 2013).

[977] Hofbauer, *supra* note 77 at 202.

[978] *Ibid* at 210.

[979] *Ibid.*

[980] *Ibid.*

will not –essentially for reasons of space– attempt to deal with all public international law instruments or doctrines that may be pertinent to a discussion on Indigenous sacred sites.

Broadly speaking, minority rights protection protects an Indigenous community *qua* Indigenous group against infringements of various rights as stipulated in different human rights instruments. These are collective rights, raising various issues, including –but not limited to– definitional (who is 'Indigenous',[981] who are 'peoples',[982] who qualify as members of the community and how and by whom are the membership rules determined?); representational (who is duly authorized to act on behalf of and represent the collective, and what is the basis of that authority?); consensual (what happens if there is inter-community disaccord about the way forward?); and may give rise to identity politics[983] (i.e. a community artificially plays on outdated perceptions of them in order to get ahead) and authenticity issues[984] (the exclusion of members on the basis that they are not "Indigenous" in the traditional sense, and therefore inauthentic; claims that only Indigenous people can authentically put forward Indigenous matters).

---

[981] See Saul, *supra* note 959 at 21–31 on various definitional approaches, including that of the International Labour Organization in *Convention No 107 of 1957 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* and *Convention 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries* and the United Nations. Core definitional elements identified by him include: non-dominance, "historical continuity, self-identification as socially distinct groups, and distinctive ethnic identity, culture and institutions" (*ibid* at 31). For analysis of the definitional elements, see *ibid* at 32–37.

[982] See *ibid* at 31–32. He specifically addresses the distinction between 'peoples' [communities] and 'people' [the entire population of a country].

[983] See the sources cited *infra*, note 1004.

[984] See the sources cited *infra*, note 1005.

3.3.1.2 Individual and Collective Rights

Michael McDonald builds upon the work of Neil MacCormick[985] and Will Kymlicka[986] to develop the argument that communities as "identifying groups" have an equally valid claim to legal protection and recognition as individuals do.[987]

For such societies there is a kind of Humpty Dumpty effect; once such a community is shattered it cannot be put back together again.[988] To pretend that individual rights without the addition of powerful collective rights and powers would preserve the social goods in question would be disingenuous.[989]

Isa cites the Columbian Constitutional Court as having recognized on various occasions that "the Indigenous community has ceased to be just an actual and legal reality and become the *holder* of

---

[985] Michael McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism" (1991) 4 Canadian Journal of Law and Jurisprudence 217 at 234. He points out that MacCormick makes a connection between the notion of respect for persons and respect for cultures.

[986] "Once we recognize the importance of the cultural structure and accept that there is a positive duty on the state to protect the cultural conditions which allows for autonomous choice, then cultural membership does have political salience. Respect for the autonomy of the members of minority cultures requires respect for their cultural structure, and that in turn may require special linguistic, educational, and even political rights for minority cultures": Will Kymlicka, "Liberal Individualism and Liberal Neutrality" (1989) 99 *Ethics* 883 at 899, quoted by McDonald, *supra* note 985 at 235. Also see Neus Torbisco Casals, *Group Rights as Human Rights: A Liberal Approach to Multiculturalism* (Dordrecht, the Netherlands: Springer, 2006); Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007); and, for criticism on Kymlicka's propositions, David Lea, *Property Rights, Indigenous People and the Developing World: Issues from Aboriginal Entitlement to Intellectual Ownership Rights* (Leiden: Martinus Nijhoff Publishers, 2008) at 34–38.

[987] "As it stands, this welfare liberal argument is powerful and convincing. Briefly it is that becoming an autonomous person requires a social context in which one acquires an identity not just as an individual but as a member of a community. Language and culture are central to the formation of an autonomous identity. If one's language and culture is penalized or even marginalized, then the barriers to personal autonomy are likely to be high. But language and culture are paradigmatically collective assets; their protection is best vested in the community. Hence, the need for collective rights to provide linguistic and cultural security of the members of minority cultural, linguistic, religious, and other groups": *ibid.* Also see Wiessner, "Cultural Rights", *supra* note 213 at 125; Laura Reidel, "What Are Cultural Rights? Protecting Groups with Individual Rights" (2010) 9 Journal of Human Rights 65;

[988] McDonald, *supra* note 985 at 230.

[989] *Ibid.* On minority and Indigenous groups in the international human rights context, see notably Doris Farget, *Le droit au respect des modes de vie minoritaires et autochtones dans les contentieux internationaux des droits humains*, (Montréal: Les Éditions Thémis, 2012); Joseph Pestieau, "Minority Rights: Caught Between Individual Rights and Peoples' Rights" (1991) 4 Canadian Journal of Law and Jurisprudence 361. Further see Lesley A Jacobs "Bridging the Gap Between Individual and Collective Rights with the Idea of Integrity" (1991) 4 Canadian Journal of Law and Jurisprudence 375.

fundamental rights."[990] He links this with the willingness of the Inter-American Court on Human Rights' (IACtHR) to give effect to the worldview of the Indigenous community in the *Awas Tingni Community v Nicaragua*[991] case, in the sense that it "was legitimate to take a collective view of a right which from the traditional liberal perspective had always been interpreted as an exclusively individual one": the right to property.[992] In this regard he notes the connection made by the courts between the close ties of Indigenous peoples to their land, their spiritual legacy and their right to life and cites in support *the Case of the Plan de Sánchez Massacre v Guatemala*;[993] *the Case of the Mayagna (Sumo) Awas Tingni Community of Nicaragua*;[994] *and the Case of the Yakye Axa Indigenous Community v Paraguay.*[995]

In this context Wiessner distinguishes between "organic" and "non-organic" communities, the former being people who have made and keep to a conscious decision to live together as a community (commonly designated as a 'nation' or a 'people').[996] He argues that

> the psychosocial reality of a community is manifest. … Membership of a group is of fundamental importance to individuals, to their pursuit of self-realization, a key-need. In the constant interplay between the individual and society's constituent groups, not only is the individual self shaped and changed, but general patterns of group behaviour are reconstructed and modified as well. Groups of meaning to individuals are thus essential

---

990 Corte Constitucional de Columbia (C.C.) (Columbian Constitutional Court), Sentencia T-380/93, 13 Sept 1999, 8 (Colombia.), cited by Felipe Gómez Isa, "Cultural Diversity, Legal Pluralism, and Human Rights from an Indigenous Perspective: The Approach by the Colombian Constitutional Court and the Inter-American Court of Human Rights" (2014) 36:4 Hum Rts Q 722 at 724 (his translation and emphasis).

991 *Case of the Mayagna Community (SUMO) Awas Tingni Community v Nicaragua (Merits, Reparations and Costs)* IACtHR Series C No 79 (31 August 2001) [*Awas Tingni*].

992 Isa, *supra* note 990 at 742.

993 *Case of the Plan de Sánchez Massacre v Guatemala. Reparations, IACtHR (Ser. C) No. 116 (19 Nov 2004)* [*Plan de Sánchez Massacre*] at para 85.

994 *Awas Tingni*, *supra* note 991 at para 149.

995 *Case of the Plan de Yakye Axa Indigenous Community v Paraguay, Judgment, IACtHR (Ser. C) No. 125 (17 Jun 2005)* [*Yakye Axa*] at para 168.

996 See in this context Miodraga Jovanovic, "Recognizing Minority Identities Through Collective Rights" (2005) 27:2 Hum Rts Q 625.

> extensions of self, necessary parts of a person's identity. Interaction with and reliance upon others is a condition sine qua non for human existence.[997]

Similarly, Nicola Wenzel argues that there is no structural difference in conflict between individual interests and conflict between individual and collective interests.[998]

In a 1998 article,[999] Vivian Curran makes two important observations: first that we need to pose questions about the capacity of constitutional law "within what formerly frequently passed for homogenous legal cultures … to protect the rights of all of a state's constituencies"[1000] and second, that contemporary legal scholarship increasingly challenges the notion that "equality under the law is incompatible with the recognition of group differences."[1001] Both of these are of fundamental importance for present purposes. The first, because even in a country with an ultra-inclusive Constitution like South Africa,[1002] there are groups like the San who find themselves marginalized and vulnerable,[1003] and the second, because, so I argue, substantive equality can only be attained for a minority group through express recognition of its otherness.

The scope of this thesis does not permit an investigation of the role that recognition policies and identity politics play in the constitution of these groups,[1004] nor the issues of authenticity that arise

---

997 Wiessner, "Cultural Rights", *supra* note 213 at 124.

998 Nicola Wenzel, *Group Rights* (Oxford University Press, 2011).

999 Vivian Grosswald Curren, "Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives" (1998) 46:4 Am J Comp L 657.

1000 *Ibid* at 657.

1001 *Ibid* at 666.

1002 Cf the Preamble to the *Constitution of the Republic of South Africa, 1996*, 1996 [*South African Constitution*]: "We, the People of South Africa, … Believe that South Africa belongs to all who live in it, united in our diversity".

1003 See Steve Robbins, "Whose 'culture', whose 'survival'? The ≠Khomani San land claim and the cultural politics of 'community' and 'development' in the Kalahari" in Alan Barnard & Justin Kenrick, eds, *Africa's Indig Peoples "First Peoples" or 'Marginalized Minor* (Edinburgh: Edinburgh University Centre of African Studies, 2001) 229 at 238. For an overview of the San's uphill battle for the protection of their traditional knowledge in the Hoodia debacle, see Rachel Wynberg & Roger Chennells, "Green Diamonds of the South: An Overview of the San-Hoodia Case" in Rachel Wynberg, Doris Schroeder & Roger Chennells, eds, *Indig Peoples, Consent Benefit Sharing Lessons From San-Hoodia Case* (Dordrecht: Springer, 2009) 89.

1004 See in this context Ayelet Schachar, *Multicultural Jurisdictions: Cultural Differences and Women's* Rights ((Cambridge: Cambridge University Press, 2001) 1–26, 63–122; Elizabeth A Clark, "International and Comparative Law Protections

from identity-based rights.[1005] Nonetheless, these are important facets of the debate that merit consideration.

---

of Collective Aspects of Religious Freedom" in Newman, *Religious Freedom*, *supra* note 358, 131 at 144–150; Tove H Malloy, "Standards to Eliminate Compounded Discrimination: The Case of the Intersectionality of 'Minorities Within Minorities' Or, Why Universal Legal Standards Must Engage with the Concept of Culture" in Kristin Henrad, ed, *Double Standards Pertaining to Minority Protection* (Leiden: Martinus Nijhoff, 2010) 25; Corsin Bisaz, *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons* (Leiden: Martinus Nijhoff Publishers, 2012) at 201–203; Federico Lenzerini, "Conclusive Notes: Defining Best Practices and Strategies for Maximizing the Concrete Chances of Reparation for Injuries Suffered by Indigenous Peoples" in Lenzerini, *supra* note 903, 605 at 605ff; James Griffin, "Group Rights" in Lukas H Meyer et al, eds, *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*, electronic ed, (Oxford Scholarship Online: 2003) 162; Yael (Yuli) Tamir, "Against Collective Rights" in Lukas H Meyer et al, eds, *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*, electronic ed, (Oxford Scholarship Online: 2003) 184; Michael Hartney, "Some Confusions Concerning Collective Rights" (1991) 4 Canadian Journal of Law and Jurisprudence 293; Frederick Charette, *Les droits collectifs: De quel droit?* (LLD Thesis, Faculty of Law, Université de Montréal, 1996); Sujit Choudhry, "Group Rights in Comparative Constitutional Law: Culture, Economics, or Political Power" in Michel Rosenfeld & András Sajó, eds, The Oxford Handbook of Comparative Constitutional Law (Oxford: Oxford University Press, 2012) 1099; Emir Delic, "Mondialisation, minoritarité et conscience altéritaire" in Sophie Croisy, ed, *Globalization and 'Minority' Cultures: The Role of 'Minor' Cultural Groups in Shaping Our Global Future* (Leiden & Boston: Brill Nijhoff, 2015) 31; Clive Baldwin, "Do Vulnerable Groups Within Ethnic, Religious or Linguistic Minorities Need Special Standards?" in Kristin Henrad, ed, *Double Standards Pertaining to Minority Protection* (Leiden: Martinus Nijhoff, 2010) 243; Seymour, "Introduction", *supra* note 69 at 1; Tariq Modood, "Difference, 'Multi' and Equality" in Seymour, *Recognition*, *supra* note 69, 152; Michel Seymour, "Political Liberalism and the Recognition of Peoples" in Seymour, *Recognition*, *ibid*, 172; Avigail Eisenberg, "The Public Assessment of Indigenous Identity" in Seymour, *Recognition*, *ibid*, 197; Michel Seymour, "Conclusion: The Return of Peoples" in Seymour, *Recognition*, *ibid*; Benedict Kingsbury, "'Indigenous Peoples'" in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 American Journal of International Law 414; Erik B Bluemel, "Separating Instrumental from Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule-Making" (2005) 30 American Indian Law Review 55; Miodrag A Jovanovic, "Recognizing Minority Identities Through Collective Rights" (2005) 27:2 Human Rights Quarterly 625; Yvonne Donders, "A Right to Cultural Identity in UNESCO" in Francesco Francioni & Martin Scheinin, eds, *Cultural Human Rights* (Leiden: Martinus Nijhoff, 2008) 317; Avigail Eisenberg, "Indigenous Cultural Rights and Identity Politics in Canada" (2013) 18 Review of Constitutional Studies 89; Adrien Rodd, "Indigenous Peoples and National Self-Image in Australia and New Zealand" in Sophie Croisy, ed, *Globalization and 'Minority' Cultures: The Role of 'Minor' Cultural Groups in Shaping Our Global Future* (Leiden & Boston: Brill Nijhoff, 2015) 77; Rodolfo Stavenhagen, *The Emergence of Indigenous Peoples*, electronic ed (Heidelberg: Springer, 2013); Stéphanie Vaudry, "Conflicting Understandings in Polar Bear Co-Management in the Inuit Nunangat: Enacting Inuit Knowledge and Identity" in Thora Martina Herrmann & Thibault Martin, eds, *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic*, electronic ed (Switzerland: Springer International, 2016) 145; Edmund Terence Gomez & Suzana Sawyer, "On Indigenous Identity and a Language of Rights" in Sawyer & Gomez, *supra* note 910, 9; Raymundo D Rovillos & Victoria Tauli-Corpuz, "Development, Power, and Identity Politics in the Philippines" in Sawyer & Gomez, *ibid*, 129; Virginius Xaxa, "Identity, Power, and Development: The Kondhs in Orissa, India in Sawyer & Gomez, *ibid*, 180; Megan Davis, "Identity, Power, and Rights: The State, International Institutions, and Indigenous Peoples in Canada" in Sawyer & Gomez, *ibid*, 230; Kristen Henrad, "Minorities, Identity, Socio-Economic Participation and Integration: About Interrelations and Synergies" in Kristen Henrad, ed, *The Interrelation Between the Right to Identity of Minorities and Their Socio-Economic Participation* (Leiden: Martinus Nijhoff, 2013) 21.

[1005] Seymour, "Political Liberalism", *supra* note 1004; Modood, *supra* note 1004; Eisenberg, *supra* note 1004; Edmund Terence Gomez & Suzana Sawyer, "State, Capital, Multinational Institutions, and Indigenous Peoples" in Sawyer &

3.3.2 International Human Rights Instruments

Although they are rooted in a range of cultures, values and religions, human rights have as core value the protection of the inherent dignity of human beings.[1006] Lenzerini argues that in the case of Indigenous communities, they suffer violations of "their basic individual and collective rights as well as humiliation and mortification of their communal dignity and pride."[1007] However, as he also points out, there is a "dark side" to the international human rights regime in that many perpetrators get away with impunity despite "unacceptable offences to the sanctity of human dignity" due to the lack of effective remedies in the real world.[1008] In the discussion that follows I take a practical approach, in that I am searching for measures that could concretely be implemented by Indigenous communities in the four jurisdictions studied. Thus, for instance, I will consider UNDRIP from up close –given the fact that at least Canada might actually adopt it– but not ILO 169.[1009] I emphasize that in making this choice I am not negating the importance of ILO 169[1010] for Indigenous rights *in*

Gomez, *supra* note 1004, 33; See Ward Churchill, "The Indigenous Peoples of North America: A Struggle Against Internal Colonialism" in Churchill, *Struggle for the Land*, *supra* note 320, 15.

[1006] Islam, *supra* note 906 at 559.

[1007] Federico Lenzerini, "Reparations for Indigenous Peoples in International and Comparative Law: An Introduction" in Lenzerini, *supra* note 903, 3 at 8.

[1008] Lenzerini, "Introduction", *supra* note 1007, at 7. Indeed, this is problematic in the jurisdictions under consideration, notably in the context of Indigenous peoples. Thus Islam criticizes the Australian government's "half-hearted" and frequently long outstanding reporting under the ICESCR and the ICCPR and notes that the UN Committee on Economic, Social and Cultural Rights (CESCR) "raised grave concerns about the economic, social and cultural plight of the Aborigines in Australia in September 2000" in relation to a proposed uranium mining development adjoining the Jabiluka National Park, a World Heritage Site: Islam, *supra* note 906 at 117–118. Also see *ibid* at 118–119 on the August 2007 suspension of the *Racial Discrimination Act 1975* (Cth) with the objective of enacting the Northern Territory "Emergency Reponse" Intervention laws intended to "address claims of rampant child sexual abuse and neglect in Northern Territory Aboriginal communities" – a step criticized by the IHRC in April 2009 as constituting a breach of Australia's obligations under the ICCPR: *ibid* at 119.

[1009] *ILO Convention 169 on Indigenous and Tribal Peoples* of 1989 [ILO 169].

[1010] Thus, for instance, Ben Saul points out –with reference to Benedict Kingsbury–that Convention 169's definition of 'Indigenous peoples' likely has achieved the status of customary international law: Saul, *supra* note 959 at 29.

general: it is a reflection of the fact that ILO 169 has had little success among traditional Western jurisdictions.[1011]

Insofar as the four jurisdictions studied are concerned, the international human rights regime offers four main modalities that may be pursued: Indigenous rights; minority rights / religious rights / anti-discrimination rights; cultural rights; and property rights. The next four sections deal with these in turn. Note, however, that this is an artificial and uneasy structure within which to cast Indigenous peoples' endeavours to protect their cultural and spiritual heritage:[1012] the structure as presented below is reflective of Western classification patterns that seek to compartmentalize cultural heritage and where property interests play a central role;[1013] as observed in Chapter 2, Indigenous conceptualizations of culture, religion and identity are on the whole much more holistic and integrated – with land (traditionally conceived of in property terms in Western thinking) fulfilling a control role in that regard.[1014] There will accordingly of necessity be overlap in the discussions below.

[1011] Only around 11% of all countries are signatories to Convention 169 –a total of 22– and of these 22, 15 come from Latin America. Almost none of the countries with Indigenous populations are members: Saul, *supra* note 959 at 30.

[1012] *Cf ibid* at 55: "[F]orcibly 'fitting' indigenous interests into the framework of minority rights has proven too restrictive to vindicate the full suite of rights to which indigenous peoples are now entitled."

[1013] See Vrdoljak, *supra* note 903 at 202.

[1014] Ana F Vrdoljak makes a similar observation, wording it as follows: "Reparations for cultural loss by indigenous peoples are significant for several reasons. Culture and its disappearance through destruction or assimilation have been central to the colonial project and nation-building by settler-states. These policies and practices have had a particularly devastating effect on indigenous peoples because they conceive of culture and its manifestations as holistic, symbiotic, collective, and intergenerational in character.": *ibid* at 197.

3.3.2.1 Indigenous Rights

3.3.2.1.1 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[1015] contains various important provisions when it comes to the protection of Indigenous sacred sites, notably Articles 8, 10, 25–34 and the following provision in the Preamble:

> *Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources[1016]

Insofar as natural resource developments are concerned: although UNDRIP recognizes a right of self-determination for Indigenous peoples in Article 3, Article 4 appears to limit it to "matters relating to their internal and local affairs" and "ways and means of financing their autonomous functions." There is no mention of a right to PSNR *for Indigenous communities*.

UNDRIP does contain safeguards against involuntary displacements, territorial dispossessions and forcible removals of Indigenous peoples from their territories,[1017] and expressly provides for FPIC and for the payment of "just and fair compensation" with a return option where possible.

The core sacred site provisions are to be found in Articles 11 and 12. I cite them in full for ease of reference:

> *Article 11*
>
> 1. Indigenous peoples shall have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future

[1015] *Supra* note 39.

[1016] UNDRIP, *supra* note 39, Preamble para 7.

[1017] Art 8 read with Art 10.

manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 12(1) appears broad enough to cater for sacred sites conceived of both from a religious and a cultural perspective – this is important specifically in the context of the Māori. As discussed in 2.4.3.2 above ("Translation and Universalization") large-scale Christianization of the Māori has meant that the sacred site conversation in Aotearoa New Zealand is a cultural rights discourse, rather than one founded on religious rights.[1018] This is important, because the cultural heritage protection provision in Article 11(1) would not appear to provide for sacred sites in the form of landscapes – mention is made only of "archaeological and historical sites". However, as we saw in 1.3.3 ("Sacred Sites") and 2.4.3 ("Indigenous Conceptions of the Sacred") above, Indigenous sacred sites often take the form of a landscape or natural site without any embellishment. Article 12 does not suffer from the same default – likely the result of the fact that Indigenous peoples actively participated in the 20-year process to negotiate UNDRIP.[1019] But there is a serious difference in

[1018] See specifically at 2.4.3.3.3 above ("The Role of Ritual: Aotearoa New Zealand: Māori Traditions").

[1019] Sermet points out that as an instrument UNDRIP benefits from *prima facie* legitimacy in that Indigenous peoples' representatives had been involved in the actual drafting thereof: Sermet, *supra* note 60 at 213. He accordingly argues that UNDRIP challenges classic interpretative principles of international law such as state sovereignty as being foundational to international law: *ibid* at 211. For a first-hand account of the negotiation process, see James (Sa'ke'j) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples* (Saskatoon: Purich Publishing, 2008).

ambit between Articles 11 and 12: Article 11(2) contains a restitution and FPIC provision, while Article 12(1) simply speaks of "the right to maintain, protect, and have access in privacy to their religious and cultural sites".[1020] They therefore do not offer the same measure of protection – this renders it serious that most sacred sites would likely fall within the ambit of Article 12(1), a somewhat toothless provision.

Yet I would argue that Article 11 remains important for sacred site protection purposes, specifically when it comes to the removal of objects that do not fall into the "ceremonial" category, but are nonetheless sacred to the Indigenous peoples concerned. An example here is to be found in the facts of the *Ortitz* case[1021] where the New Zealand Government tried in vain to prevent the sale at a Sotheby's auction of intricately carved wooden doors that were of great sacred significance to the Māori.[1022]

Other provisions in UNDRIP protect the rights of Indigenous peoples to the "lands, territories and resources that they have traditionally occupied, owned or used"[1023] and their "right to strengthen and maintain their distinctive spiritual relationship" with lands,[1024] providing for cultural heritage

---

[1020] See Vrdoljak, *supra* note 903 at 218–219. She observes that "[t]his limited interpretation of "return" of sacred sites within the context of the right to religious profession and practices has proved problematic for indigenous peoples in the domestic sphere when their right is balanced against third party and national interests", with reference to the American sacred site *locus classicus*, *Lyng*, *supra* note 787, as well as the Australian one, *Milirrpum v Nabalco Pty Limited* (1971) 17 FLR 141: *ibid*. Note, however, that the Australian precedent referred to precedes *Mabo*.

[1021] *Attorney-General of New Zealand v Ortitz & Others* [1982] 3 All ER 432 (HC &CA): [1983] 2 All ER 931 (HL).

[1022] See Sir Ian Barker, "The Protection of Cultural Heritage Items in New Zealand" in Hoffman, *supra* note 80, 145 at 146–147.

[1023] Art 26.1.

[1024] Art 25. See in this context G Barrie, "The United Nations Declaration on the Rights of Indigenous Peoples: Implications for Land Rights and Self-Determination" 2013:2 *Journal of South African Law* 292.

protection,[1025] prior consultation in resource development projects,[1026] prior informed consent (PIC)[1027] and mitigation strategies.[1028]

The problem here lies in the enforceability of UNDRIP. Apart from the fact that UN Declarations are generally not enforceable,[1029] the four jurisdictions studied were the only ones out of 158 to vote against the adoption of UNDRIP in 2007.[1030] Although they have all since adopted the *Declaration*, they have all equally made it clear that they consider it as a politically legitimate but not a legally enforceable document.[1031] As such, not one of the four jurisdictions has thus far adopted legislation

---

[1025] Art 31.

[1026] Art 32(2).

[1027] *Ibid.*

[1028] Art 32(3). Vrdoljak, *supra* note 903 at 219–220 criticizes compensation as an option to restitution on the basis that "the intrinsic importance of traditional lands to the identity and cultural integrity of indigenous communities makes monetary redress, in lieu of restitution, problematic and untenable." She argues that some human rights violations such as the right to life are not remediable by restitution. An interesting recent case in this regard is that of the *African Court on Human and Peoples' Rights in African Commission on Human and Peoples' Rights v Republic of Kenya*, Application No 006/2012 (26 May 2017) [*Ogiek Case*]. See the discussion below at 3.3.3 ("Jurisprudence: International Human Rights Bodies").

[1029] Islam, *supra* note 906 at 589.

[1030] In fact, they had also successfully lobbied to delay the adoption of UNDRIP: see Vrdoljak, *supra* note 903 at 211, note 86.

[1031] In adopting the Declaration in April 2009, the Australian Government clarified that it is a "positive, aspirational document" with "no legal force": Australian Human Rights Commission, "Questions and answers on the UN Declaration on the Rights of Indigenous Peoples", (2 April 2009), online: <https://www.humanrights.gov.au/publications/questions-and-answers-un-declaration-rights-Indigenous-peoples-2009>. The official Aotearoa New Zealand position appears to be a little nebulous: the website of the Human Rights Commission has a section on UNDRIP that makes neither mention of Aotearoa New Zealand's initial vote against, nor its later assent. It also contains two documents with (apparently) conflicting statements: the standard refrain that UNDRIP is "an aspirational document, whose text is not legally binding" on the member states: New Zealand Human Rights Commission Te Kahuri Tika Tangata, "United Nations Declaration on the Rights of Indigenous Peoples", online: *Hum Rights Treaty Wait* <http://www.hrc.co.nz/human-rights-and-the-treaty-of-waitangi/united-nations-declaration-on-the-rights-of-Indigenous-peoples/>, but in "UNDRIP and the Treaty", online: *Hum Rights Treaty Wait* <http://www.hrc.co.nz/human-rights-and-the-treaty-of-waitangi/undrip-and-the-treaty/> UNDRIP is described in the following terms: "It provides a set of international human rights standards that apply to the Treaty of Waitangi". On December 16, 2010 the US Department of State released its "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples. Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples", (2010), online: <http://www.state.gov/s/tribalconsultation/declaration/>, motivating its decision to review its position as both a "response to calls from many tribes, individual Native Americans, civil society, and others in the United States" (at 1) and an indication of its desire to "be a better model for the international community in protecting and promoting the rights of Indigenous peoples" (at 15). On Canada, see Government of Canada, "Canada Endorses The United Nations Declaration On The Rights Of Indigenous Peoples", (12 November 2010), online: <http://www.aadnc-aandc.gc.ca/eng/1292354321165/1292354361417>. Interestingly, the Canadian Government had previously explained

aimed at implementing UNDRIP. However, the position as to the enforceability is not cut and dried: arguments could be made that it is (at least partially, and increasingly) legally binding.[1032] Even where it clearly has only aspirational status, as in Australia, M Rafiqul Islam submits that –

> the declaration brings to Australia guidance to interpret, discuss, and resolve Aboriginal rights, in particular land and resource rights. Although the Native Title Act 1993 deals with these matters, the declaration can provide additional assistance to the government in formulating policies to engage in just and fair processes to ascertain ownership, control and compensation issues.[1033]

The most important implication that a legally enforceable UNDRIP would hold for the four jurisdictions in question, is the FPIC requirement.[1034]

---

its refusal to adopt the Declaration in the following terms: "While not a legally-binding instrument, a declaration is an expression of political commitments, and Canada takes its political commitments made at the international level seriously": Government of Canada, "Update Paper: United Nations Declaration on the Rights of Indigenous Peoples", (10 January 2008), online: *Aboriginal Affairs and Northern Development Canada* <http://www.aadnc-aandc.gc.ca/eng/1100100014161/1100100014162>. Logically, therefore, the question arises whether in adopting the Declaration in 2010 Canada has committed itself at the international level. Canada's position has been somewhat more complex since the inauguration of the Trudeau Government. Although the Prime Minister initially announced that Canada would comply in full with UNDRIP, the Minister of Justice has since suggested that that would not be possible in the literal sense.

[1032] Sermet, *supra* note 60 at 204. Shaw, *supra* note 313 at 83 argues that "'soft law' is not law" but emphasizes that a document need not be legally binding in order to exert political influence. Also see *ibid* at 84.

[1033] Islam, *supra* note 906 at 117.

[1034] See Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014) at 142–165; Tyler Levitan & Emilie Cameron, "Privatizing Consent? Impact and Benefit Agreements and the Neoliberalization of Mineral Development in the Canadian North" in Arn Keeling & John Sandlos, eds, *Mining and Communities in Northern Canada: History, Politics and Memory* (Calgary, Alberta: University of Calgary Press, 2015) 259; Jon Altman, "Contestations over Development" in Jon Altman & David Martin, eds, *Power, Culture, Economy: Indigenous Australians & Mining* (Canberra: ANU E-Press, 2009) 1; David F Martin, "The Governance of Agreements Between Aboriginal People and Resource Developers: Principles for Sustainability" in Altman & Martin, *ibid*, 99; Leena Heinämäki, "Global Context — Arctic Importance: Free, Prior and Informed Consent, a New Paradigm in International Law Related to Indigenous Peoples" in Thora Martina Herrmann & Thibault Martin, eds, *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic*, electronic ed (Switzerland: Springer International, 2016) 209. The preferred outcome of FPIC is the conclusion of an Access and Benefit agreement ¿ sources in this regard are legion, but some insightful ones include: Benedict Scambary, *My Country, Mine Country: Indigenous People, Mining and Development Contestation in Remote Australia* (Canberra: ANU E Press, 2013); Hereward Longley, "Indigenous Battles for Environmental Protection and Economic Benefits during the Commercialization of the Alberta Oils Sands, 1967–1986" in Keeling & Sandlos, *ibid*, 207; Jon Altman, "Indigenous Communities, Miners and the State in Australia" in Altman & Martin, *ibid*, 17; Robert Leviticus, "Aboriginal Organizations and Development: The Structural Context" in in Altman & Martin, *ibid*, 73; Sarah Holcombe, "Indigenous Entrepreneurialism and Mining Land Use Agreements" in Altman & Martin, *ibid*, 149; Benedict Scambary, "Mining Agreements, Development, Aspirations, and Livelihoods" in Altman & Martin, *ibid*, 9)

3.3.2.2 Cultural Rights

3.3.2.2.1 The Right to Take Part in Cultural Life (ICCPR, Article 27)

Art 27 of the ICCPR constituted the first minority protection provision of universal application[1035] and in General Comment No 23 Indigenous communities were recognized as a potential minority group for purposes of Article 27.[1036]

While it arguably "has proved decisive in affording a measure of protection to the cultural integrity [of] indigenous peoples in international law"[1037] its denomination as "minority protection" has been contentious among Indigenous peoples who reason that minority status negates their collective self-determination rights[1038] by minimizing the pernicious effects that colonialism has had on their communities and their members.[1039]

171; Alfred Michael Dockery, "The Mining Boom and Indigenous Labour Market Outcomes" in Martin Brueckner et al, eds, *Resource Curse or Cure? On the Sustainability of Development in Western Australia*, electronic ed (Berlin: Springer-Verlag, 2014) c 5; Katherine Sinclair, "Untouched and Uninhabited: Conflicting Canadian Rhetoric on the Protection of the Environment and Advancing Northern Economics" in Herrmann & Martin, *ibid*, 243.

1035 Vrdoljak, *supra* note 903 at 210. Also see Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Leiden: Martinus Nijhoff, 2007); Johanna Gibson, "The UDHR and the Group: Individual and Community Rights to Culture" (2008) 30 Hamline Journal of Public Law and Policy 285; William Kurt Barth, *On Cultural Rights: The Equality of Nations and the Minority Legal Tradition* (Leiden: Martinus Nijhoff, 2008); Lourdes Arizpe, *Culture, Diversity and Heritage: Major Studies*, electronic ed (Switzerland: Springer International, 2015).

1036 See Saul, *supra* note 959 at 59.

1037 Vrdoljak, *supra* note 903 at 210; Rodolfo Stavenhagen, *Peasants, Culture and Indigenous Peoples: Critical Issues*, electronic ed (Heidelberg: Springer, 2013); Siegfried Wiessner, "Culture and the Rights of Indigenous Peoples" in Ana Vrdoljak, ed, *The Cultural Dimension of Human Rights*, electronic ed (Oxford Scholarship Online, 2014) 117.

1038 See in this context Patrick Macklem, "Minority Rights in International Law" (2008) 6:3–4 International Journal of Constitutional Law 531; Will Kymlicka, "The Internationalization of Minority Rights" (2008) 6:1 International Journal of Constitutional Law 1); Tino Makkonen, "Minorities' Right to Maintain and Develop Their Cultures: Legal Implications of Social Science Research" in Francesco Francioni & Martin Scheinin, eds, *Cultural Human Rights* (Leiden: Martinus Nijhoff, 2008) 193); Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995); Will Kymlicka, "Liberal Theories of Multiculturalism" in Lukas H Meyer et al, eds, *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz,* electronic ed, (Oxford Scholarship Online: 2003) 229; Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007).

1039 See Vrdoljak, *supra* note 903 at 210.

3.3.2.2.2 Cultural Heritage Rights

When it comes to the protection of culture –living culture at that–three UNESCO instruments are particularly key: the *World Heritage Convention*, 1972[1040] the UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*; 2003[1041] and the UNESCO *Convention on the Protection and Promotion of Cultural Diversity*, 2005.[1042] Yet Ana F Vrdoljak argues that the definitions of "culture" and "cultural heritage" in the various UNESCO instruments are deficient in a number of ways because they are at variance with Indigenous conceptions of the same.[1043] Key differential factors identified by her include the following: the "holistic nature; the central significance of land and resources; collective and intergenerational custodianship; and the importance of customary law."[1044] In the present context of sacred sites and natural resource development projects, both the holistic nature of their conceptualizations and the central role of land and resources are key: effective protection of Indigenous sacred sites cannot be possible where all of these elements are not addressed satisfactorily.

Insofar as the holistic Indigenous conceptualization of culture is concerned, it transcends multiple of the traditional Western categorical divisions, for instance: tangible and intangible; movable and immovable.[1045] It is loath to delineate the boundaries of sacred land and yet it considers some land to be more sacred than others. Land itself is of the very essence,[1046] the relationship between Indigenous peoples and their territorial lands being primordially a matter not of property but of

---

[1040] *Convention concerning the Protection of the World Cultural and Natural Heritage 15511 (16 November 1972)*, 1972 [*World Heritage Convention*], United Nations, Treaty Series, vol. 1037, No. 15511.

[1041] *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003).

[1042] *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005).

[1043] Vrdoljak, *supra* note 903 at 199, note 7.

[1044] *Ibid* [my emphasis].

[1045] *Ibid* at 200.

[1046] *Ibid.*

spirituality.[1047] All of this is jarring to the Western legal mind: we function by categorical division; land lies at the base of immovable property law and is necessarily territorially bound and defined; classification distinctions ("sacredness", for instance) are made in black-and-white terms rather than as a matter of degrees. In other words: on the face of it, cultural rights and the protection of Indigenous sacred sites appear to be uneasy bedfellows. In their present formulation cultural rights also do not convey the fact that Indigenous peoples have clearly stipulated to what degree their identities are directly dependent on the maintenance of their holistically conceptualized cultures.[1048]

The *World Heritage Convention*'s criteria were revised in 1993 to provide for "associative cultural landscapes", being sites whose inclusion is "justifiable by virtue of the powerful religious, artistic or cultural associations of the natural element rather than material evidence, which may be insignificant

[1047] *Ibid* at 202 with reference to UN Doc E/CN.4/Sub.2/1983/21/Add.8, paras 196 and 197. She points out that this is in line with the provisions of Art 13(1) of ILO 169 and the judgment of the Inter-American Court of Human Rights in the *Case of the Mayagna (SUMO) Awas Tingni Community v Nicaragua*, *(Judgment)* (2001) 79 IACtHR (ser C) para 149: *ibid.*

[1048] See *ibid* at 200. She speaks of a "symbiotic relationship" in this context.

or even absent".[1049] While the objective of the 1972 Convention is to preserve the "common heritage of mankind", the other two Conventions target the protection of living cultures.[1050]

Buggey notes that "UNESCO's guidelines focus on [the] interaction between societies and the natural world that shapes the cultural landscape"[1051] and observes as follows:

> Associative cultural landscapes mark a significant move away from conventional heritage concepts rooted in physical resources, whether the monuments of cultural heritage or wilderness in natural heritage. They also accentuate the indivisibility of cultural and natural values in cultural landscapes.[1052]
>
> Associative cultural landscapes are, then, defined by cultural values related to natural resources. The range of natural features associated with cosmological, symbolic, sacred, and culturally significant landscapes may be very broad: mountains, caves, outcrops, coastal waters, rivers, lakes, pools, hillsides, uplands, plains, woods, groves, trees. While the physical resources are largely natural, cultural values transform these places from natural to cultural

---

[1049] United Nations Educational Scientific and Cultural Organisation, *Operational Guidelines for the Implementation of the World Heritage Convention* (2008) at 86. See in this context: Ian Lilley, "Nature and Culture in World Heritage Management: A View from the Asia-Pacific (Or, Never Waste a Good Crisis!)" in Sally Brockwell, Sue O'Connor & Denis Byrne, eds, *Transcending the Culture–Nature Divide in Cultural Heritage: Views from the Asia-Pacific Region* (Canberra: ANU E-Press, 2013) 13; Thomas F King, "Cultural Heritage Preservation and the Legal System With Specific Reference to Landscapes" in Ludomir R Lozny, ed, *Landscapes Under Pressure: Theory and Practice of Cultural Heritage Research and Preservation* (New York: Springer Science & Business Media: 2008) 246; Daniela Tommasini, "The Governance of Protected Areas in Greenland: The Resource National Park among Conservation and Exploitation" in Herrmann & Martin, *supra* note 1034, 125; John Mameamskum, Thora Martina Herrmann & Blanka Füleki, "Protecting the 'Caribou Heaven': A Sacred Site of the Naskapi and Protected Area Establishment in Nunavik, Canada" in Herrmann & Martin, *ibid*, 107; Julie Raymond-Yakoubian, "Conceptual and Institutional Frameworks for Protected Areas, and the Status of Indigenous Involvement: Considerations for the Bering Strait Region of Alaska" in Herrmann & Martin, *ibid*, 83; Sue O'Connor, Sandra Pannell & Sally Brockwell, "The Dynamics of Culture and Nature in a 'Protected' Fataluku Landscape" in Brockwell, O'Connor & Byrne, *ibid*, 203; Andrew McWilliam, "Cultural Heritage and Its Performative Modalities: Imagining the Nino Konis Santana National Park in East Timor" in Brockwell, O'Connor & Byrne, *ibid*, 191; Denis Byrne, "The WCPA's Natural Sacred Sites Taskforce: A Critique of Conservation Biology's View of Popular Religion" in Brockwell, O'Connor & Byrne, *ibid*, 157; Daud A Tanudirjo, "Changing Perspectives on the Relationship Between Heritage, Landscape and Local Communities: A Lesson from Borobudur" in Brockwell, O'Connor & Byrne, *ibid*, 65; Sandra Pannell, "Nature and Culture in a Global Context: A Case Study from World Heritage Listed Komodo National Park, Eastern Indonesia" in 53; Ian D Rotherham, "Cultural Landscapes and Problems Associated with the Loss of Tradition and Custom: An Introduction and Overview" in Ian D Rotherham, ed, *Cultural Severance and the Environment: The Ending of Traditional and Customary Practice on Commons and Landscapes Managed in Common*, electronic ed (Dordrecht: Springer Science & Business Media, 2013).

[1050] Francesco Francioni, "The Evolving Framework for the Protection of Cultural Heritage in International Law" in Silvia Borelli & Federico Lenzerini, eds, *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Leiden Boston: Martinus Nijhoff Publishers, 2012) [Francioni, "Evolving Framework"] 3 at 19–22.

[1051] Buggey, *supra* note 143 at 20.

[1052] *Ibid* at 21.

> landscapes. In language, narratives, sounds, ceremonies, kinships, relationships, and social customs are found cohesive evidences of cultural meanings.[1053]

Other pertinent international instruments in the sacred site debate include: the 1989 UNESCO Recommendation on Safeguarding of Traditional Culture and Folklore;[1054] the 1992 Rio Declaration on Environment and Development;[1055] the 1993 Vienna Declaration and Program of Action;[1056] and the 2001 UNESCO Declaration on Cultural Diversity.[1057]

3.3.3 Jurisprudence: International Human Rights Bodies

The latest sacred site jurisprudence rendered by an international human rights body, the African Court on Human and Peoples' Rights in the *Ogiek Case*,[1058] –rendered on 26 May 2017– provided a strong victory for the Ogiek Community in their endeavour to fight against eviction by the Kenya Forestry Service from the Mau Forest. Their application succeeded on all but one ground: that of breach of right to life as guaranteed by Article 4 of the *African Charter*. As Vrdoljak has pointed out, this is a particularly serious breach, in that it is not remediable by restitution.[1059]

Kenya is a Party to the *African Charter on Human and Peoples' Rights*, the *Protocol* to the *Charter*, and to both the *ICCPR* and the *ICESR*.[1060] The application in question was concerned with alleged violations of *Charter* Articles 1 (the rights and freedoms guaranteed in the *Charter*);[1061] 2 (the right to

---

[1053] *Ibid* at 21–22.

[1054] *Recommendation on Safeguarding of Traditional Culture and Folklore,* UNESCO (15 November 1989).

[1055] *Rio Declaration on Environment and Development* (14 June 1992) 31 ILM 874 [*Rio Declaration*].

[1056] *Vienna Declaration and Program of Action*, (adopted 25 June 1993) [*VDPA*].

[1057] *Declaration on Cultural Diversity*, UNESCO (adopted 2 November 2001).

[1058] *Supra* note 1028.

[1059] See the text at note 1028 *supra.*

[1060] *Ogiek Case*, *supra* note 1028 at para 2.

[1061] See *ibid* at para 212–217.

non-discrimination);[1062] 4 (the right to life);[1063] 8 (the free practice of religion);[1064] 14 (the right to communal ownership of land);[1065] 17(2) and (3) (the right to culture);[1066] 21 (the right to freely dispose of their wealth and natural resources);[1067] and 22 (the right to development).[1068] They requested a number of disparate remedies from the Court, including:

- a declaratory order that "the Mau Forest has, since time immemorial, been the ancestral home of the Ogiek people, and that its occupation by the Ogiek people is paramount for their survival and the exercise of their culture, customs, traditions, religion and for the well-being of their community;"[1069]

- an order halting the evictions, and prohibiting harassment, intimidation and interference with the Community's traditional livelihoods;[1070]

- recognition of their ancestral land, award of legal title to it, and a revision of state property laws to provide for communal ownership of land;[1071]

- compensation for "all the loss they have suffered through the loss of their property, development, natural resources and also freedom to practice their religion and

---

[1062] See *ibid* at paras 132–146 – a distinction based on 'ethnicity and/or 'other status'"" (at para 142).

[1063] See *ibid* at paras 147–156. The Court held that while "the violation of economic, social and cultural rights (including forced evictions) many generally engender conditions unfavourable to a decent life, (…) the sole fact of eviction and deprivation of economic, social and cultural rights may not necessarily result in the violation of the right to life under Article 4 of the Charter." (at para 153).

[1064] See *ibid* at para 157–169.

[1065] See *ibid* at paras 114–131. The jurisprudence of the African Court is markedly at variance with the direction taken by the Inter-American Court of Human Rights – see, e.g., *Yakye Axa*, *supra* note 995.

[1066] See *Ogiek* Case, *supra* note 1028 at para 170–190.

[1067] See *ibid* at para 191–201.

[1068] See *ibid* at note 202–211.

[1069] *Ibid*, at para 43.B.

[1070] *Ibid*, at para 41.1.

[1071] *Ibid*, at para 41.2 read with paras 43.E.(i), (vii) and (viii).

culture"[1072], comprising both pecuniary and non-pecuniary damages; the establishment of a community development fund for "health, housing, educational, agricultural and other relevant purposes"; royalty payments relating to existing economic activities in the Mau Forest; and employment opportunity assurances.[1073]

- Consultation with FPIC insofar as development, conservation and investment projects on Ogiek ancestral land is concerned;[1074]

- A public State apology for all the violations and the erection of a public memorial in the Mau Forest by the State "in a place of significant importance to the Ogieks and chosen by them";[1075] and

- Full recognition of the Ogieks as an Indigenous people of Kenya, which includes "recognition of the Ogiek language and Ogiek cultural and religious practices".[1076]

The Kenyan State unsuccessfully opposed the application on material,[1077] personal[1078] and temporal[1079] jurisdiction grounds. An important aspect of the case centers on the Respondent Government's objection based on the non-exhaustion of local remedies.[1080] The Court confirmed that local remedies must be exhausted before it can be approached under the *Charter*, but confirmed its prior jurisprudence in terms of which such local remedies must be "available, effective and

---

[1072] *Ibid*, at para 41.3.

[1073] *Ibid*, at para 43.E.(ii) read with para (ix).

[1074] *Ibid*, at para 43.E.(iii).

[1075] *Ibid*, at paras 43.E.(iv)–(v) read with paras (x)–(xi).

[1076] *Ibid*, at para 43.E.(vi).

[1077] See *ibid*, at paras 48–55.

[1078] See *ibid*, aparas 56–61.

[1079] See *ibid*, aparas 62–66.

[1080] See *ibid*, aparas 84–85.

sufficient and must not be unduly prolonged."[1081] In addition, it emphasized that the rule of exhaustion of local remedies is satisfied once it has been proved that "the Respondent has had an opportunity to deal with such matter through the appropriate domestic proceedings."[1082] *In casu*, the Court held that there had been unreasonable delays in the local *fora* and that "the prolonged proceedings before the domestic courts were largely occasioned by the actions of the Respondent, including numerous absences during the Court proceedings and failure to timely defend its case."[1083]

The case largely turned on the question whether the Ogieks constituted an Indigenous people for the purposes of the *Charter*, a concept that the *Charter* does not define.[1084] The Court drew on the work of the African Commission's Working Group on Indigenous Populations/Communities,[1085] as well as that of the UN Special Rapporteur on Minorities[1086] and produced the following determinative criteria:

> From the foregoing, the Court deduces that for the identification and understanding of the concept of indigenous populations, the relevant factors to consider are the presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.[1087]

[1081] *Ibid*, at para 93, with reference to *Lohé Issa Konaté v Burkina Faso* (judgment on Merits) 5 December 2014 at paras 96–115, and *The Beneficiaries of the Late Norbert Zongo et al v Burkina Faso* (Judgment on Merits) 28 March 2014 at paras 56–106.

[1082] *Ogiek* Case, *supra* note 1028 at para 94.

[1083] *Ibid*, at para 96.

[1084] See *ibid*, at paras 102–104.

[1085] See *ibid*, at para 105. The Court refers here to the *Advisory Opinion of the African Commission on Human and Peoples' Rights on The United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the African Commission on Human and Peoples' Rights at its 41st Ordinary Session held in May 2007 in Accra, Ghana, at 4.

[1086] See *ibid*, at para 106. The Court refers here to the *Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/1986/7/Add.4 at paras 69, 379, 381–382.

[1087] *Ogiek* Case, *supra* note 1028 at para 107.

In casu the Court ruled that the Ogieks are an Indigenous population who deserve special protection on the basis of their vulnerability.[1088] This is due to their clear connection with the land (Mau Forest), the fact that they demonstrate "a voluntary perpetuation of cultural distinctiveness", which includes aspects such as "religious, cultural and spiritual values"; and because "[t]he records before [the] Court show that the Ogieks have suffered from continued subjugation, and marginalisation."[1089]

Of immediate importance for present purposes is the Court's approach to the Article 8 claim (free practice of religion). The Court's reasoning can be summarized in 6 points: (1) In traditional societies such as the Ogieks', there usually is an intrinsic relationship between religious worship on the one hand, and land and the environment on the other.[1090] (2) The Mau Forest comprises the Ogieks' spiritual home and it is core to their religious practice.[1091] (3) The Ogiek are presently prevented from engaging in such religious practice by regulatory means and eviction measures.[1092] (4) Although Article 8 allows the right to free exercise of religion to be limited, the Respondent has not demonstrated that these restrictions are justified for the ends of law and order.[1093] (5) The fact that some Ogiek have converted to Christianity and/or modernized their way of life "cannot be said to have entirely eliminated their traditional spiritual values and rituals".[1094] (6) In view of the relationship between Indigenous communities and their land for religious practice purposes it is clear that the eviction of the Ogiek from Mau Forest has made it impossible for them to continue

---

[1088] *Ibid*, at para 112.

[1089] *Ibid*, at paras 109–111.

[1090] Cf *ibid* at para 164: "in the context of traditional societies, where formal religious institutions often do not exist, the practice and profession of religion are usually inextricably linked with the land and the environment. In indigenous societies in particular, the freedom to worship and to engage in religious ceremonies depends on access to land and the natural environment. Any impediment to, or interference with accessing the natural environment, including land, severely constrains their ability to conduct or engage in religious rituals with considerable repercussion on the enjoyment of their freedom of worship."

[1091] See *ibid* at para 165.

[1092] See *ibid* at para 166.

[1093] See *ibid* at para 167.

[1094] *Ibid* at para 168.

to practice their religion, i.e. it constitutes an unjustifiable interference with their freedom of religion, meaning that the Respondent is in violation of Article 8 of the *Charter*.[1095]

Regarding the communal land claim (Article 14), the Court commenced by observing that the right to property as guaranteed by Article 14 of the *Charter* also extends to communal property[1096] and then proceeded to interpret Article 14 with the aid of UNDRIP's Article 26. The Court came to the conclusion that

> the rights that can be recognized for indigenous peoples/communities on their ancestral lands are variable and do not necessarily entail the right of ownership in the classical meaning, including the right to dispose thereof (*abusus*). Without excluding the right to property in the traditional sense, this provision places greater emphasis on the rights of possession, occupation, use/utilization of land.[1097]

In the present matter the Court held that the Respondent Government violated Article 14 in that it expulsed the Ogiek from their ancestral lands, without prior consultation and without being able to demonstrate a public need that justified such expulsion.[1098]

By way of comparison, in the *Yakye Axa Community Cas*e[1099] the Court stated with regards to Article 21 of the *American Convention* (Right to Property):

> [In its analysis of the content and scope of Article 21 of the Convention in the instant case, the Court will take into account, in the light of the general rules of interpretation set forth in Article 29 of the same Convention, as it has done previously, the special meaning of communal property of ancestral lands for the indigenous peoples, including the preservation of their cultural identity and its transmission to future generations, as well as the steps that the State has taken to make this right fully effective.[1100]

[1095] See *ibid* at para 169.

[1096] I.e. the right can be individual or collective: see *ibid* at para 123.

[1097] See *ibid* at para 127.

[1098] *Ibid,* at para 131.

[1099] *Yakye Axa*, *supra* note 995.

[1100] *Ibid*, at para 124.

Concerning the right to culture claim (Articles 17(2) and (3)), in the *Ogiek Case* the Court held that cultural preservation is of special importance when it comes to Indigenous communities, the practice of spiritual ceremonies forming an integral part of their cultural identity.[1101] *In casu* the Respondent failed to prove that the adverse measures were necessary for the preservation of the Forest.[1102]

Insofar as Article 21 is concerned (the right of peoples to freely dispose of their wealth and natural resources), this judgment creates an important precedent. The Court had to consider whether the word "people" in Article 21[1103] can be read to include an ethnic subgroup – and ruled in the affirmative. The importance of this ruling is to be found in the fact that it effectively extends the principle of permanent sovereignty over natural resources to Indigenous communities.[1104]

The most crucial facet of this case for present purposes lies in the Court's holistic approach to the problem – although it deals with the different alleged breaches individually, the Court does not compartmentalize the Ogieks' spiritual beliefs, cultural identity and attachment to land. Rather, its *modus operandi* is to first establish that the Ogiek qualify as an Indigenous population for purposes of the *Charter*, and then to take judicial notice of the fact that there is an intrinsic connection between Indigenous communities' capacity to practice their religions and their access to their land and the environment. From this flows three consequences on the facts: a breach of the right to communal property (Article 14) because there are no justifying factors for restricting their well-recorded collective property right to their ancestral land; a breach of the right to freedom of religious practice (Article 8), because they are being prevented access to their land and thus cannot practise their religion; a breach of their cultural rights, because cultural identity is intertwined with spiritual practice for them, and they are being hindered in that spiritual practice (Article 17(2) and (3)). The fact that their right to their communal land ownership is breached without justifiable limitation also

---

[1101] See *Ogiek Case* at para 180–183.

[1102] See *ibid* at para 185.

[1103] Article 21(1) states: "All peoples stall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it."

[1104] See above at 3.2.4 ("The Principle of Permanent Sovereignty Over Natural Resources").

has further implications: a breach of their right to freely dispose of their wealth and the natural resources on that property (Article 21) and a breach of their right to development (Article 22), because they do not derive any royalties from the resource exploitation activities that are presently active on the land in question.

Finally, it is important to bear in mind that although this case specifically deals with the African *Charter*, the Inter-American Court of Human Rights (IACtHR) has ruled that it is "useful and appropriate" in the analysis of the scope of Article 21 of the *American Convention* to take into consideration other international instruments such as the *ILO Convention 169*, as well as pertinent developments in International Human Rights Law.[1105] In the same case, the Court held with reference to its own jurisprudence and that of the European Court of Human Rights (ECHR) that "human rights are live instruments, whose interpretation must go hand in hand with evolution of the times and of current living conditions."[1106]

3.4 The Domestic Implementation of International Law

> The government seems to have a misplaced complacency that Australia is not among the states with poor human rights records, though its human rights record relating to the Aborigines and Torres Strait Islanders shows clear evidence to the contrary. Australia does support an effective human rights protection regime as long as it is enforced elsewhere.[1107]

3.4.1 Introduction

Having considered the ambit of potential international law protections, our final port of enquiry pertains to the manner in which international law is is implemented into the domestic law of the four jurisdictions under consideration.

[1105] *Yakye Axa*, *supra* note 995 at para 127.

[1106] *Ibid*, at para 125.

[1107] Islam, *supra* note 906 at 119.

Shaw argues that, as a general rule, common law states adopt the British approach when it comes to questions surrounding the domestic implementation of international law.[1108] As a departure point, therefore, I briefly summarize the main tenets of the British approach in this regard.

First, UK public policy holds that insofar as possible, courts should give effect to clearly established international law rules.[1109] Second, international law provisions need not be proved, as judges are considered to know it: UK courts accordingly take judicial notice of international law.[1110] Third, there is a basic tension between the doctrine of *incorporation* –that historically applies in respect of customary law– and that of *transformation* –that governs the position where treaties are at stake.[1111] The doctrine of incorporation, Shaw tells us, "holds that international law is part of the municipal law automatically without the necessity for the interposition of a constitutional ratification procedure."[1112] The doctrine of transformation, to the contrary,

> is based upon the perception of two quite distinct systems of law, operating separately, and maintains that before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically 'transformed' into municipal law by the use of the appropriate constitutional machinery, such as an Act of Parliament.[1113]

Fourth, while customary international law is traditionally considered as constituting part of England's common law,[1114] it is subject to the doctrine of precedent and the priority granted to the

---

[1108] Shaw, *supra* note 313 at 122.

[1109] *Ibid*, at 99, with reference to *In re Claim by Herbert Wragg & Co Ltd* [1956] Ch 323, 334, Upjohn J; *Oppenheimer v Cattermole* [1976] AC 249, 277; 72 ILR 446, Lord Cross; *Sandline v Papua New Guinea* 117 ILR 552, 560.

[1110] Shaw, *supra* note 313 at 100, and see the authority cited at note 57. He observes that in this regard the position differs markedly from that concerning foreign law, which needs to be proved as a matter of fact through the leading of evidence: *ibid.*

[1111] *Ibid.* However, he cautions this is not an absolute dichotomy that can be strictly upheld any longer, in view of modern developments: *ibid* at 100–105.

[1112] *Ibid.*

[1113] *Ibid*, at 99.

[1114] *Ex Parte Pinochet (No 3)* [2000] 1 AC 147, 276; 119 ILR 135, 230, Lord Millett; *Regina (European Roma Rights Centre) v Immigration Officer at Prague Airport and Another* [2004] UKHL 55, paras 22ff, Lord Bingham; 131 ILR 652, 671ff, as cited by Shaw, *supra* note 313 at 104.

Acts of Parliament,[1115] as well as the constitutional considerations.[1116] Fifth, although there is a presumption in UK law that legislation must be construed in such a manner as to prevent a conflict with international law,[1117] in the event of clear conflict the courts will uphold the legislation and let the state deal with the fallout occasioned by the breach of customary international law.[1118]

Sixth, when it comes to international agreements such as treaties, it is the Crown's constitutional prerogative to sign and ratify them,[1119] but they cannot become effective unless transformed into UK law by an Act of Parliament.[1120] The Courts cannot impugn them[1121] and must interpret legislation so as to render it congruent with international law[1122] unless the statute's words do not allow for any ambiguity.[1123]

Finally, insofar as interpretation of treaties incorporated by legislation is concerned, Shaw observes that the UK courts follow a more expansive approach than is usual for statutory interpretation,[1124] based on the international treaty interpretation rules set out in the *Vienna Convention on the Law of Treaties* 1969. He summarizes the main rules of such treaty interpretation in six points: (1)one commences by searching for the clear meaning of the words used, taking into consideration the purpose for which the article was enacted; (2) the interpretation of international conventions is governed not by the doctrine of precedents or English rules of construction, but by broadly accepted general principles; (3) a treaty should be interpreted in good faith and in accordance with

---

[1115] See *ibid*, at 100.

[1116] See *ibid*, at 105.

[1117] See *ibid*, at 109. This applies to customary international law and international agreements alike.

[1118] *Ibid*, at 102.

[1119] *Ibid*, at 107, with reference to *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418; *Rustomjee v R* (1876) 2 QBD 69; and *Lonrho Exports v ECGD* [1996] 4 All ER 673, 687; 108 ILR, 596, 611.

[1120] *Maclaine Watson v Department of Trade and Industry* [1989] 3 All ER 523, 531; 81 ILR 671, 684, Lord Oliver; *Lonrho Exports v ECGD* [1996] 4 All ER 673, 687; 108 ILR, 596, 611, as cited by Shaw, *supra* note 313 at 107.

[1121] *Ibid*, at 107.

[1122] *Assange v The Swedish Prosecution Authority* [2012] UKSC 22, para 10, Lord Phillips, as cited by Shaw, *supra* note 313 at 110.

[1123] *Ibid*, 313 at 109; also see the authority cited by him at 110 note 131.

[1124] Shaw, *supra* note 313 at 110.

the ordinary meaning of the words used; (4) only in the event that the outcome is manifestly absurd or unreasonable may recourse be had to supplementary means of interpretation such as *travaux préparatoires*; (5) subsequent commentaries on the treaty only bear persuasive value; and (6) the terms of the convention take precedence over interpretative aids such as *travaux préparatoires*, international case law and jurists' writings.[1125]

Insofar as treaties are concerned, the four countries that form the focus of this study were the only ones to vote against the adoption of *UNDRIP*[1126] and not one of them has thus far adopted the other major international instrument that is of significant interest to Indigenous peoples: the *ILO Convention 169 on Indigenous and Tribal Peoples,* 1989.[1127] All four have subsequently adopted *UNDRIP*, although they continue to dispute its legal enforceability.[1128] They all are state parties to the *International Convention on the Elimination of All Forms of Racial Discrimination*[1129] and to the *International Covenant on Civil and Political Rights* (ICCPR).[1130] Canada, Australia and New Zealand are also state parties to the *International Covenant on Economic, Social and Cultural Rights* (ICESR), but the United

---

[1125] Shaw, *supra* note 313 at 111–112.

[1126] Eleven other countries abstained and 143 voted in favour. See "Declaration on the Rights of Indigenous Peoples", online: <www2.ohchr.org/English/issues/Indigenous/declaration.htm> and Dixon, McCorquodale & Williams, *supra* note 915 at 267.

[1127] *ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, C169 (entered into force 5 September 1991) [*ILO 169*].

[1128] See above at 3.3.2.1.1 ("United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)").

[1129] See "Status of Ratification Interactive Dashboard: International Convention on the Elimination of All Forms of Racial Discrimination" (8 June 2017), *United Nations Office of the High Commissioner of Human Rights (OHCHR)*, online: <indicators.ohchr.org>.

[1130] See "Status as at: 23-06-2017 05:01:19 EDT", (23 June 2017), *United Nations Treaty Collection*, online: <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en>. However, the United States is not a signatory to the *Optional Protocol to the International Covenant on Civil and Political Rights*: see "Status of Ratification Interactive Dashboard: Optional Protocol to the International Covenant on Civil and Political Rights" (8 June 2017), *United Nations Office of the High Commissioner of Human Rights (OHCHR)*, online: <indicators.ohchr.org>.

States is only a signatory.[1131] Insofar as regional treaties are concerned, neither Canada nor the United States are members of the *American Convention on Human Rights*.[1132]

All four of the states under comparison are parties to the *World Heritage Convention*,[1133] but none is a signatory to the *Convention for the Safeguarding of the Intangible Cultural Heritage*.[1134] Australia and New Zealand have acceded to the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, while Canada has accepted it.[1135]

3.4.2 Canada

According to Niezen, "International law has long been a source of domestic law reform in Canada and, therefore, a potential source of ideas about the legal standing of Indigenous cultures."[1136] In this regard, he refers particularly to the *Optional Protocol to the International Covenant on Civil and Political*

[1131] See "Status of Ratification Interactive Dashboard: International Covenant on Economic, Social and Cultural Rights" (8 June 2017), *United Nations Office of the High Commissioner of Human Rights (OHCHR)*, online: <indicators.ohchr.org>. None of the states in question is a signatory to the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*: see "Status of Ratification Interactive Dashboard: Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (8 June 2017), *United Nations Office of the High Commissioner of Human Rights (OHCHR)*, online: <indicators.ohchr.org>.

[1132] The United States has signed but not ratified it, while Canada has done neither: see "Signatories and Ratifications", *Inter-American Commission on Human Rights*, online: <www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm>. Insofar as Canada is concerned, its continued non-adherence flies in the face of a 2003 recommendation by the Standing Senate Committee on Human Rights that it "take all necessary action to ratify the American Convention on Human Rights, with a view to achieving this goal by July 18, 2008, which is the thirtieth anniversary of the entry into force of the Convention": Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights* (Report: May 2003), available online at: <https://sencanada.ca/content/sen/committee/372/huma/rep/rep04may03-e.htm>.

[1133] See UNESCO, "States Parties Ratification Status" (31 January 2017), *World Heritage Convention*, online: <whc.unesco.org/en/statesparties/>.

[1134] See Legal Instruments, "Convention for the Safeguarding of the Intangible Cultural Heritage. Paris, 17 October 2003", *UNESCO*, online: <www.unesco.org/eri/la/convention.asp?KO=17116&language=E&order=alpha>.

[1135] See Legal Instruments, "Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Paris, 20 October 2005", *UNESCO*, online: <www.unesco.org/eri/la/convention.asp?order=alpha&language=E&KO=31038>.

[1136] Niezen, *Rediscovered Self*, *supra* note 59 at 81.

Rights (IPCPR).[1137] Canada is a member of the Organization of American States (OAS), but not a signatory to the *American Convention on Human Rights*.[1138] As a member of the OAS, it is bound by the *American Declaration on the Rights and Duties of Man,* 1948,[1139] which holds the concept of dignity to be axiomatic.[1140] At least two Canadian Indigenous groups have thus far successfully approached the Inter-American Commission on Human Rights (IACHR)[1141] with petitions for admission: the Hul'qumi'num Treaty Group (October 30, 2009)[1142] and Grand Chief Michael Mitchell (October 22, 2003).[1143]

Gaudreault-DesBiens has demonstrated that, while there may be potential impediments to international norms' "immediate influence on the elaboration of a normative framework that takes into account cultural diversity within the society"[1144] in Canada, there are at least two reasons why one should not discard their potential impact: first, Canada's extensive ratification of pertinent treaties and conventions, and second, the willingness of particularly the Supreme Court of Canada to have regard to international norms, irrespective of the fact that they may formally be of non-binding application.[1145] To this I would add a third aspect, mentioned by him in the context of federal/provincial collaboration: *Realpolitik*.[1146] This latter aspect is elegantly illustrated by the U-

---

[1137] *Optional Protocol to the International Covenant on Civil and Political Rights* (1966) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 302: see Niezen, *Rediscovered Self*, *supra* note 59 at 82.

[1138] The *American Convention on Human Rights* (1969) (adopted 22 November 1969, entered into force 1978) has been ratified by 25 countries, but these do not include Canada or the United States. See Organization of American States [OAS], "What is the IACHR", online: <http://www.oas.org/en/iachr/mandate/what.asp> [OAS, "IACHR"].

[1139] It is thus bound by the *American Declaration on the Rights and Duties of Man* (Bogotá, Columbia, 1948).

[1140] E.g., the Preamble commences as follows: "All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another": *ibid.*

[1141] The IACHR is an autonomous organ of the OAS whose mission is the promotion and the protection of human rights in the American hemisphere: OAS, "IACHR>, *supra* note 1138.

[1142] Inter-American Commission on Human Rights, *Hul'qumi'num Treaty Group (Canada)*, Admissibility Report Petition No. 592-07 (2009).

[1143] Inter-American Commission on Human Rights, *Grand Chief Michael Mitchell (Canada)*, Admissibility Report Petition No. 790/09 (2003).

[1144] Gaudreault-DesBiens, "State Management", *supra* note 59 at 207.

[1145] *Ibid.*

[1146] *Ibid.*

turn of Aotearoa New Zealand, Australia, Canada and the United States on the issue of *UNDRIP* in the face of sustained political pressure.[1147]

In conformance with the pre-European Union British constitutional model, Canada follows a dualist[1148] approach to international law,[1149] in that formal incorporation of international norms is required into domestic law where such norms "are of a conventional nature".[1150] In relation to customary international law Canada apparently takes the English law position in recognizing this as an "exceptional case" of "norms that may be directly recognized in common law."[1151] It follows the British doctrine of separation of powers and thus experiences difficulties related to the fact that treaties and conventions are entered into by the executive branch but must be formally implemented by the legislative branch.[1152] Canada being a federation, this dichotomy is exacerbated where the federal executive enters into international instruments that fall within the legislative domain of the provincial legislatures.[1153]

One important way in which Canadian law appears to have evolved away from the common law cohort was in the Supreme Court's determination that it was incumbent on Canada to interpret its domestic law in accordance with its treaty obligations and with the principles of customary

---

[1147] See *supra* note 388 and Sermet, *supra* note 60 at 227–228. Since I do not subscribe to legal positivist ideology, I do not believe that law functions in a vacuum and I consider the interaction between law and politics to be highly relevant to international law.

[1148] Shaw, *supra* note 313 at 21 explains the 'monist' / 'dualist' dichotomy from a historical perspective: monists essentially adhered to the fundamental rule governing the execution of agreements (*pacta sunt servanda*), while dualists, "in a more truly positivist frame of mind, emphasised the element of consent." Also see *ibid* at 94–95.

[1149] Gaudreault-DesBiens, "State Management", *supra* note 59 at 205.

[1150] *Ibid*, *supra* note 59 at 206. Also see Shaw, *supra* note 313 at 120.

[1151] Gaudreault-DesBiens, "State Management", *supra* note 59 at 206. Also see Also see Shaw, *supra* note 313 at 120, citing *Reference re Exemption of US Forces from Canadian Criminal Law* [1943] 4 DLR 11, 41; *Reference re Powers to Levy Rates on Foreign Legations and High Commissioner's Residences* [1943] SCR 208; and *R v Munyaneza*, [2009] QJ No 4913; ILDC 1339 (CA 2009).

[1152] Gaudreault-DesBiens, "State Management", *supra* note 59 at 206. Also see Shaw, *supra* note 313 at 120 with reference to *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326; 8 AD 41.

[1153] See Gaudreault-DesBiens, "State Management", *supra* note 59 at 206.

international law in the *Mugesera* case.[1154] Shaw argues that this "would go further than most common law states would accept."[1155]

Insofar as its Indigenous peoples are concerned, Canada has consistently shunned the international law doctrine in favour of its own more conservative internal policy. Thus Bradford Morse records,

> Self-determination in the terms envisioned by the United Nations Charter of 1945, the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights of 1966, amongst other international instruments, has not been welcome in Canada.[1156]

The upshot is that the federal government has entered into a range of more limited self-government agreements with the various First Nations groups since 1993.[1157] This is a complex area of law, given that the contents of such self-government arrangements are negotiated on a case-by-case basis, reflecting varying community objectives and local circumstances.[1158]

3.4.3 The United States

The United States' relationship with International law is somewhat more complex than that of Canada.[1159] In the first place, a distinction must be drawn between treaties and executive

---

[1154] *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100, para 82; 132 ILR, 295–296. See Shaw, *supra* note 313 at 122.

[1155] *Ibid.*

[1156] Bradford W Morse, "Indigenous Peoples of Canada and Their Efforts to Achieve True Reparations" in Lenzerini, *supra* note 903, 271 at 310.

[1157] *Ibid* at 310–312.

[1158] *Ibid* at 311. Although this author lists the following list of influential factors in the context of land claims negotiations, they appear to be equally apposite to self-government agreements: "the relative bargaining strength of the parties, the quality of the leadership involved, national politics that determine the party in power, the natural; resource and property value of the territory in question, its location in relation to urban centres, the evolution in negotiations and changes in legislation and case law": *ibid* at 296.

[1159] For an excellent summary, see United States, Congressional Research Service, *International Law and Agreements: Their Effect upon US Law* by Michael John Garcia, Legislative Attorney, CRS Report No 7-5700 RL32528 (18 February 2015) [CRS, *International Law*].

agreements,[1160] of which there are three kinds.[1161] Congress plays no role with regards to treaties: treaties are concluded by the Executive and enter into force if approved by a two-thirds majority of the Senate.[1162] Conversely, Congress plays a role in relation to two types of executive agreements – congressional-executive agreements and executive agreements made pursuant to an earlier treaty– but these are not submitted to the Senate for its advice and consent.[1163] The third kind, sole executive agreements, are made by the President without reference to either Congress or the Senate.[1164]

A second reason for this domain's complexity is that in US law treaties can be divided into self-executing and non-self-executing treaties.[1165] Self-executing treaties become domestic law upon ratification of the treaty by the United States;[1166] non-self-executing treaties require implementing legislation or regulations.[1167] Importantly, the US Supreme Court has held that Acts of Congress are "on full parity" with treaties, meaning that an earlier treaty will be subrogated by a later statute insofar as they are in conflict.[1168] As well, the US Constitution is on full parity with treaties as "the supreme law of the land."[1169]

[1160] *Ibid* at 2–5.

[1161] Congressional-executive agreements, executive agreements made pursuant to an earlier treaty and sole executive agreements. In the last instance the agreement is made pursuant to the President's constitutional authority without any congressional input: see *ibid* at 5.

[1162] See *ibid* at 2–3; Shaw, *supra* note 313 at 116.

[1163] See Garcia, *supra* note 1159 at 4–5.

[1164] See *ibid* at 5; Shaw, *supra* note 313 at 116.

[1165] See Garcia, *supra* note 1159 at 12–14; Shaw, *supra* note 313 at 117. The modalities of distinguishing between them are far from clear: see *ibid* at 117–118.

[1166] *Ibid* at 12; Shaw, *supra* note 313 at 117.

[1167] See *ibid* at 12–13. At 12, Garcia lists three reasons why this may be the case. Also see Shaw, *supra* note 313 at 117.

[1168] *Beard v Greene*, 140 L Ed 2 d 529, 537 (1998); 118 ILR 22, cited in Shaw, *supra* note 313 at 119.

[1169] *Ibid.*

While there is authority to the effect that customary international law forms part of US law,[1170] this is a controversial area and it is likely that in the event of conflict domestic legislation will prevail.[1171] Similarly, there is no unanimity over the utilization of foreign jurisprudence in the interpretation of domestic legislation or constitutional requirements.[1172] Thus Michael John Garcia, legislative attorney for the Congressional Research Service, concluded in 2015 that "[a]lthough foreign law and practice have historically had a role in American jurisprudence and courts will likely continue to refer to it, where, when, and how significantly they will rely upon it is difficult to predict."[1173]

The United States not only played a significant role in the creation of the *World Heritage Convention*, but became the nation to ratify it in 1973 by a unanimous Senate vote.[1174] However, although the *Convention* took effect on 17 December 1975, it was only in 1980 that the US enacted implementing legislation in the form of amendments to the *National Historic Preservation Act* (NHPA),[1175] and then it did so in a manner calculated to restrict the *Convention*'s application.[1176]

3.4.4 Australia

Australia has been criticized both for its human rights record and for the manner in which it wields the doctrine of sovereignty as a shield to deflect any consequent UN interference in its domestic

---

[1170] See *ibid* at 16. Shaw, *supra* note 313 at 113 supplies considerable authority for his assertion that customary international law is regarded as federal law and that state courts are bound to its interpretation by federal courts, but acknowledges that controversy exists around the impact that it has on democratic governance. Furthermore, akin to the position in English courts, both the doctrine of precedent and statutes may overrule customary law: *ibid.*

[1171] Garcia, *supra* note 1159 at 16; Shaw, *supra* note 313 at 113–114. Thus statutes supersede both earlier treaties and rules of customary international law: *ibid* at 114. However, there is a presumption that legislation will not contravene international law: *ibid.*

[1172] See Garcia, *supra* note 1159 at 19–21; Philip D Racusin, "Looking at the Constitution Through World-Colored Glasses: The Supreme Court's Use of Transnational Law in Constitutional Adjudication" (2006) 28:3 Houston J Int L 913.

[1173] CRS, *International Law*, *supra* note 1159 at 21.

[1174] James K Reap, "The United States and the World Heritage Convention" in Hoffman, *supra* note 80, 234.

[1175] Reap, *supra* note 1174 at 234.

[1176] See *ibid* at 235–237.

matters.[1177] Like Canada, Australia follows an essentially dualist approach to international law.[1178] Yet it differs from Canada in its approach to customary international law: while Canada apparently takes the English law position in recognizing the application of the doctrine of automatic incorporation[1179] this does not appear to consistently reflect the position of the Australian courts.[1180] A distinction is thus made between conventional (treaty) law and obligations stemming from other sources of law,[1181] with the former requiring implementing legislation due to the fact that there is no self-executing mechanism in Australian law.[1182] The position is somewhat unclear with regards to the latter.[1183]

Like Canada, Australia furthermore follows the British doctrine of separation of powers[1184] and thus experiences difficulties related to the fact that treaties and conventions are entered into by the executive branch but must be formally implemented by the legislative branch.[1185] Unlike in Canada, the Federal Parliament (i.e. the Commonwealth) possesses an extensive "external affairs" authority that allows it to incorporate implementing legislation in domain that normally falls within the exclusive jurisdiction of the States and Territories[1186] – as it has done with in respect of environmental and heritage legislation. Although unincorporated treaties are not binding, they are

---

[1177] See Islam, *supra* note 906 at 111.

[1178] At least insofar as the incorporation of conventional norms is concerned: see Crawford, *supra* note 1153 at 6; Islam, *supra* note 906 at 111.

[1179] Gaudreault-DesBiens, "State Management", *supra* note 59 at 206.

[1180] See Crawford, *supra* note 1153 at 10. She argues that this "begins to blur the clear demarcation of Australia as a dualist state": *ibid.* Also see Shaw, *supra* note 313 at 120, notes 204 and 211.

[1181] See Islam, *supra* note 906 at 111.

[1182] See *ibid* at 112.

[1183] See *ibid* at 113–114.

[1184] See *ibid* at 136, note 345.

[1185] See e.g. *Minister of State for Immigration and Ethnic Affairs v Teoh*, (1995) 128 ALR 353; 104 ILR 466, as cited by Shaw, *supra* note 313 at 121. He points out that this case is authority for the somewhat contentious contention that unincorporated but ratified conventions are legally authoritative in the absence of statutory or executive indications to the contrary: see *ibid* at 121, especially note 222. Also see Islam, *supra* note 906 at 112.

[1186] See *ibid* at 112.

not without effect.[1187] Indeed, Islam suggests that Australian judges utilize them as the basis for a fair amount of international law infusion into the Australian common law in an act of "judicial activism",[1188] especially for purposes of resolving ambiguities and *lacunae* in the human rights domain.[1189]

Shaw observes that the employ of international law in constitutional interpretation has been particularly polemical in Australia, although complications arise wherever there are written constitutions at play in common law countries, and irrespective of whether the constitution explicitly mentions the treatment of international agreements.[1190] Islam, however, argues that while Australia gives every appearance of being a responsible member of the UN and of the international community through its generosity in adopting and ratifying treaties, it is exceedingly selective in electing which laws to incorporate into domestic law, and that it has "attached reservations in the form of a federal clause to many human rights treaties" with the objective of reducing its domestic treaty implementation obligations.[1191]

Australia was the first state party to enact dedicated national legislation that embodied its *World Heritage Convention* obligations.[1192] It accordingly has a well-developed body of jurisprudence interpreting this Convention,[1193] starting with the 1983 *Tasmanian Dam Case*.[1194] On the constitutional level the *World Heritage Convention* fulfills an important structural function in that it

---

[1187] See *ibid* at 113–114 with regard to *Minister for Immigration and Ethnic Affairs v Teah* (1995) 18 CLR 273; (1995) 128 ALR 353 where the Court distinguished between a "legitimate expectation" and a "binding rule of law", ruling that the former did not necessarily give rise to the latter.

[1188] Islam, *supra* note 906 at 115.

[1189] See I*bid*, *supra* note 906 at 115–117.

[1190] Shaw, *supra* note 313 at 121, citing as example the divergent approaches of McHugh J and Kirby J in *Ahmed Ali Al-Kateb v Godwin* [2004] HCA 37, para 63 (McHugh J), para 190 (Kirby J).

[1191] Islam, *supra* note 906 at 121.

[1192] Matthew Peek & Susan Reye, "Judicial Interpretations of the World Heritage Convention in the Australian Courts" in Hoffman, *supra* note 80, 206 at 206. Also see Jane L Lennon, "Paris Down Under – World Heritage Impacts in Australia" in Hoffman, *ibid*, 210.

[1193] See Peek & Reye, *supra* note 1192 at 206–208.

[1194] *The Commonwealth of Australia v Tasmania* (1983) 158 CLR 1 ["*The Tasmanian Dam Case*"].

effectively enables the Commonwealth to legislate in relation to the environment and heritage – matters that actually fall within the domain of the provinces.[1195] This is because it has the constitutional authority to legislate in respect of "external affairs",[1196] and the *Convention* accordingly neatly brings both environmental and heritage-related matters within the sphere of the Commonwealth's legislative jurisdiction.[1197]

In 1991, Australia ratified and implemented domestically the *First Optional Protocol to the International Covenant on Civil and Political Rights (1966)*.[1198] This means that aggrieved individuals may approach the International Human Rights Committee (IHRC) in respect of alleged violations of their rights under the ICCPR.[1199]

3.4.5 Aotearoa New Zealand

True to the Common Law roots that it shares with the other systems, Aotearoa New Zealand follows a primarily dualist approach to international law,[1200] though the Aotearoa New Zealand courts appear to be increasingly willing to consider and apply unincorporated international instruments.[1201] Like the other three systems, New Zealand law accepts that the rules of customary international law form part of its common law[1202] and acknowledges a presumption of statutory

---

[1195] See Peek & Reye, *supra* note 1192 at 206; Lennon, *supra* note 1192 at 210.

[1196] Peek & Reye, *supra* note 1192 at 206; Lennon, *supra* note 1192 at 210–211.

[1197] See the discussion on "associative cultural landscapes" above at 3.3.2.2.2.

[1198] Islam, *supra* note 906 at 115.

[1199] Islam, *supra* note 906 at 115.

[1200] See Alice Louise Marie Osman, *The Effects of Unincorporated International Instruments on Judicial Reasoning in New Zealand* (LLB (Hons) Dissertation: Faculty of Law, University of Otago, 2012) [unpublished] at 8.

[1201] See Osman, *supra* note 1200 at 10ff; Shaw, *supra* note 313 at 121, citing *Hosking & Hosking v Runting and Pacific Magazines NZ Ltd* [2004] NZCA 34, para 6.

[1202] Shaw, *supra* note 313 at 120, citing *Marine Steel Ltd v Government of the Marshall Islands* [1981] 2 NZLR 1; 64 ILR 539; *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426; 104 ILR 508.

interpretation according to which legislation is to be interpreted in accordance with New Zealand's international obligations insofar as this is permitted by the wording.[1203]

New Zealand was prompted to incorporate the provisions of the *UNESCO Convention* into its domestic legislation pursuant to its unsuccessful attempt at preventing the Sotheby's sale of an intricately carved set of doors of great Māori cultural significance by a collector of Polynesian artifacts in the *Ortiz* case.[1204]

3.5 Summary

The objective of Chapter 3 has been to uncover a second building block towards the context sensitive frameworks to be constructed in Part III ("Crafting Solutions").

The Chapter commenced with a discussion of three important concepts against the background of colonialism and the doctrine of discovery: that of State sovereignty, the right to self-determination, and the principle of permanent sovereignty over natural resources.

Next, it considered first two kinds of international human rights instruments (founding indigenous and cultural rights, respectively), followed by a close-up look at the latest international human rights body judgment: the *Ogiek Case* of the African Court of Human and Peoples Rights. A number of conclusions were drawn, notably that the Court's approach was far less formal and compartmentalized than that of the human rights instruments discussed.

Finally, the domestic implementation of international law in each of the four jurisdictions was studied, so as to determine, first, to what extent the international law instruments considered would have binding force in the pertinent jurisdictions, and second, whether they may be considered by each such jurisdiction's courts as constituting persuasive authority.

[1203] Shaw, *supra* note 313 at 120, note 210, citing *Rajan v Minister of Immigration* [1996] 2 NZLR 543,551; *Wellington District Legal Services v Tangiora* [1998] 1 NZLR 129, 137; 115 ILR 655, 663.

[1204] See *supra* note 1021 and Barker, *supra* note 1022 at 146–147.

As indicated earlier, is it predominantly the potential practical utility of various international law doctrines, instruments and judgments that has determined their inclusion in this Chapter that necessarily no more than scratches the surface of the vast ocean of international law. It is quite conceivable to ground the protection of Indigenous sacred sites wholly in public international law terms – but that would be another thesis entirely. This one is rooted in positive law, but it is realistic enough to recognize both the promise and the peril that globalization holds.

Conclusion to Part I

The objective of Part I has been to set the scene for the exposition of positive law that follows in and for the solutions that are crafted in Part II. To this end, Chapter 1 presented the research problem and addressed thorny issues of terminology, dealt with the thesis structure and the theoretical framework, and introduced the three main components of the latter as being legal anthropology/indigenous theory, legal comparison and international law. Chapter 2 endeavoured to gain insights into Indigeneity insofar as Indigenous sacred sites and natural resource development projects are concerned, and drew heavily on legal anthropology and Indigenous theory for these ends, with the objective of laying a foundation for the concrete legal comparison to follow in Part II. It identified three key themes, considered the interrelation between culture, religion and identity, and then explored certain Indigenous paradigms that will be key to the solutions crafted in Part II. Notably, it contemplated Indigenous conceptions of time, space, and the sacred. In the latter context it looked at issues of cross-cultural translation; translation and universalization; the role of ritual; and secrecy about the sacred. This Chapter sought to group its conclusions on a geographical basis (North America / Australia / Aotearoa New Zealand) without being too reductionist. Chapter 3 dealt with the second building block required for purposes of the solutions to be crafted in Part II: international law. In a focussed investigation it identified key concepts of international law that are pertinent to the enquiry, contemplated important international law instruments in the field at hand and considered the most recent jurisprudence of an international law human rights body dealing extensively with Indigenous sacred sites protection in a context of natural resource exploitation. Finally, as a preliminary step for the work to be undertaken in Part II, it considered the implementation of international law in each of the four jurisdictions in question.

The objective of the next part is to take stock of the positive law inventory of the four common law jurisdictions studied, particularly insofar as their treatment of Indigenous sacred sites and natural resource developments is concerned. In each instance a physical desktop study will be used to illustrate the effectiveness of the system at hand.

PART II: CRAFTING SOLUTIONS

Introduction to Part II

> I cannot complain of any lack of evidence, and I am very clearly of the opinion, upon the evidence, that the social rules and customs of the plaintiffs cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to a country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is shown in the evidence before me.[1205]

The objective of Part II, so I said in my introduction to Part I, is to look at the black letter law of four postcolonial common law states with related historical roots and significant Indigenous populations: Canada, the United States, Australia, and New Zealand.

First, then, some *caveats*.

To begin with, it is not possible –nor is it my objective– to present a comprehensive picture of the state of the law relating to either Indigenous peoples or natural resources in four disparate jurisdictions within the scope of one (reasonable) thesis. My objective, instead, is to portray an accurate picture of how the law has to date dealt with issues arising from the intersection of natural resource development projects and Indigenous sacred sites. Even in this well-defined domain I by no means claim to cover all: one search for Australian jurisprudence on Indigenous sacred sites, for instance, rendered 290 results…

What I do claim, is a discussion of such laws in a manner consistent with the foundations laid in Part I. By way of example: instead of an *exposé* of the doctrine of aboriginal title that traces its

---

[1205] *Milirrpum v Nabalco Pty Ltd*, 17 FLR 141 (NT Sup Ct 1971), [1972-73 ALR] 65, WL 117366 (the Gove Peninsula Case) Blackburn J [*Milirrpum*] at 89.

development through a chronological discussion of ground-setting precedents, I focus on aboriginal title jurisprudence with a sacred site dimension. My second *caveat* is thus that I must necessarily presume a certain level of familiarity with the broader field on the part of my reader.

In the third instance, I do not claim to have covered every possible angle that may legally be pursued in the quest to protect Indigenous sacred sites. I aim, instead, to identify the main mechanisms at work, to contemplate how they have been employed to date, and to illustrate their effectiveness (or lack thereof) from a sacred site protection perspective by means of concrete examples. Since this approach takes a slender slice from a many-layered cake, I do so against the backdrop of the historical evolution of relations between Indigenous communities and the salient State.

At this point a word of caution may not be amiss. I explained in the *Preface* that mine is not a neutral regard. In evaluating the effectiveness of these legal mechanisms, I am not critiquing them in the abstract: viewed from the natural resource developer's perspective, not protecting Indigenous sacred sites renders developments much more cost-efficient, meaning that such developers are likely to consider the same mechanisms as being highly effective. The State, having the public interest at heart, may have yet a third angle of approach. Let me therefore clarify: effectiveness, to me, means that an effective legal mechanism exists whereby Indigenous communities can protect their sacred sites *should they elect to do so in their sole and absolute discretion.* I am expressly not advocating that Indigenous communities have any obligation –moral, legal, or otherwise– to protect their sacred sites.

In Part II ("Crafting Solutions"), I continue to explore the four dimensions identified in Part I pertaining to Indigenous conceptions of the sacred: (1) issues of cross-cultural translation; (2) translation and universalization; (3) the role of ritual; and (4) secrecy about the sacred. This I do in order to verify my hypothesis that at least one of these usually characterizes a failed sacred site protection attempt. Or, to put it in more positive terms: that these are the dimensions that have to be addressed if a legal mechanism for the protection of Indigenous sacred sites is to work.

For purposes of the legal comparison in which I will engage in Part II, I follow a uniform structure in all four Chapters. I commence with a brief chronological socio-historical contextualization of the interplay between the State legal system, Indigenous peoples within State borders, and Indigenous sacred sites. The objective here is to set the scene for a contextually richer understanding of the

legal survey that follows in the second part of the chapter, when I consider the State's legal responses to natural resource developments that have the potential of impacting on Indigenous sacred sites. In this part of the chapter I consider legal mechanisms that have been or are likely to be employed in Indigenous sacred site protection endeavours. In respect of each such mechanism, I first summarize the present legal position and then illustrate the mechanism's effectiveness with reference to an actual desktop study that may or may not already have been the subject matter of litigation. Finally, I draw a number of conclusions from the foregoing discussion, before summarizing the applicable statutory and case law in table format for quick reference purposes.

Chapter 4: Canada

> "Treaties are unconstrained Acts of independent powers." But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.[1206]

> ***

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal peoples' concerns, and the lack of respect in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.[1207]

4.1 Introduction

In Chapter 2 we dealt with the Indigenous inhabitants of Canada and the United Nations jointly, on the basis that, from their perspective, the US-Canada border constitutes a somewhat arbitrary method of distinguishing between them. We saw that there is a vast variety of tribes, languages and practices and we witnessed up close the dangers of reductive and essentialized thinking.

We learnt of the importance of cultural continuity for Indigenous Identity, the reconstruction of cultures in the aftermath of the Residential School brutality, and the central importance of sacred

---

[1206] *R v Syliboy*, [1929] 1 DLR 307 (Nova Scotia County Court, 10 September 1928) Patterson Acting Co Ct J, at 314.

[1207] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 3 SCC 388, Binnie J [*Mikisew*] at 393.

sites in this equation (2.3.1). Notably in the Canadian context, we saw that issue of youth suicide that takes on epidemic proportions in some communities has formed the subject matter of a comprehensive study that has linked it back to the loss of a connection between rootedness in the past and hope for the future.

We observed that there is an intricate link between culture and religion (2.3.2) and that a weakening of the one may weaken the other. This also led us to explore the identitary role of sacred sites in Indigenous culture and religion (2.3.3).

In Chapter 3 we considered Canada's approach to International law and witnessed a somewhat startling contradiction: while Canada seems ready to go further than its common law peers in reconciling its domestic laws with international human rights standards, this openness of spirit appears not to extend to the Indigenous peoples who reside within its borders.

In this Chapter we consider more closely the position insofar as Canadian law is concerned. I commence with a non-exhaustive timeline for contextualization purposes (4.2). This is followed by some background on Canada's legal *mentalité* (4.3) and a summary of relevant sources that will likely feature in the discussion (4.4). I then get to the crux of the matter, and contemplate the two Canadian mechanisms that seem to me to be most pertinent in the context of sacred sites protections (4.5). Each of these is illustrated at the hand of a desktop study (4.5.2.4; 4.5.4.3), and I end off the Chapter with a summary of conclusions drawn from my investigation into Canadian law (4.6).

4.2 Timeline

> For many years, the rights of Indians to their aboriginal lands -certainly as legal rights- were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1969), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status.[1208]

Table I: Brief Historical Survey – Canada

DATE	DETAILS
1763	The ***Treaty of Paris*** **(February 10, 1763)** that ended the seven-year war, recorded an exchange of territories between France, Great Britain and Spain – including the cession of Canada by France to Great Britain. Early twentieth-century jurisprudence based Canada's territorial rights on a combination of the doctrine of discovery and ancient possession that were to have passed to Great Britain from France through this Treaty.[1209]
1763	The ***Royal Proclamation*** **(October 7, 1763)**[1210] has been described as "[North America's] first constitutional document".[1211] In it, the British Crown *inter alia* pledged to protect Indigenous rights.[1212] In modern-day Canada it often forms the basis of self-determination claims.[1213]

[1208] *Sparrow*, *supra* note 1227 at 1103.

[1209] See *R v Syliboy*, *supra* note 1206 at 314ff; Robert J Miller, Jacinta Ruru, Larissa Behrendt & Tracey Lindberg, "The Doctrine of Discovery in Canada" in *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford Scholarship Online: 2010), 89; Julie Evans, Patricia Grimshaw, David Philips & Shurlee Swain, "Canada: 'If They Treat the Indians Humanely, All Will Be Well'" in *Equal Subjects, Unequal Rights: Indigenous Peoples in British Settler Colonies, 1830–1910* (Manchester: Manchester University Press, 2003), 43.

[1210] *Royal Proclamation, 1763*, RSC, 1985, c I-7.

[1211] Anderson et al, *supra* note 386 at 923.

[1212] For historical background, see Sarah Carter, "Aboriginal People of Canada and the British Empire" in Phillip Buckner, ed, *Canada and the British Empire* (Oxford Scholarship Online, 2010) 200 at 201–205.

[1213] See e.g. *Calder v British Columbia (Attorney-General of)*, [1973] SCR 313 [*Calder*] and the thought-provoking reflection by Ghislain Otis, "The Impact of the Royal Proclamation of 1763 on Quebec: Then and Now", *LCAC Creating Canada Symposium* (7 October 2013), online: <ssrn.com/abstract=2423785>. Michel Morin wrote an insightful piece on the important role historians play in court proceedings when it comes to the interpretation of historical documents such as

1867	The ***British North America Act* of 1867** was Canada's first constitutional document as a national government.[1214] Today it forms Canada's Constitution along with the *Constitution Act, 1982*.
1871	**First Canadian treaties with First Nations:** From 1871 onwards, Canada began entering into treaties with First Nations pursuant to the powers that the *British North America Act* extends to it over "Indian affairs".[1215]
1874-1996	The **Residential School era** entailed the forcing of Indigenous children from their homes with the express intention to "destroy their family and community bonds, their languages, their cultures, and even their names."[1216] This had debilitating identitary consequences for Indigenous communities and lies at the root of a host of dire socio-economic problems presently faced by such communities.[1217]
1876	The ***Indian Act* (RSC, 1985, c I-5)** is a general act that governs registered "Indians", regulating the main aspects of Indigenous life and reserve governance.[1218] It is supplemented by a range of complementary statutes that regulate particular subject areas and claims processes, and that implement modern treaties and self-governing agreements.[1219]
1885	***St Catharines Milling and Lumber Co v The Queen***[1220] was described by the *Calder* Court (at 320) as being the natural starting point for any Canadian enquiry into aboriginal title. Here "it was held that the Crown had at all times a present proprietary estate, which title, after confederation, was in the province, by virtue of s 109 of the *B.N.A. Act*. The Indian title was a mere burden upon the title which, following the cession of the lands under the treaty, was extinguished." (*Calder* at 320). This case built strongly upon two American classics of the Marshall Court, *Johnson v McIntosh*,[1221] and *Worcester v State of Georgia*.[1222]

the *Royal Proclamation*, in order to avoid caricature notions: Michel Morin, "Les insuffisances d'une analyse purement historique des droits des peuples autochtones" (2003) 57:2 Revue d'histoire de l'Amérique française 237.

[1214] Anderson et al, *supra* note 386 at 923. It is now known as the *Constitution Act, 1867*.

[1215] See Anderson et al, *supra* note 386 at 923; Carter, *supra* note 1215 at 211ff.

[1216] *Report of the Special Rapporteur on the Rights of Indigenous Peoples* (2014), *supra* note 157 at 4. See Bradford W Morse, "Indigenous Peoples of Canada and Their Efforts to Achieve True Reparations" in Lenzerini, *supra* note 903, 271 at 281–285.

[1217] *Ibid.*

[1218] See Miller, Ruru, Behrendt & Lindberg, 'Contemporary Canadian Resonance of an Imperial Doctrine" in *Discovering Indigenous Lands*, *supra* note 1209, 126. For historical background, see Carter, *supra* note 1215 at 209–211.

[1219] See *Report of the Special Rapporteur on the Rights of Indigenous Peoples* (2014), *supra* note 157 at 5.

[1220] (1885), 10 OR 196, affirmed (1886), 13 OAR 148, affirmed (1887), 13 SCR 557, affirmed (1888), 13 App Cas 46.

[1221] (1823), 8 Wheaton 543, 21 US 240.

[1222] (1832), 6 Peters 515, 31 US 530.

1927	***R v Syliboy*, [1929] 1 DLR 307 (CoCt 1928)** is classed by Anderson et al as constituting "[t]he low point for judicial disparagement of treaty rights"[1223] due to the Court's ruling that hunting and fishing rights held by Nova Scotia Indians were unenforceable because Indigenous rights of sovereignty or ownership had never been recognized in Nova Scotia.
1948	Canada was one of the 48 States to vote in favour of the adoption of the ***Universal Declaration of Human Rights*, (adopted 10 December 1948) UNGA Res 217A (III) [UDHR].** Although not binding in itself, it has been adopted by the international community as a common standard of human rights. Human dignity is a core concept of the Declaration, and article 22 specifically provides that: "Everyone (…) is entitled to the realization (…) of the economic, social and cultural rights indispensable for his dignity."
1960s–1980s	The **"Sixties Scoop"** practice of fostering and adopting Indigenous children into non-Indigenous homes heightened the process of estranging such children "from their cultures and languages, with debilitating effects on the maintenance of their indigenous identity."[1224]
1960	The ***Canadian Bill of Rights* SC 1960 c 44** was enacted with the express purpose of recognizing and protecting human rights and fundamental freedoms. However, it does not form part of the Canadian *Constitution* and hence does not *per se* impact the principle of Parliamentary sovereignty.
1970	***Manitoba Northern Flood Agreement*:** In order to gain access to hydroelectric power and other modern conveniences such as direct colour television broadcasts and telephone services and with the promise of employment, the five nations in question had entered into the 1970 *Manitoba Northern Flood Agreement* with the Canadian government, which agreement involved their resettlement and the flooding of their traditional fishing and trapping grounds, some of which had been considered sacred.[1225]
1973	***Calder v British Columbia (Attorney-General of)* [1973] SCR 313**: the Nishga Tribal Council instituted an aboriginal title claim in respect of their unceded traditional territory in British Columbia, basing it on the provisions of the *Royal Proclamation* of 1763. They lost by a majority of 4-3, but the Court affirmed aboriginal title to be a legal interest in land. The Court was evenly split on the question whether such interest had been extinguished prior to British Columbia's entry into Canada.[1226]

[1223] Anderson et al, *supra* note 386 at 923–924.

[1224] *Report of the Special Rapporteur on the Rights of Indigenous Peoples* (2014), *supra* note 157 at 5.

[1225] See McLeod, *supra* note 158.

[1226] See Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart, 2015) at 41-42.

1973	First federal statement of willingness to negotiate aboriginal title claims is contained in the ***Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit Peoples*** (8 August 1973), pursuant to the *Calder* case.[1227]
1975	***James Bay and Northern Quebec Agreement***: A further consequence of the *Calder* case, this Agreement resulted from negotiations between the federal government, the province of Quebec and the James Bay Cree, Inuit and Naskapi over a huge hydro-electric development in northern Quebec.[1228]
1976	Canada acceded to the ***ICESCR*** and the ***ICCPR*** (19 May 1976). Article 15 of the *IESCR* –the right to participate in a cultural life– repeats article 27.2 of the *UDHR*.[1229] Article 27 of the *ICCPR* accords to right holders the right to use their language, to practise their religion and to enjoy their culture in community with others, i.e. the exercise of such rights presupposes the existence of a community that supports the culture in question.[1230]
1982	The ***Constitution Act*, 1982 (Schedule B of the Canada Act 1982 (UK))** was among the first of the world's constitutions to enshrine Indigenous rights in its section 35.[1231] With the advent of the *Charter of Rights and Freedoms* in the 1982 *Constitution Act,* the doctrine of Parliamentary sovereignty has been constrained. However, the rights in the *Charter* are not absolute, being subject both to the general limitation clause in section 1 and the power of Parliament or the provinces to invoke the "notwithstanding" provisions of section 33(1).[1232]
1984	***Guerin v The Crown*, [1984] 2 SCR 335** recognized that the Crown owns a fiduciary duty (not a mere political obligation) in respect of Indian Reservation lands placed in its care. This case introduced the concept of the honour of the Crown, i.e. that the Crown must be held to a high standard of honourable dealing insofar as Indigenous peoples in Canada are concerned.
1985	The ***Canadian Human Rights Act*, 1985, R.S.C., 1985, c. H-6** established the Canadian Human Rights Tribunal that hears discrimination cases, and –unlike in New Zealand– has the status of a federal administrative tribunal. Thus, for instance, the Tribunal has the powers of a superior court of record in the hearing of an enquiry[1233] and an order made by the Tribunal under section 53 may be made an order of the Federal Court for enforcement purposes.[1234]

[1227] See *R v Sparrow*, [1990] 1 RCS 1075, Dickson CJ at 1104. The Court emphasized that this detailed "a statement of policy, rather than a legal position" (at 1105).

[1228] See Webber, *supra* note 1226 at 42; Morse, *supra* note 1216 at 294–297.

[1229] Parties are obliged to assure the progressive exercise of these rights to the maximum of their available resources.

[1230] Parties are obliged to respect and guarantee civil and political rights.

[1231] Note that s 35 forms part of the *Constitution*, but not of the *Charter of Rights and Freedoms*. On the impact of s 35, see Morse, *supra* note 1216 at 288–292.

[1232] The power in s 33(1) only applies in respect of legislation that would have run afoul of ss 2 or 7–15 of the *Charter*.

[1233] S 50(3).

[1234] S 57.

	The *Canadian Human Rights Act* is binding on the Crown, except with regards to the Yukon Government, the Government of the Northwest Territories and Nunavut.[1235]
1985	***Simon v The Queen*, [1985] 2 SCR 387** rejected the stance of the *Syliboy* court.[1236]
1988	The **Lubicon Cree** protested ***The Spirit Sings*** exhibition due to the inappropriate display of false medicine masks, these being sacred to the Cree.[1237]
1990	**Quebec Oka Crisis** (July–September 1990): a proposed golf course extension and residential development that would have further infringed on a Mohawk burial site. A crisis developed between the town of Oka and the Mohawk community of Kanesatake. It resulted in the death of one SQ officer and the eventual involvement of the Canadian armed forces. Ultimately the land was purchased by the Crown and the proposed development cancelled. However, it left the Mohawk dissatisfied, as they still did not own the land in question.[1238]
1990	Ratification of the **Charter of the Organization of the American States (OAS) by Canada (1 August 1990)**, binding Canada to the ***American Declaration on the Rights and Duties of Man*, (Bogotá, Columbia, 1948).**
1990	***R v Sparrow*, [1990] 1 SCR 1075** was the first case to test the scope of section 35(1) of the *Constitution Act, 1982*.[1239]
1996	***R v Van der Peet* [1996] 2 SCR 507** The Supreme Court per Lamer CJ expressly distinguished between human rights and aboriginal rights, holding that that aboriginal rights as recognized and affirmed by section 35(1) "cannot … be defined on the basis of the philosophical precepts of the liberal enlightenment", these being that "rights are held by all people in society because each person is entitled to dignity and respect".[1240]
1996	***Northern Flood Implementation Agreement* of 1996:** In 1996, negotiations between the 5 First Nations affected by the *Manitoba Northern Flood Agreement*, Manitoba Hydro and the Canadian Government resulted in the *Northern Flood Implementation Agreement*.[1241]

[1235] S 66(1).

[1236] See Anderson et al, *supra* note 386 at 925 on Supreme Court of Canada cases that affirm the Canadian government's special obligations to First Nations, and in respect of aboriginal rights to land, hunting and fishing.

[1237] See Karen Coody Cooper, *Spirited Encounters: American Indians Protest Museum Policies and Practices* (Plymouth, United Kingdom: AltaMira Press, 2008) at 34-35.

[1238] See the sources cited *supra* at note 34.

[1239] *Sparrow, supra* note 1227 at 1083. See P G McHugh, "Moving Beyond Recognition: Aboriginal Governance in the Turbulent 1990s" in *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford Scholarship Online, 2004) 427 at 470–487.

[1240] *Van der* Peet, *supra* note 175 at 534.

[1241] See McLeod, *supra* note 158.

1996	***Report of the Royal Commission on Aboriginal Peoples*** is published in 6 volumes.[1242]
1997	***Delgamuukw v British Columbia*, [1997] 3 SCR 1010** "established aboriginal title as a proprietary right in the land grounded in occupation at the time of British assertion of sovereignty",[1243] holding that aboriginal title rights are subject to infringement, provided that such infringement is "in furtherance of a legislative objective that is compelling and substantial" and "consistent with the special fiduciary duty relationship between the Crown and aboriginal peoples."[1244]
1999	***R v Sioui*, 1990 CanLII 103 (Supreme Court of Canada)** confirmed that treaties must be interpreted in accordance with the Indigenous parties' understanding thereof, and cannot unilaterally be abrogated by the State.
2003	**Grand Chief Michael Mitchell** successfully petitioned the **IACHR** for admission in a dispute with Canada.[1245]
2004	***Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73:** the Haida Nation obtained a historic legal victory against the Government of British Columbia in a case that set an important precedent concerning the right of aboriginal people to be consulted in respect of development on land where there is an outstanding aboriginal title claim. However, this duty vests in the Crown and does not devolve onto developers.[1246]
2005	***Mikisew First Nation v Canada (Minister of Canadian Heritage)*, [2005] SCR 388:** the fundamental obligation of modern aboriginal and treaty law is reconciliation between Indigenous and non-Indigenous peoples in Canada. This means that it is not sufficient for the Crown to unilaterally inform a First Nation of its intention to construct a winter road through the First Nation's reserve – meaningful consultation must take place.
2007	***Haida Gwai Strategic Land Use Agreement* (2007):** In September 2007, the Indigenous People of Haida Gwaii (as represented by the Council of the Haida Nation) and the Province of British Columbia entered into an innovative *Strategic Land Use Agreement* in respect of the Haida Gwaii.

[1242] See Tanja Zinterer, *Politikwandel durch Politikberatung? Die kanadesische Royal Commission on Aboriginal Peoples und die Unabhängige Kommission "Zuwanderung" im Vergleich* (Wiesbaden, Springer Fachmedien, 2004) Part II, entitled "Kanada: Die *Royal Commission on Aboriginal Peoples* und ihr Beitrag zu Politikwandel" at 59–211; Morse, *supra* note 1216 at 278–279. For the perspective of the Commissions Co-President, the honourable René Dussault, see René Dussault, "L'avenir passe par la reconnaissance, le partage et le respect: Entrevue avec Andrée Lajoie" (2002) 17 Canadian Journal of Law and Society 9.

[1243] *Report of the Special Rapporteur on the Rights of Indigenous Peoples* (2014), *supra* note 157 at 5.

[1244] *Delgamuukw*, *supra* note 550 at 1107–1108.

[1245] Inter-American Commission on Human Rights, *Grand Chief Michael Mitchell (Canada)*, Admissibility Report No. 74/03 Petition No. 790/09 (2003).

[1246] Richardson notes that some developers have commenced to do so independently: Benjamin J. Richardson, "The Ties that Bind: Indigenous Peoples and Environmental Governance" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford and Portland, Oregon: Osgoode Readers, 2009) 337 [Richardson, "Ties that Bind"] at 368. Also see Anderson et al, *supra* note 386 at 934–935.

	The Agreement follows on a "government-to-government"[1247] process to which the parties had committed in 2001. It sets in place a new "ecosystem based management"[1248] plan that is driven by the Haida. In term of the Agreement, the Haida is responsible to identify "New Protected Areas"[1249] and "Special Value Areas"[1250] "as Haida Natural, Cultural and Spiritual Areas, and will maintain these areas in accordance with their laws, policies, customs, traditions and decision making processes."[1251]
2008	**Canadian apology for residential schools:** The Canadian government "expressed its commitment to healing and reconciliation with indigenous peoples, and to forging a new relationship in which the Government and indigenous people can move forward in partnership."[1252]
2009	The **Hul'qumi'num Treaty Group** successfully petitioned the IACHR with a petition for admission.[1253]
2010	**Canada reversed its opposition to *UNDRIP*** on 12 November 2010, although maintaining its position that it is not a legally binding document**.**
2013	In 2013, the Kawacatoose First Nation became the first community to opt into the **First Nations Oil and Gas and Moneys Management Act (FNOGMA)**, which "provides First Nations with the option of managing and regulating oil and gas exploration and exploitation and of receiving moneys otherwise held for them by Canada."[1254]
2013	**Elsipogtog clashes:** Ongoing clashes between the Elsipogtog community and the RCMP culminated in the arrest of 40 community members and the torching of 6 RCMP vehicles on 13 October 2013. The Elsipogtog First Nation was deeply opposed to proposed fracking activities in their (unceded) territory, as they considered it their duty to "protect these lands and to defend them" and they considered that insufficient consultation had taken place.[1255]

[1247] *Haida Gwai Strategic Land Use Agreement* (2007), preamble, par (b) at 2.

[1248] *Ibid.*

[1249] Clause 1.0 H at 3.

[1250] Clause 1.0 G at 3.

[1251] Clause 4.2 at 4.

[1252] *Report of the Special Rapporteur on the Rights of Indigenous Peoples* (2014), *supra* note 157 at 6.

[1253] Inter-American Commission on Human Rights, *Hul'qumi'num Treaty Group (Canada)*, Admissibility Report No. 105/09 Petition No. 592-07 (2009).

[1254] In doing so, the community procures full control of revenues generated from the natural resources on its lands, and absolves the need to seek the Canadian government's approval for their expenditure. See <http://firstpeoples.org/wp/first-nation-acquires-control-of-natural-resource-revenues/ >.

[1255] Schwartz & Gollom, *supra* note 54.

2014	***Daniels v Canada*, 2013 FC 6 (CANLII) (Fed. Ct) (upheld on appeal with respect to the Métis on 17 April 2014):** Parliament's jurisdiction over "Indians and lands reserved for Indians"[1256] includes Métis.
2014	***Tsilhqot'in Nation v British Columbia* 2014 SCC 44:** history is made with the first successful aboriginal title claim in Canadian history. [1257]
2015	The **Truth and Reconciliation Commission (TRC)** on Residential Schools publishes its Final Report in 6 Volumes,[1258] including 98 recommendations for reconciliation.[1259] One of these is that *UNDRIP* be implemented fully by the Canadian Government.
2015	The **Chaudière Falls/Akikodjiwan Falls sacred site dispute** unfolds in Ottawa, triggering a resolution by the Assembly of First Nations of Quebec and Labrador (AFNQL) to protect the site against an envisaged condominium/commercial development by Windmill Development Group Ltd in partnership with Dream Corp.[1260]

4.3 Background: Uncovering Canada's Legal *Mentalité*

4.3.1 Legal Family/Legal Tradition

While the four countries studied have a legal ancestor in common –England–, Canada has an additional French heritage, giving it both bilingualism[1261] and bijuralism. Thus the United States, Australia and Aotearoa New Zealand have common law legal systems and Canada's system is

---

[1256] *Constitution Act*, 1867, 30 & 31 Vict, c 3, s 91(24).

[1257] See the discussion in Anderson et al, *supra* note 386 at 935–936.

[1258] *Canada's Residential Schools*, vol 1–6 (2015). Also see TRC, *The Survivors Speak* (2015); TRC, *What We Have Learned: Principles of Truth and Reconciliation* (2015); and TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015).

[1259] See TRC, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015).

[1260] See Assembly of First Nations Quebec-Labrador, *Protection of Algonquin Sacred Waterfalls Area: Akikodjiwan Kicizibi (Chaudiere Falls, Ottawa River)* (Resolution No. 27/2015, 19 November 2015); Greg Macdougall, Nine Algonquin Chiefs, AFNQL Oppose 'Zibi' Condos and Resolve to Protect Sacred Area in Ottawa/Gatineau" (25 November 2015), online: <equitableeducation.ca/2015/Algonquin-chiefs-afnql-oppose-zibi>.

[1261] Although Canada is officially bilingual (French and English), my case study is drawn from the predominantly Anglophone British Columbia. I will be referring to the Francophone Quebec and Quebec law, however.

bijural:[1262] all the provinces but Quebec follow a common law system, while Quebec has a civil law system. For purposes of legal comparison my case studies are drawn from the predominantly Anglophone British Columbia, which has a common law legal tradition. However, given the role of the doctrine of precedent in common law systems generally,[1263] and in Canada particularly, the importance of French-Canadian law in this equation should not be underestimated. In addition, Oka, Quebec, remains the site of Canada's most infamous Indigenous sacred site confrontation[1264] and Quebec Indigenous leaders are vociferous in their opposition to transnational oil pipeline projects.[1265]

An interesting variable in the legal cultures of the four countries is the approach that each has taken in relation to its respective Indigenous peoples. The Canadian tradition has both French and British roots: prior to the 1763 *Treaty of Paris*[1266] there had been alliances between the French Crown and

---

[1262] Gaudreault-DesBiens, "State Management", *supra* note 59 at 198 and, for a more detailed discussion, Jean-François Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada* (Montreal: Thémis, 2007). On Quebec, also see Pawel Laidler, "The Distinctive Character of the Quebec Legal System" in Magdalena Paluszkiewicz-Misiaczek et al, eds, *Place and memory in Canada : global perspectives : 3rd Congress of Polish Association for Canadian Studies and 3rd International Conference of Central European Canadianists, April 30-May 3, 2004, Cracow, Poland : proceedings = Lieu et mémoire au Canada : perspectives globales : 3ème Congrès de l'Association Polonaise des Études Canadiennes et 3ème Conférence internationale des canadianistes d'Europe Centrale, 30 avril–3 mai, 2004, Cracovie, Pologne : actes* (Kraków: Polska Akademia Umiejętnosci, 2005) 277. My Canadian case study is specifically situated in a common law province, *viz* British Columbia (discussed below at 5.5 "Desktop Study: Ktunaxa Nation and Jumbo Glacier Ski Resort"). However, the importance of Quebec should not be underestimated in any discussion pertaining to sacred sites, in view of the events at Oka/Kanesatake in 1990. (See Ross, *supra* note 34 at 181 n 1; Nickel, *supra* note 34, 221; and Peter Blue Cloud, *supra* note 34.)

[1263] One should be careful not to assume that the doctrine of precedent operates the same in all jurisdictions: see e.g. De Cruz, "Comparative Law", *supra* note 240 at § 9 on variances in the United States and England.

[1264] The Oka-issue is far from resolved: see e.g. CBC News, "Frustration Mounts as Land Dispute Continues in Oka, Qué" (2 August 2017), *CBC News Indigenous*, online: < http://www.cbc.ca/news/indigenous/frustration-mounts-kanesatake-land-dispute-continues-1.4231208>.

[1265] The Assembly of First Nations for Quebec and Labrador (AFNQL) officially opposes the Energy East project, which would traverse Quebec and its rivers. However at the 2016 AFN annual meeting in Gatineau, the AFNQL's regional leader, Ghislain Picard, was unequivocal about the need for vigilance elsewhere, stating, "There comes a time in our lives when we need to exercise our sacred duty to protect Mother Earth.": see Shawn McCarthy & Justine Hunter, "From Standing Rock to Trans Mountain, Dissent is in the Pipeline" *The Globe and Mail* (11 December 2016) online: < http://www.theglobeandmail.com/news/national/standing-rock-and-what-comes-next/article33280583/>.

[1266] *Treaty of Paris,* Great Britain, France and Spain, 10 February 1763.

some Indigenous groups[1267] and in the *Royal Proclamation*[1268] of the same year the British Crown pledged protection of Indigenous rights.[1269] Gaudreault-DesBiens has classified Canada's initial approach as one of "embryonic recognition, or to put it otherwise, [the] absence of a formal and total erasure of aboriginal customary norms" which "was by and large forgotten as Aboriginals soon became objects of legislation instead of being equal legal subjects."[1270]

4.3.2 Constitutional Tradition

> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.[1271]

Canada is a federation[1272] with a bicameral parliamentary system.[1273] It is a constitutional monarchy with the British Queen as its sovereign.[1274] Having been subject to British sovereignty, it subsequently became independent. Canada is a member of the Commonwealth of Nations.

[1267] For ample details, see Morin, "Propriétés et territoires", *supra* note 213; Morin, "Gestion de chasse", *supra* note 213.

[1268] *Royal Proclamation, supra* note 1210.

[1269] See Gaudreault-DesBiens, "State Management", *supra* note 59 at 200.

[1270] *Ibid.*

[1271] *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 745.

[1272] See the interesting theoretical reflection on federalism by Jean-François Gaudreault-DesBiens, *In Praise of Principles, or Beyond the Toolbox Approach to Federalism* (Paper presented at the 8th World Congress of the International Association of Constitutional Law, in Mexico City, on 8 December 2010) available online: <ssrn.com/abstract=1907271>.

[1273] On Canada, see Paul G Thomas, "Parliament and Legislatures: Central to Canadian Democracy" in John C Courtney & David E Smith, eds, *The Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010) 153.

[1274] David E Smith, "Canada: A Double Federation" in Courtney & Smith, *supra* note 1273, 75 at 76.

Although constitutionalism has been achieved in all four of the jurisdictions studied[1275] and they each also have a constitution[1276] (albeit not necessarily a codified one), there appear to be considerable differences between their constitutional and legal cultures.

Of the four, Canada has had the most recent substantial change to its constitutional dispositions, in the form of the *Constitution Act* (1982),[1277] which introduced the *Charter of Rights and Freedoms*. Its constitution is uncodified and comprises both other texts of constitutional significance and unwritten constitutional conventions. It has a Human Rights Tribunal[1278] that hears discrimination cases, and the Canadian Human Rights Tribunal has the status of a federal administrative tribunal.[1279] The *Canadian Human Rights Act*[1280] is binding on the Crown, except with regards to the Yukon Government, the Government of the Northwest Territories and Nunavut.[1281] With the advent of the *Charter of Rights and Freedoms* in the 1982 *Constitution Act,* the doctrine of Parliamentary sovereignty has been constrained.[1282] However, the rights in the *Charter* are not absolute, being subject both to the general limitation clause in section 1 and the power of Parliament or the provinces to invoke the "notwithstanding" provisions in section 33(1).[1283] The latter provision is an

---

[1275] See Grimm, *supra* note 908 at 103–104.

[1276] Having a constitution is no guarantee of the achievement of constitutionalism and, conversely, constitutionalism does not require that a state have a (written) constitution: see *ibid* at 105–106.

[1277] *Canada Act 1982* (UK), 1982, c 11 [*1982 Canadian Constitution*]. It builds on the *Constitution Act*, 1867, 30 & 31 Vict, c 3 and does not substitute it.

[1278] Established by the *Canadian Human Rights Act*, RSC 1985, c H-6.

[1279] Thus, for instance, the Tribunal has the powers of a superior court of record in the hearing of an enquiry (s 50(3)) and an order made by the Tribunal under s 53 may be made an order of the Federal Court for enforcement purposes (s 57).

[1280] *Supra* note 1278.

[1281] S 66(1).

[1282] See Janet L Hiebert, "The Canadian Charter of Rights and Freedoms" in Courtney & Smith, *supra* note 1273, 54. Of particular interest for present purposes are the fundamental freedoms in s 2, the equality rights in s 15 and the multicultural heritage provisions of s 27. However, Gaudreault-DesBiens, "State Management", *supra* note 59 at 206 points out that this "remains an important constitutional principle" in Canada. Although the *Canadian Bill of Rights*, SC 1960, c 44 was enacted with the express purpose of recognizing and protecting human rights and fundamental freedoms, it does not form part of the Canadian Constitution and hence does not *per se* impact the principle of Parliamentary sovereignty.

[1283] The power in s 33(1) only applies in respect of legislation that would have run afoul of ss 2 or 7–15 of the *Charter*.

override clause that may be invoked against judicial review of legislative acts.[1284] Grimm considers it problematic that the judiciary is not named among the powers that are bound by the *Charter*, submitting that this creates difficulties when it comes to holding private parties accountable to the provisions of the *Charter*.[1285]

The Canadian Supreme Court has developed a sophisticated body of human rights jurisprudence that has had considerable influence elsewhere in the world.[1286] In this context it is functional to refer to Goldsworthy's characterization of the Canadian constitutional legal culture as demonstrating an "enthusiastic judicial activism" that is partly due to the influence of US jurisprudence.[1287] Finally, constitutionally speaking, Canada differs most expressly from the other three states for purposes of my research in the context of the "recognition and affirmation" in section 35 of the 1982 Canadian Constitution of "existing" aboriginal and treaty rights.[1288] There is no parallel provision in any one of the other countries' constitutional dispositions. Canadian courts have interpreted "existing aboriginal rights" to constitute a pre-contact requirement[1289] which, as Gaudreault-DesBiens explains, "has been subject to intense criticism because of its potential to fossilize Aboriginal cultures to a pre-modern stage of development, as if modernity and these cultures were absolutely incommensurable."[1290]

[1284] Grimm, *supra* note 908 at 112.

[1285] *Ibid* at 110.

[1286] The *South African Constitution* and its developing body of constitutional jurisprudence being a case in point.

[1287] Jeffrey Goldsworthy, "Constitutional Interpretation" in Rosenfeld & Sajó, *supra* note 276, 689 at 710. For arguments *pro* and *contra* such judicial activism, see James B Kelley & Christopher P Manfredi, "Courts" in Courtney & Smith, *supra* note 1273, 39 at 51.

[1288] S 35(1). S 35(3) stipulates that treaty rights "include rights that now exist by way of land claims agreements or may be so acquired." Note that s 35 forms part of the Constitution, but not of the *Charter of Rights and Freedoms*. See the *dictum* of Lamer CJ in *Van der Peet*, *supra* note 175 at 534 in this context.

[1289] *Van der Peet*, *ibid*, constitutes a prime example.

[1290] Gaudreault-DesBiens, "State Management", *supra* note 59 at 217. Also see Leclair, "Le sacré", *supra* note 356 at 484, who argues that in doing so, the judges themselves create a form of sacred normativity ("*les juges se font apprentis sorciers*") due to the fact that the law takes on apodictic truth. This is particularly problematic from the point of view of the individual, who has no say in this collective treatment being meted out by the court. Further see Otis, "Revendications foncières", *supra* note 105, as well as the sources that he cites at 763 n 78.

In Canada, the 1973 decision of the Supreme Court of Canada in *Calder v Attorney-General of British Columbia*[1291] postulated the recognition of "land rights based on Aboriginal title originating in traditional use and occupancy of the land" by the common law.[1292] This led the federal Canadian government to establish a federal policy for the negotiation and settlement of land claims on the twin basis of the Comprehensive Claims Policy[1293] and the Specific Claims Policy.[1294] A specific tripartite treaty process was established in respect of the Province of British Columbia in 1993 for purposes of implementing this federal policy.[1295]

In this country, "existing aboriginal rights" have furthermore been constitutionally recognized since the advent of the 1982 *Constitution*.[1296] Yet these are not absolute: they may be extinguished[1297] and are subject to infringement, provided that such infringement is "in furtherance of a legislative objective that is compelling and substantial" and "consistent with the special fiduciary duty relationship between the Crown and aboriginal peoples."[1298] The concept of aboriginal title is neutral as to the intrinsic sacredness of a site: the fact that a site is sacred does not afford it greater

---

[1291] [1973] SCR 313 [*Calder*].

[1292] "Calder v Attorney-General of British Columbia (1973)", *ATNS Project*, online: <http://www.atns.net.au/agreement.asp?EntityID=2359>.

[1293] Comprehensive claims are founded on "the assertion of continuing title to land and resources": "Agreement Making with Indigenous Peoples: Background Material", *ATNS Project*, online: <http://www.atns.net.au/page.asp?PageID=1#aust>.

[1294] Specific claims relate to "Canada's breach or non-fulfilment of lawful obligations found in treaties, agreements or statutes (including the *Indian Act* (1876))": "Specific Claims Policy 1973", *ATNS Project*, online: <http://www.atns.net.au/agreement.asp?EntityID=2360>. It has since been substantially reformed by the *Specific Claims Resolution Act* RSC 2003 c 23.

[1295] *Ibid.*

[1296] S 35(1).

[1297] *Indigenous Constitution*, *supra* note 147 at 265. However, Barrie argues that subsequent to *Delgamuukw*, *supra* note 550, aboriginal title is no longer subject to unilateral extinction by the federal government: it must either be voluntarily surrendered by the Indigenous people in question, or s 35(1) of the *Canada Act 1982* requires amendment: GN Barrie, "The United Nations Declaration on the Rights of Indigenous People: Implications for Land Rights and Self-Determination" [2013]:2 J South African Law 292 [Barrie, "UNDRIP"] at 299.

[1298] *Delgamuukw*, *supra* note 550 at 1107–1108. *In casu* such "compelling and substantial" legislative objective was held to include matters like "the development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims" (*ibid* at 1111).

protection than one that is not.[1299] In 1997, the Supreme Court of Canada described aboriginal title as "a collective title to land held by all members of an aboriginal nation" in the seminal case of *Delgamuukw v British Columbia*.[1300] Yet it was only in 2014, in the historic *Tsilhqot'in v British Columbia*[1301] decision that an Indigenous people managed to formally establish aboriginal title in Canada.

Smith emphasizes Canada's uniqueness: Not only is there great diversity insofar as language, religion, law, economy and geography are concerned,[1302] but Canada distinguishes itself in at least four ways on the federal level — it was the world's first parliamentary federation;[1303] it constitutes a "double federation [,] based on peoples and territory";[1304] it possibly has one of world's most decentralized federal systems;[1305] and it is "arguably (…) still among the most complex of parliamentary federations — bilingual, with an entrenched Charter of Rights and Freedoms".[1306] The fact that its system is highly decentralized is a complicating factor in this research, for natural resource exploitation and regulation fall under provincial control.[1307] "Indians" fall under the jurisdiction of the Parliament of Canada.[1308]

[1299] Ross, *supra* note 34 at 19. But consider in this regard Fonda, *supra* note 1357 at 1: "historical Aboriginal cultures did not have as marked a conceptual separation between sacred and secular, or between culture, language and identity, or between spirituality and the land on or through which it is expressed as did most European cultures. These things were, and for many contemporary Aboriginal peoples, are all interrelated in Aboriginal worldviews."

[1300] *Delgamuukw*, *supra* note 550 at 1115.

[1301] *Tsilhqot'in, supra* note 1530.

[1302] See Smith, "Canada", *supra* note 1274 at 76.

[1303] *Ibid* at 75.

[1304] *Ibid* at 76.

[1305] See *ibid* at 83.

[1306] *Ibid* at 89.

[1307] See *ibid* at 83–84. He observes that all but the Maritime Provinces are exceptionally resource-rich: *ibid.*

[1308] In terms of s 91:24 of the *Constitution Act, 1867*: see *ibid* at 78.

4.3.3 Approach to and Relationship with Indigenous Peoples

> [F]ailure to acknowledge that there are at least two major, distinct, and sometimes overlapping public spaces on Canada's territory (one mostly francophone in Quebec, the other mostly Anglophone outside Quebec) and that there are at least three major "historical communities," e.g., communities which share a specific identity based on a common historical memory and on a common set of representations –the franco-Canadians concentrated in Quebec, the anglo-Canadians concentrated outside Quebec, and the native peoples– jeopardizing Canada's chances of survival in the long term, because it amounts to a denial of Canada's intrinsically complex nature. Canada's ability to manage its deep diversity, without falling prey to uncontrolled centrifugal forces, will prove critical in its attempts to remain united.[1309]

4.3.3.1 Self-Identification and State Identification

The position in Canada is somewhat complex when it comes to the definition of Indigeneity. There are various potential definitions: Indigenous persons can self-identify (for instance, on the Census forms); the federal government distinguishes between "status Indians" and "non-status Indians" for purposes of the antiquated federal *Indian Act*, 1876[1310] and maintains a register in that regard; and each First Nation keeps a list of its Band members.[1311] These sources are not always congruent[1312] and while the Supreme Court recently clarified in the *Daniels* decision[1313] that "Indian"

[1309] Jean-François Gaudreault-DesBiens, "The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives about Law, Democracy and Identity" (1999) 23 Vermont Law Review 793 at 817–818.

[1310] See Mark D Walters, "Promise and Paradox: The Emergence of Indigenous Rights Law in Canada" in Richardson, Imai & McNeil, *supra* note 1246, 21 at 30–32.

[1311] Bands are empowered under the *Indian Act* to define membership criteria, which are mostly based on "lineal descent from Aboriginal ancestors": Bartels & Bartels, *supra* note 470 at 250.

[1312] Chandler et al, *supra* note 402 at 67–68.

[1313] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 Abella J [*Daniels*]. The Court found that Métis and non-status Indian people found themselves at the mercy of a "jurisdictional tug-of-war" where neither the federal nor the provincial levels of government wanted to take responsibility for them (at para 15). Holding that s 91(24) of the *Constitution Act, 1867* included both groups under "Indian" in the broad constitutional sense of "Aboriginal peoples" as also employed in s 35 of the *Constitution Act, 1982* (at para 35), the jurisdictional issue was therefore put to rest even if it did not create an obligation to legislate (at para 15).

includes both Métis and non-status Indians for purposes of s 91(24) of the *Constitution Act, 1867*[1314] it declined to specifically rule either that the federal Crown owes a fiduciary duty to them or that that there is a duty on the federal government to consult with them in good faith.[1315]

The *Indian Act* confers band status onto bands with whom either the British Crown or the federal Canadian government has entered into in a treaty.[1316] Until successfully challenged before the United Nations Human Rights Committee by Sandra Lovelace[1317] and the *Act*'s consequential revision in 1985,[1318] its gender discriminatory provisions meant that status Indian women who married non-

---

[1314] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

[1315] However, the Court's refusal was motivated not by a denial of such duties on the federal government, but rather by the "lack [of] practical utility" that would come with restating settled law: In the first instance, the Supreme Court had already found that such a fiduciary relationship existed with Canada's Aboriginal peoples in *Delgamuukw*, *supra* note 550 at specifically with the Métis in *Manitoba Métis Federation Inc v Canada (Attorney General)*, [2013] 1 SCR 623 [*Manitoba Métis Federation*] (*Daniels*, *supra* note 1313 at para 53); insofar as the duty to consult is concerned, the Supreme Court had "already recognize[d] a context-specific duty to negotiate when Aboriginal rights are engaged" in *Haida*, *supra* note 1477 and in *Tsilhqot'in, supra* note 1530 (*Daniels*, *supra* note 1313 at para 56).

[1316] Bartels & Bartels, *supra* note 470 at 250. This has been interpreted by the Department of Indian and Northern Affairs as requiring "continuous maintenance of a distinctive Aboriginal community" as a registration criterion: *ibid* at 262.

[1317] UNHRC *Sandra Lovelace v Canada*, Communication No R6/24, UN Doc Supp No 40 (A/36/40), 1981, 166 [*Lovelace*]. Sandra Lovelace had lost her Indian status in 1970 upon marrying a non-Indian man. Upon separating from him in 1977 she was denied permission to return to Tobique Reserve, where she had lived with her parents until her marriage. She based her claim on art 27 of the *International Covenant on Civil and Political Rights* (*ICCPR*), *supra* note 949. The Human Rights Committee ruled that although she had lost her rights before the *ICCPR* came into force in Canada on 19 August 1976, the effects of her loss of status continued after that date and were in violation of her rights under art 27 as a member of a minority group. Importantly the HRC utilized as criterion for purposes of determining whether she formed part of the minority the fact that she was "ethnically a Maliseet Indian and [had] only been absent from her home reserve for a few years during the existence of her marriage" (at para 14) rather than the *Indian Act*'s definition. Although art 27 did not protect her right to live on the reserve as such, it guaranteed her access rights to her native culture and language that she could only enjoy "'in community with other members' of her group" — and, since her "main cultural attachment" was with the Maliseet band of Indians (at para 17), the Maliseet Indian band only existed on the Tobique Reserve (at para 15), and denying her the right to live on the reserve was not a prerequisite to the preservation of the tribe's identity (at para 17), in denying her a legal right to reside on the Tobique Reserve, the Government of Canada was in breach of art 27 of the Covenant (at para 19).

[1318] In terms of Bill C-31, an *Act to Amend the Indian Act*. Bill C-31 (passed June 28, 1985): Department of Indian Affairs and Northern Development, "The Impacts of the 1985 Amendments to the *Indian Act* (Bill C-35)", Information Sheet (Ontario: September 1995). However, Bill C-31 introduced a different problematic related to blood quantum in the form of the provisions of s 6(2)'s "second generation cut-off rule". In a nutshell the problem is that only "full status Indians" (s 6(1) Indians) can transmit Indian status to their children: the child of a status Indian and a non-status Indian receives s 6(2) status and after the second-generation Indian status is lost. In addition, this provision comes into play one generation earlier in the case of Indigenous women marrying out than in respect of Indigenous men: for a detailed explanation, see Sébastien Grammond, "Discrimination in the Rules of Indian Status and the McIvor Case" (19 August 2009) SSRN Working Paper online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1416409>. He classifies

status men lost their status, while non-status women who married status Indian men gained status under the *Act*.[1319]

Dennis and Alice Bartels deftly illustrate the disparities wrought by differentiated treatment of Indigenous Canadians for "status" purposes:

> Possession of Indian status confers certain economic advantages. Status Indians are exempt from federal and provincial taxes. As well, bands administer government-funded programs that sometimes provide housing, vocational training, or other benefits for band members. At the same time, Indians suffer more than any other group in Canada from unemployment, poverty, family violence, substance abuse, suicide, incarceration, and low levels of education. Indians are sometimes stereotyped as lazy, violent, or alcoholic, and thus underserving of government support. These stereotypes often underlie discriminatory practices. Thus, Indians without status may suffer from stigmatization and discrimination without receiving any of the benefits that status confers."[1320]

Matters are further complicated by the reductive, essentialist interpretation that the courts have given to indigeneity in the context of "aboriginal rights" for the purposes of section 35 of the *Constitution*.[1321]

In the *2011 National Household Survey*, 851,560 people self-identified as First Nations persons, representing 60.8% of the total Indigenous population and 2.6% of the total Canadian population. 451,795 people furthermore self-identified as Métis,[1322] constituting 32.3% of the total Indigenous population and 1.3% of the total Canadian population and 59,445 people self-identified as Inuit,[1323]

---

this as an instance of "intersectional discrimination", that is, discrimination on the grounds of "two or more prohibited grounds of discrimination" —here, both sex and race (at 4).

[1319] See Bartels & Bartels, *supra* note 470 at 250.

[1320] Bartels & Bartels, *supra* note 470 at 250–251.

[1321] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

[1322] *Daniels*, *supra* note 1313 explicitly recognizes that the Métis are (and remain) a "culturally distinct Aboriginal people living in culturally distinct communities", irrespective of their inclusion in s 91(24) of the *Constitution Act, 1887* (at para 42).

[1323] Inuit are also "Indians" for purposes of s 91(24) of the *Constitution Act, 1887*, despite the fact that they have a unique language, culture and discrete identities from those of the other Canadian "Indian tribes": *Reference as to whether "Indians" in s 91(24) of the BNA Act includes Eskimo inhabitants of the Province of Quebec*, [1939] SCR 104 [*Re Eskimo*], as applied in *Daniels*, *supra* note 1313 at para 39.

constituting 4.2% of the total Indigenous population and 0.2% of the total Canadian population. In total, therefore, 1,400,685 people had an Indigenous identity.[1324]

Terminological usage is particularly striking in the Canadian political context: while policy makers and anthropologists utilize terms such as "tribes" and "bands", Indigenous people prefer words like "nation" and "confederacy".[1325] In addition, English tribal names are increasingly being replaced, e.g. MicMac (Mi'kmaq); Maliseet (Wolastoqiyik); Huron (Wendat); Iroquoian (Haudenosaunee); and Ojibway (Anishnaabe).[1326]

Because my Canadian desktop studies specifically pertain to First Nations communities of status Indians, I will use (in order of preference and depending on context) the name of the First Nation in question, First Nation and Indigenous. Because of the wording of legislation and regulations I may from time to time need to use "Indian" or "Aboriginal" interchangedly with these.

4.3.3.2 Evolving Approach

According to Indigenous and Northern Affairs Canada, there are 617 First Nations communities,[1327] 53 Inuit communities[1328] and an unspecified further group of "Métis and Non-Status Indians" in Canada.[1329] In 2008, Statistics Canada reported an "Aboriginal" population of 1.3 million (3.5% of

---

[1324] Statistics Canada, *Aboriginal Peoples in Canada: First Nations People, Métis and Inuit. National Household Survey, 2011* (2013) at 4.

[1325] David R Newhouse & Yale D Belanger, "Beyond the 'Indian Problem': Aboriginal Peoples and the Transformation of Canada" in Courtney & Smith, *supra* note 1273, 339 at 340.

[1326] See *ibid.*

[1327] This includes both "Status" and "Non-Status" "Indian people"—a statutory distinction imposed by the antiquated *Indian Act* (1876) that will be dealt with in detail below at 3.7 (*Canadian Law on Sacred Indigenous Sites and Natural Resource Development Projects*). According to the official Canadian Agency, there are presently 617 First Nations "communities", representing "more than 50 cultural groups and 50 Aboriginal languages": "First Nations", (2015-04-07), *Indigenous and Northern Affairs Canada*, online: < www.aadnc-aandc.gc.ca/eng/1100100013791/1100100013795 >.

[1328] "Inuit", (2015-06-26), *Indigenous and Northern Affairs Canada*, online: < www.aadnc-aandc.gc.ca/eng/1100100014187/1100100014191 >.

[1329] "Métis and Non-Status Indians", (31 August 2012), *Indigenous and Northern Affairs Canada,* online: < www.aadnc-aandc.gc.ca/eng/1100100014271/1100100014275>. Note, however, that this page predates the "First Nations" page by some three years: as noted *supra* note 1313, the concept of "First Nations" now seems to officially embrace "Non-Status Indians".

the Canadian population), with an additional 1.7 million Canadians reporting Aboriginal ancestry without considering themselves to be Aboriginal.[1330] Like Canadians generally, Canada's Indigenous population has become increasingly urbanized.[1331] Unlike Canadians generally, they have poor socio-economic indicators: low levels of education and income; poor housing; marginal social and economic status; a disproportionately high incarceration rate; and difficulties with racism in the criminal justice system.[1332] Newhouse and Belanger ascribe this discrepancy to Canada's colonial legacy and observe that it is "indicative of the difficult relationship that many Canadians have with the country's original inhabitants".[1333]

This relationship traced the familiar policy path of assimilation to integration to self-determination.[1334] Currently there is a movement underway towards self-government on an equal nation-to-nation basis.[1335] Indigenous people are considered to comprise "politically and culturally distinct communities" and the Canadian Supreme Court recognizes Indigenous rights on an "ever-evolving" basis.[1336]

[1330] Newhouse & Belanger, *supra* note 1325 at 340.

[1331] Though to a lesser degree: 54% of the Indigenous Canadian population lived in urban centres in 2006, as opposed to 80% of the Canadian population at large: see Newhouse & Belanger, *supra* note 1325 at 340; Smith, "Canada", *supra* note 1274 at 78. They are spread throughout the provinces, with the highest proportion to be found in Ontario: *ibid*.

[1332] See Newhouse & Belanger, *supra* note 1325 at 342.

[1333] *Ibid*.

[1334] For a good historical overview of the period 1969–1995, see *ibid*; Will Kymlicka, "Ethnic, Linguistic, and Multicultural Diversity of Canada" in Courtney & Smith, *supra* note 1273, 301 [Kymlicka, "Diversity"] at 305–306.

[1335] Newhouse & Belanger, *supra* note 1325 at 339.

[1336] *Ibid* at 340.

Important recent policy documents have included the *Hawthorn Report* (1966 and 1967);[1337] the 1969 *White Paper*,[1338] the *Red Paper* of 1970;[1339] the *Penner* Report (1983);[1340] the *Royal Commission Report on*

[1337] Canada, Indian Affairs Branch Ottawa, *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies: Part 1*, by HB Hawthorn, ed (Ottawa: Information Canada, 1966), available online: <www.collectionscanada.gc.ca/webarchives/20071120104036/http://www.ainc-inac.gc.ca/pr/pub/srvy/sci_e.html> and Canada, Indian Affairs Branch Ottawa, *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies: Part 2*, by HB Hawthorn, ed (Ottawa: Information Canada, 1967), available online: <www.collectionscanada.gc.ca/webarchives/20071126042509/http://www.ainc-inac.gc.ca/pr/pub/srvy/sci3_e.pdf> [*The Hawthorn Report*]. These reports introduced the powerful concept of "citizens plus", meant to emphasize simultaneously their common citizenship and their difference as original occupiers of the country: see Newhouse & Belanger, *supra* note 1325 at 344.

[1338] Canada, Indian Affairs and Northern Development, *Statement on Indian Policy of the Government of Canada* (Ottawa: Indian Affairs and Northern Development, 1969), available online: <nctr.ca/assets/reports/Historical%20Reports/1969%20The%20White%20Paper.pdf> [*the White Paper*]. The *White Paper* was considered to be Canada's version of the United States' allotment legislation and met with fierce opposition from Indigenous people. It was withdrawn in 1971, but remained a "potent political icon" in Indigenous circles: see Newhouse & Belanger, *supra* note 1325 at 344–346; Kymlicka, "Diversity", *supra* note 1334 at 306.

[1339] Canada, Indian Chiefs of Alberta (ICA), *Citizens Plus* (June 1970) published in (2011) 1:2 *Aboriginal Policy Studies* 188, available online: <ejournals.library.ualberta.ca/index.php/aps/article/view/11690/8926> [*the Red Paper*]. Published as a response to the *White Paper*, the *Red Paper* (as it soon became known) argued for a special status akin to the *Hawthorn Report*'s "citizens plus", but one based on treaties: see Newhouse & Belanger, *supra* note 1325 at 345. Also see Leon Crane Bear, *The Indian Association of Alberta's 1970* Red Paper *Published as a Response to the Canada Federal Government's Proposed 1969* White Paper *on Indian Policy* (MA Thesis: Department of Native Studies, University of Lethbridge, Alberta, Canada, 2015) [Unpublished].

[1340] Canada, House of Commons, *Indian Self-Government in Canada: Report of the Special Committee*, Keith Penner, Chairman: Special Committee on Indian Self-Government (October 1983) available online: <caid.ca/PennerRep1983.pdf> [the *Penner Report*]. The *Penner Report* proposed Aboriginal self-government as the foundation for a new Canada-First Nations relationship, suggesting that the right to self-government be constitutionally entrenched: see Newhouse & Belanger, *supra* note 1325 at 348–350. They note that while the Trudeau government accepted the *Penner Report* in 1984 and agreed to commence a new relationship with Canada's Indigenous peoples, it did not adopt the idea to constitutionally entrench the right to self-government — but that the same right would ultimately be read into s 35 of the *Constitution* by the Canadian government a decade later (at 349). Also see Kymlicka, "Diversity", *supra* note 1334 at 307. He observes that it is "difficult to exaggerate the shift in thinking about Aboriginal policy" that took place in Canada within such a short period of time. On the Penner Report, see Paul Tennant, "Aboriginal Rights and the Penner Report on Indian Self-Government" in Menno Boldt & J Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 321.

Aboriginal Peoples (*RCAP*, 1996);[1341] the Kelowna Accord (2005);[1342] and the Final Reports of the Truth and Reconciliation Committee (2015).[1343]

The upshot is a "reluctant acceptance of the right of self-government" in Canada according to Newhouse and Belanger.[1344] Although socio-economic disparities persist, progress is being made on the cultural front: most Canadian universities now offer an Indigenous study programs;[1345] Canada has had its own Indigenous television channel, Aboriginal Peoples Television Network (APTN), since 1999,[1346] and there is a burgeoning Indigenous art,[1347] music[1348] and literature

---

[1341] Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol 1–5 (Ottawa: Communication Group, 1996), available online: <qspace.library.queensu.ca/handle/1974/6874> [*RCAP*]. A shorter version has been published as Canada, Royal Commission on Aboriginal Peoples, *Highlights from the Report of the Royal Commission on Aboriginal Peoples: People to People, Nation to Nation* (Ottawa: Communication Group, 1996), available online: < https://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637> [*RCAP Highlights*]. See Kymlicka, "Diversity", *supra* note 1334 at 307.

[1342] A CAD 5.1 billion over 5 year-agreement was signed under Prime Minister Paul Martin to bridge the life gap of Canada's Indigenous peoples, but was abandoned shortly thereafter by the incoming Harper government: see Christopher Alcantara & Zac Spicer, "Learning from the Kelowna Accord" (July–August 2015) *Policy Options* 95.

[1343] These include: Canada, Truth and Reconciliation Commission (TRC), *Canada's Residential Schools*, vol 1–6 (2015); TRC, *The Survivors Speak* (2015); TRC, *What We Have Learned: Principles of Truth and Reconciliation* (2015); TRC, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015); and TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015). All can be accessed online at: <nctr.ca/reports.php>.

[1344] Newhouse & Belanger, *supra* note 1325 at 352.

[1345] *Ibid* at 354.

[1346] *Ibid* at 353.

[1347] Indigenous art is now a respected (and sought-after) genre of its own: see Newhouse & Belanger, *supra* note 1325 at 352. Three main genres are commonly distinguished: Northwest Coast Art (both traditional and contemporary, e.g., the work of the Haida artist Bill Reid); the Woodlands School (inspired and influenced by Ojibwa artist Norval Morrisseau); and Independent Contemporary Aboriginal Art (e.g. Ojibwa artist Carl Beam; Ojibway artist Rebecca Belmore and Cree/Irish artist Kent Monkman). Rebecca Belmore was the first female Indigenous artist to represent Canada at the Venice Biennale (2005) and was awarded the 2013 Governor General's Award in Visual and Media Arts: Joan Vastokas, "Contemporary Indigenous Art in Canada" (24 July 2013) *Historica Canada*, online: <www.thecanadianencyclopedia.ca/en/article/contemporary-aboriginal-art-in-canada/>.

[1348] Thus, for instance, the 2016 edition of Aboriginal Music Week was to feature 27 Indigenous acts over the course of 5 days in front of an expected audience in excess of 9,000 members. It constituted the 8th anniversary of the festival. See: "AMW News" *Aboriginal Music Week* online: <www.aboriginalmusicweek.ca/news/read,article/200/aboriginal-music-week-2016-festival-details>. Indigenous artists have achieved important mainstream success, as was exemplified by Buffy Sainte-Marie's 3 2016-Juno nominations, of which she won two awards (Contemporary Roots Album of the Year and Aboriginal Album of the Year). She had also been nominated as Songwriter of the Year. See: "Awards" *Juno Canada's Music Awards* online: <junoawards.ca/awards/?from-year=1970&to-year=2016&nomination-category=&wins-only=no&artist=buffy+sainte-marie>.

scene.[1349] Although the Kelowna Accord was rescinded by the Harper Government in 2006, the Liberal Trudeau Government appears to have made Indigenous reconciliation a priority. While there may be reason for cautious optimism, it should be tempered with realism, as the government's recent retreat on its *UNDRIP* implementation promise illustrates.[1350]

4.3.4 Approach to International Law

In 3.4.2 above ("The Domestic Implementation of International Law: Canada"), the following points were made in relation to Canada: (1) It follows a dualist approach to International law, so that norms of a conventional nature need to be formally incorporated through implementing legislation in order for them to take effect. (2) Customary International law is directly recognized as forming part of the common law. (3) The doctrine of separation of powers creates difficulties in that conventions are entered into by the executive and must be formally enacted by the legislative authority. (4) This is particularly complex when the matter falls within the provincial domain and the convention is signed by the federal executive. (5) The Supreme Court of Canada has utilized international law as a source of domestic reform by holding that it is incumbent on Canada to interpret its domestic law in accordance with its treaty obligations and with the principles of customary international law – here it diverges from most common law states. (6) This open-mindedness has not extended to its treatment of Indigenous peoples, as Canada has consistently shunned the international law doctrine in favour of its more conservative internal policy. (7)

[1349] E.g., in 2014, Thomas King won the Governor General's Literary Award for Fiction for *The Back of the Turtle* –he had already been nominated twice previously–, as well as the British Columbia's National Award for Canadian Non-Fiction and the RBC Taylor Prize for *The Inconvenient Indian: A Curious Account: A Curious Account of Native People in North America*. See: Brian John Busby, "Thomas King" (4 April 2014) *Historica Canada*, online: <www.thecanadianencyclopedia.ca/en/article/thomas-king/> and Mark Medley, "Thomas King Wins Governor-General's Award for Fiction" (18 November 2014) *The Globe and Mail*, online: <www.theglobeandmail.com/arts/books-and-media/thomas-king-wins-governor-generals-award-for-fiction/article21636001/>.

[1350] See APTN National News, "Justice Minister Jody Wilson-Raybould Says Adopting UNDRIP Into Canadian Law 'Unworkable'" (12 July 2016) *APTN National News*, online: < http://aptnnews.ca/2016/07/12/justice-minister-jody-wilson-raybould-says-adopting-undrip-into-canadian-law-unworkable/>: "'Simplistic approaches such as adopting the United Nations declaration as being Canadian law are unworkable and, respectfully, a political distraction to undertaking the hard work actually required to implement it back home in communities,' said Wilson-Raybould in a speech to a room of chiefs at the Assembly of First Nations 37th annual general assembly Tuesday in Niagara Falls.".

Consequently the Federal Government has entered into a limited range of self-government arrangements with various First Nations groups since 1993, but these vary in contents and scope.

4.4 Summary of Sources

Table II: Overview of the Canadian Legal Framework

	CANADA
Express Constitutional Protection	*Canada Act, 1982*, s 35: Aboriginal & Treaty Rights *R v Sparrow,* [1990] 1 SCR 1075 *R v Van der Peet*, [1996] 2 SCR 507 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] SCC 74 *Mikisew First Nation v Canada (Minister of Heritage)*, [2005] SCR 388 *Beckman v Little Salmon/Carmacks First* Nation, [2010] SCC 53 *Rio Tinto Alcan v Carrier Sekani Tribal Council*, [2010] SCC 43 *Tsilhqot'in v British Columbia,* (2014) SCC 44 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 *First Nation of Nacho Nyak Dun v Yukon (Government of)*, 2014 [*Nacho Nyak Dun*] *Chartrand v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345. *Prophet River First Nation v British Columbia (Environment)*, 2015 BSCS 1682 *Prophet River First Nation v British Columbia (Environment)*, 2017 BCCA 58 *Prophet River First Nation v Canada (Attorney General)*, 2015 FC 1030 *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 58
Implicit Constitutional Protection: Fundamental Rights Protection	**Freedom of Religion** *Charter of Rights and Freedoms* (1982): s 2(a) (Subject to limitation clause s. 1 & 'notwithstanding' clause s 32(1)) (Broad interpretation) *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295

	Edwards Books and Art v The Queen, [1986] 2 SCR 713 *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 *Ktunaxa Nation Council v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568 *Ktunaxa Nation Council v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2015 BCCA 352 *Ktunaxa Nation Council v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, DCC File No 3664 (1 December 2016)
Implicit Constitutional Protection Minority Rights Protection	**Equality Rights** *Charter of Rights and Freedoms* (1982) s 27
Statutory Provisions: Sui Generis Legislation	
Statutory Provisions: Indigenous Peoples (Non-Exhaustive)	*Indian Act* (1876)
Statutory Provisions: General Legislation (Non-Exhaustive)	**Heritage Legislation** *Historic Sites and Monuments Act* (1953) (Fed) *British Columbia Heritage Conservation Act* (1996) **Environmental Legislation** *Canadian Environmental Assessment Act* (2012) (Fed) *British Columbia Environmental Assessment Act* (2002)
Common Law Provisions: Aboriginal Title	**Aboriginal Title** *Canada Act* (1982) s 35 Comprehensive Claims Policy Specific Claims Policy *Specific Claims Resolution Act* RSC 2003 c 23 *Calder v British Columbia (Attorney General of)*, [1973] SCR 313 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 *Tsilhqot'in v British Columbia,* (2014) SCC 44
Common Law Provisions: Treaty Rights	**Treaty Rights** *Canada Act* (1982) s 35 Tripartite Treaty Process: British Columbia (1993)

	Mikisew First Nation v Canada (Minister of Heritage), [2005] SCR 388 *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, [2017] SCC 21 (26 Juky 2017)

4.5 The Canadian Legal Response to Developments that (Potentially) Impact on Indigenous Sacred Sites

4.5.1 Introduction

When contemplating mechanisms that may be relevant to the protection of Indigenous sacred sites under Canadian law, two main candidates emerge: a freedom of religion-based claim under section 2(a) of the *Canadian Charter*, and/or a claim based on an unjustified infringement on aboriginal and/or treaty rights under section 35(1) of the *Constitution Act, 1982*. We will consider both of these.

4.5.2 Freedom of Religion: Section 2(a), *Charter of Human Rights and Freedoms*

4.5.2.1 Background: Indigenous Spirituality in North America – The Sacred

Both as a reminder, and as an introduction to the legal position discussed hereafter, the following core points were made regarding Indigenous conceptions of the Sacred in North America in the context of 2.4.3 above ("Indigenous Conceptions of the Sacred"): (1) issues of cross-cultural translation arise when Indigenous sacred sites are commemorated under heritage legislation or equated to Western places of worship. (2) The risks inherent in condensing all tribal experience into a single North American Native tradition ("the one, true Indian Spirit", as Nabokov put it[1351]). (3) One should also be wary of not equating tribal religions with non-tribal universalistic faiths: there are important structural differences between them. (4) The important reinforcing and validating role of rituals for a tribal community – and the legacy of the "negative acculturation processes" that

[1351] See *supra* at note 776

took the form of Residential Schools, the banning of religious dances, etc. (5) Three main reasons were advanced for secrecy about sacred sites in the North American context: (a) the existence of ancestral and/or spiritual prohibitions to disclosure; (b) fears deriving from prior prosecution for beliefs; (c) modern-day fears around increased tourism and desecration of sacred sites.

4.5.2.2 Background: Freedom of Religion

Freedom of religion has been described as "belong[ing] to the most fundamental human rights."[1352] In its modern individual rights conception it traces its origins back to the philosophies of the Enlightenment and observers have noted its role in early American constitutionalism.[1353] At first blink the fundamental right to freedom of religion (however phrased)[1354] would appear to constitute a natural ally in the quest to protect Indigenous sacred sites. This could be deceptive[1355] and clearly depends closely on the context of the particular legal system in question.

[1352] Christian Walter, "Religion or Belief, Freedom of, International Protection" in *Max Planck Encyclopedia of Public International Law* by Rüdiger Wolfrum (Oxford: Oxford University Press, 2013) at A.1.

[1353] *Ibid.*

[1354] In Canada s 2(a) of the *Charter of Rights and Freedoms* refers to "freedom of conscience and religion"; s 13 of the *New Zealand Bill of Rights Act 1990* (NZ), 1990/109 stipulates "the right to freedom of thought, conscience, religion, and belief, including the right to adopt and hold opinions without interference"; the United States *First Amendment* commences with the words, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; and s 116 of the *Commonwealth of Australia Constitution Act 1900* (Cth) states, "The Commonwealth shall not make any law for establishing any religion, nor for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

[1355] Cf Leclair: "*À supposer qu'un droit collectif de pratiquer une religion autochtone soit un jour reconnu, il n'est pas dit que ce droit conférera nécessairement une liberté de religion aux membres du groupe*": Leclair, "Le sacré", *supra* note 356 at 487.

The first major problem is that human rights in their traditional liberal conception[1356] are individual, not group rights.[1357] Thus, for instance, Justice Iacobucci defined religious freedom in the following terms in *Amselem*:

> In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.[1358]

In addition, Fonda argues that Indigenous peoples often had and still have an interrelated conception of land and spirituality[1359] and a communal vision of a "possessory interest" in land[1360] that differs deeply from "Lockean notions of property ownership".[1361]

Lefebvre suggests that the very fact of recognizing this right to freedom of religion in the form of an individual liberty impacts on the status of groups and that consequently such groups' religious conceptions carry a lesser weight.[1362] This would have the effect of raising the bar for an Indigenous

---

[1356] See, e.g. the purpose of freedom of religion as articulated by Dickson J (as he then was) in *Big M*: "The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own": *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 [*Big M*] at 346. Cf Jean-François Gaudreault-DesBiens, *Religion, expression et libertés: l'offense comme raison faible de la régulation juridique*, Social Science Research Network Working Paper Series SSRN-id1907274 (2011) [Gaudreault-DesBiens, *Religion, expression et libertés*] at 3: "*Pour l'essentiel, ce qui importe est que chacun, à partir des ressources que lui offre la doctrine compréhensive à laquelle il adhère, accepte les fondements d'une justice politique où liberté et égalité jouent un rôle central. On parle donc ici d'un consensus véritablement libéral, où, pour reprendre le cliché, la liberté de l'un s'arrête là où commence celle de l'autre.*"

[1357] Consider, e.g. See here Marc V Fonda, "Are They Like Us, Yet? Some Thoughts on Why Religious Freedom Remains Elusive for Aboriginals in North America" (2011) 2:4 The International Indigenous Policy Journal 1.

[1358] *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551 [*Amselem*], par 39.

[1359] *Ibid* at 1 and 8. Also see Ross, *First Nations*, *supra* note 34 at 3 and Waitangi Tribunal, *Te Roroa Report*, *supra* note 381 at 51–52.

[1360] *Ibid* at 8.

[1361] *Ibid* at 3.

[1362] Solange Lefebvre, "La liberté religeuse modelée par les effets paradoxaux de la modernité" in Jean-François Gaudreault-DesBiens, *Le droit, supra* note 356, 195 at 197.

community that is seeking to safeguard its sacred sites against a natural resource development project.

A second issue raised by Lefebvre takes as its focal point the highly particular value-tradition that formed the context for the development of the fundamental right to freedom of religion in North America, namely a puritanical Protestant ethos that valued individual autonomy and freedom of choice.[1363] Additional problems arise, at least in the Canadian context, in the way that this right is given substance to by the Courts: in several significant judgments the Supreme Court of Canada has adopted a relativist, subjective approach, in that the individual's subjective beliefs are at play, not the objective requirements of the religion in question.[1364] Somewhat ironically, as pointed out by Lefebvre, this has not in practice been used to embrace more fluid conceptions of religion, but rather to address conventional –even orthodox– forms thereof. Thus, she argues, "*une liberté individuelle fondamentale soutient une attitude de forte conformité*".[1365]

In this context Fonda observes that one consequence of the difference in value-traditions is that "cases regarding religious freedom as related to lands have been, for Europeans, about secular issues such as access to resources, issues of power and control, population control, and social experiments".[1366] These are not necessarily reflective of Indigenous conceptions of sacredness[1367] and faith – on the somewhat dubious supposition that there exists a coherent and relatively uniform understanding of such conceptions.[1368] Thus Frideres observes –

[1363] Lefebvre, *supra* note 1362 at 197–199.

[1364] Lefebvre, *supra* note 1362 at 203–208. See e.g. *Amselem*, *supra* note 1358 at paras 42–44.

[1365] *Ibid* at 209. Also see Fonda, *supra* note 1357 at 5–6.

[1366] Fonda, *supra* note 1357 at 8.

[1367] See e.g. Ross, *First Nations*, *supra* note 34 at 7–11 and Battiste & Henderson, *supra* note 85 at Part II c 6 ("Religious Paradoxes"). Cf James D K Morris & Jacinta Ruru, "Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?" (2010) 14:2 Aust Indig Law Rev 49 at 58: "Thus, from a Maori perspective, humans and nature are part of a unified whole. There is no dichotomy that seeks to separate humans from the natural world." For a thought-provoking contemplation of the continued appropriateness of employing the concept of 'the sacred', see Mary L Keller, "Indigenous Studies and 'the Sacred'" (2014) 38:1 Am Indian Q 82.

[1368] See here the penetrating analysis of Leclair, "Le sacré", *supra* note 356 at 481–490.

> Each Aboriginal community has a very specific creation story, institutional relations, cultural epistemologies and community relations. Each is unique in its combination of cultural belief, political relations, and land and community relations.[1369]

The key to addressing this divergence, I would argue, is to be found in Gaudreault-DesBiens' observation that religion-based claims often mask claims that primarily relate to identity.[1370] There are structural difficulties inherent in the enforcement of individual, autonomous rights in a domain that calls for collective decision-making in the interests of the community.[1371] At best it obfuscates enforcement; at worst it could lead to a collective action problem,[1372] a situation where one or a few individuals exercise their rights against the wishes and to the detriment of an entire community, or a complete *impasse*.[1373]

There is an additional sense in which Indigenous spirituality fits uneasily into the corset of Western religion: Leclair distinguishes religion from the sacred, observing that religion necessarily has a relational dimension:

> *La religion se distingue du religieux, du sacré, en ce qu'elle ne peut se limiter à une expérience personnelle. Elle est fondamentalement relationnelle; le mot latin* religare *signifie d'ailleurs 'relier, être en relation avec*.[1374]

[1369] James Frideres, "Aboriginal Identity in the Canadian Context" (2008) 28:2 Can J Native Stud 313 at 324.

[1370] Gaudreault-DesBiens, *"*L'Université", *supra* note 198 at 11. Note here Leclair's concerns pertaining to the constitutionalizing of conceptions of Indigenous identity: Leclair, "Le sacré", *supra* note 356 at 483–487, a matter to which we will return. Also consider Lefebvre's reflection on the complex question of where the boundary is situated between culture and religion: Lefebvre, *supra* note 1362 at 211.

[1371] I accordingly do not address freedom from discrimination on religious grounds of the Canadian *Charter of Rights and Freedoms* here.

[1372] It is not my intention to embark on an economic analysis of law in this thesis. Nonetheless, Law and Economics offers some useful concepts to explain human interaction – 'free riding' and 'hold out behaviour' in this instance. 'Free riding' simply implies relying on the efforts of others, while 'hold out behaviour' amounts to the withholding of consent by a party hoping to gain a greater benefit: see Mackaay, *supra* note 9 at 96–100.

[1373] E.g., there are very real issues that arise around the concept of 'consent': What constitutes sufficient consent? Who is authorized to consent on behalf of the community? What happens if a segment of a community consents to a given project while another segment declares its opposition – typically the so-called 'modernists v traditionalists' debate?

[1374] Leclair, "Le sacré", *supra* note 356 at 479.

While I am not disputing that Western religions also have an individual worshipper-deity relationship component, there is a big emphasis on the worship-in-community-with-others element – hence the importance of physical churches, synagogues, temples and mosques. Indigenous spirituality is certainly celebrated communally –think, for instance, of the importance of creation stories,[1375] ceremonial practices,[1376] rituals,[1377] etc– but the importance of individual experience – vision questing,[1378] meditation,[1379] dreaming,[1380] trance-dancing[1381]– should not be underestimated. The important point here is that while the latter may require a sacred space or may render a space sacred, they do not demand the presence of physical structures in that space. In fact, physical structures or unauthorized human access may act to desecrate the space, thus hindering their spiritual practice.[1382] This point concretizes in two ways in Western courts: (1) in the absence of structures to protect, courts are less likely to consider a sacred site as constituting a 'serious' religious space worthy of its intervention;[1383] and (2) faced with religious freedom-based claims from Indigenous groups, the courts are less likely to translate these into valid demands for maintaining sometimes extensive third-party spaces in a pristine state for the purposes of religious practice that cannot even be perceived as such. The United States *locus classicus*, *Lyng*,[1384] offers an excellent

---

[1375] See e.g. Borrows, *Indigenous Constitution*, *supra* note 147 at 26.

[1376] See above at 2.3.2 ("Indigenous Culture and Religion").

[1377] See above at 2.4.3.3 ("The Role of Ritual").

[1378] See e.g. the facts of *Lyng*, *supra* note 787.

[1379] See e.g. the facts of *Lyng*, *supra* note 787.

[1380] E.g. to the Winnemem Wintu: see below at 5.4 ("Evaluation: Desktop Study 1 – The Winnemem Wintu and the Raising of Shasta Dam, Northern California").

[1381] E.g. to the Winnemem Wintu: see below at 5.4 ("Evaluation: Desktop Study 1 – The Winnemem Wintu and the Raising of Shasta Dam, Northern California").

[1382] *Cf Ktunaxa Nation Council v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, SCC File No 36664 (1 December 2016) (Factum of the Interveners, West Moberly First Nations and Prophet River First Nation) at para 21: "In First Nations' culture, certain sacred places are specific locations which are known but are to be avoided and are not to be visited. The spiritual practices occur away from those locations. Congregating at those sacred locations would be contrary to their spiritual practice."

[1383] See *supra* note 21 on the Tlowitsis-Mumtagila.

[1384] *Lyng*, *supra* note 787.

example of the latter scenario, while the fact that there has to date not yet been a single successful sacred site protection case in either the United States or Canada speaks volumes about the former. In addition, Indigenous sacred sites may also be subject to a secrecy requirement that does not have a counterpart in respect of Western places of worship.[1385]

A further point of difference lies in the protection that the 'regular' law affords to sacred places in the Judeo-Christian tradition versus the way in which those belonging to Indigenous religions are ignored:[1386] thus the Criminal Code protects against hate-inspired interference with religious structures such as churches, synagogues, mosques, graveyards and cemeteries belonging to the Judeo-Christian tradition[1387] but not those of Indigenous religions.[1388] Thus Indigenous religions are no longer explicitly prosecuted,[1389] but often find themselves formally ignored.[1390]

As a final point, fundamental rights such as the right to freedom of religion are necessarily limited in scope as they are balanced against other fundamental rights[1391] (for instance equality rights such as those based on gender and sexual orientation)[1392] and against conflicting claims such as societal interest.

[1385] *Cf* Factum of the Interveners, West Moberly First Nations and Prophet River First Nation, *supra* note 1382 at para 22: "Oftentimes, there are complex Indigenous laws relating to spiritual sites and their locations. Members are prohibited from identifying the exact locations of these spiritual sites to preserve sacred sites from being despoiled by third parties or development."

[1386] *Ktunaxa Nation Council v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, SCC File No 36664 (1 December 2016) (Factum of the Intervener, Te'mexw Treaty Association) at para 10.

[1387] *Criminal Code* RSC 1985, c C-45 s 430(4.1).

[1388] See Factum of the Intervener, Te'mexw Treaty Association at para 10.

[1389] See King, *Inconvenient Indian*, *supra* note 392 at 66–67 for an exhaustive list of criminalization provisions.

[1390] Factum of the Intervener, Te'mexw Treaty Association at para 10.

[1391] See Gaudreault-DesBiens, *Religion, expression et libertés*, as cited *supra* note 1356.

[1392] A concept elegantly encapsulated by Shachar as "accommodating differences and respecting rights": Ayelet Shachar, *Multicultural Jurisdictions: Cultural Difference and Women's Rights* (Cambridge: Cambridge University Press, 2001) at 4.

It is clear, therefore, that freedom of religion is unlikely to constitute a sufficient mechanism on its own for the protection of Indigenous sacred sites. However, it may offer an important tool in this quest.

4.5.2.3 Freedom of Religion as Potential Avenue of Sacred Site Protection

In the Canadian context, an additional problem is to be found in the rather restrictive interpretation that the Courts have to date given to freedom of religion under section 2(a). In essence, it amounts to a negative obligation –as opposed to a positive duty– on the State that translates into the accommodation of religious difference rather than the protection of religion as such.

Section 2 of the *Constitution Act, 1982* forms part of the *Canadian Charter of Rights and Freedoms* and deals with "Fundamental freedoms". It reads as follows:

> Fundamental freedoms
>
> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

According to Brun, Tremblay & Brouillet, freedom of religion encompasses three distinct rights:[1393] (1) the right to freedom of religious expression;[1394] (2) the separation between Church and State;[1395]

[1393] Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed, (Cowansville, Canada: Yvon Blais, 2008) at 1072, 1076.

[1394] See Brun, Tremblay & Brouillet, *supra* note 1393 at 1076–1077.

[1395] See Brun, Tremblay & Brouillet, *supra* note 1393 at 1077–1080.

and (3) the right to conscientious objection on religious grounds.[1396] In the present context, it is the third sense that is of importance. They define it in the following terms:

> *L'objection de conscience est la possibilité de se soustraire à une norme d'apparence neutre pour des raisons de religion (entendue au sens large (…)). Le droit constitutionnel canadien reconnaît en effet qu'une règle neutre puisse effectivement ne pas s'appliquer à une ou quelques personnes parce qu'elle engendre des effets négatifs sur la religion ou la conscience de ces personnes* [.][1397]

Already on the above definition it is clear that freedom of religion under section 2(a) could at best offer a somewhat strained protection mechanism, in the sense that it could never imply that there is a positive duty on the State to protect Indigenous sacred sites – at best, there could be a negative duty on the State to abstain from actions that would have negative impacts on Indigenous sacred sites, on the basis that the community in question has a valid religion-based conscientious objection against such impacts *and* the impact is not mandated by the limitation provision in section 1 of the *Constitution Act, 1982*. Section 1 reads as follows:

> Rights and freedoms in Canada
>
> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Amselem introduced a three-step test to determine whether a section 2(a) freedom of religion right has been infringed: (1) the claimant must "demonstrate that he or she sincerely believes in a practice

---

[1396] See Brun, Tremblay & Brouillet, *supra* note 1393 at 1080–1085.

[1397] Brun, Tremblay & Brouillet, *supra* note 1393 at 1080, with reference to *Big M*, *supra* note 1356 at 337; *Edwards Books and Art v The Queen*, [1986] 2 SCR 713, [*Edwards Books*] at 752, 780.

or belief that has a nexus with religion";[1398] (2) the religious belief must have been infringed on by the State[1399] (3) in a non-trivial manner.[1400]

Of cardinal importance is the notion of balancing that finds itself at the very heart of conscientious objection and the concept of religious accommodation that flows from it.[1401] This entails balancing on multiple levels: between individual and collective rights, and also between respect for differences and respect for society's fundamental values.[1402] The core criterion to be considered here is one of reasonableness.[1403]

Brun, Tremblay & Brouillet argue that a broad interpretation should be extended to the right to freedom of religion, both in terms of its contents and the acts that it covers.[1404] It is in the section 1 limitation phase, so they argue, that the necessary reconciliation is made between freedom of religion and other conflicting individual and societal rights.[1405]

Section 2(a) does not presuppose belief in the existence of a (Western) deity: the Canadian Supreme Court has held that the right to believe also encompasses the right not to believe.[1406] That being said, I am not convinced that this somewhat Manichaean vision offers the correct vehicle for pleading to judges with a Western legal training the nuanced contents of what approaches our understanding of a property interest –the interrelation between Indigenous spirituality and land–[1407]

[1398] *Amselem*, *supra* note 1358 at para 65.

[1399] *Amselem*, *supra* note 1358 at para 65. Here, the Court's reference to "third party" clearly refers to the *Quebec Charter*, which applies in both public and private context: see *ibid* at para 38.

[1400] *Amselem*, *supra* note 1358 at paras 58–59, 74. What this means is a contextual question: *ibid* at para 59.

[1401] Brun, Tremblay & Brouillet, *supra* note 1393 at 1080. Also see *Amselem*, *supra* note 1358 at paras 61–63.

[1402] Brun, Tremblay & Brouillet, *supra* note 1393 at 1080.

[1403] Brun, Tremblay & Brouillet, *supra* note 1393 at 1080.

[1404] Brun, Tremblay & Brouillet, *supra* note 1393 at 1076.

[1405] Brun, Tremblay & Brouillet, *supra* note 1393 at 1076.

[1406] Brun, Tremblay & Brouillet, *supra* note 1393 at 1073, with reference to *Big M*, *supra* note 1356 at 347; *Edwards Books*, *supra* note 1397 at 759; *Zylberberg v Director of Education of Sudbury Board of Education*, (1989) 52 DLR (4th) 577 (CA Ont).

[1407] See above at 2.4.2.2 ("The Link Between Land and Religion").

or an (environmental) caretaker obligation – to boot, a belief system whose exact details often cannot be spelled out to the courts because of secrecy requirements[1408] or cultural disintegration.[1409]

Although the right protected under section 2(a) could in principle be of a purely individual nature according to Brun, Tremblay & Brouillet,[1410] they concede that it would be more difficult to prove its existence than that of an organized religion or an established belief system[1411] – notably a well-known religion or belief system.[1412] Here, again, I need to raise a question. While our courts appear to accept readily enough the sincerity of Indigenous spirituality, do they truly afford to that spirituality the same weight as they would have granted to a religious belief that forms part of one of the better known religious systems? For instance, knowing that there are sacred First Nations burial sites that will be flooded by Site C dam if constructed, and admitting that this will have "devastating consequences" for the community concerned, the Court considers that there has been adequate consultation and that the project may move ahead.[1413] Would a similar outcome be envisageable in respect of *le Cimetière Côte-des-neiges*?

[1408] See above at 2.4.3.4 ("Secrecy About the Sacred").

[1409] This goes to the heart of the question whether a site is recognized as being sacred on a subjective or an objective basis. If a sacred site is recognized as being objectively sacred, its sacredness can logically not depend on the extent or cohesiveness of the community's belief in it.

[1410] Brun, Tremblay & Brouillet, *supra* note 1393 at 1074, with reference to *Amselem*, *supra* note 1358 at paras 42–46; *Re Funk and Manitoba Labour Board*, (1976) 66 DLR (3d) 35 (CA Man); *Barker v Teamsters Union*, [1986] DLQ 447 (CCRT); *Edwards Books*, *supra* note 1397 at 759.

[1411] Brun, Tremblay & Brouillet, *supra* note 1393 at 1074, with reference to *Dorval (Ville de) v Provost*, (1996) 29 MPLR (2d) 131 (CA Que).

[1412] Brun, Tremblay & Brouillet, *supra* note 1393 at 1074.

[1413] See the discussion below at 4.5.3.4 ("Illustration: Desktop Study 2 –Prophet First Nation, West Moberley First Nations and Site C Dam, British Columbia").

4.5.2.4 Illustration: Desktop Study 1 – Ktunaxa Nation and Jumbo Glacier Ski Resort, British Columbia

> "We should be able to say 'No' and our 'No' should be heard.
>
> — Joe Pierre, Ktunaxa Citizen[1414]

4.5.2.4.1 Introducing the Desktop Study

The problem set selected is a particularly complex one, with the potential for both inter and intra-community conflict. The development in question forms part of a major tourism drive on the part of the British Columbia government, one that is intended to also create jobs and bring revenue to isolated areas.[1415] It is set against the background of British Columbia's (lack of) treaty history and the ongoing lands claims process.[1416]

The Jumbo Glacier Resort Project has occasioned both intra and inter-community conflict.[1417] Intra-community conflict is evidenced by the fact that some Ktunaxa communities are in favour of

---

[1414] Interview with Pierre, broadcast as part of the documentary, *Jumbo Wild*, produced by Nick Waggoner (Patagonia: 2015).

[1415] The Project proposal was initially submitted to the BC Minister of Forests, Lands and Natural Resources in 1991 under the then Commercial Alpine Ski Policy (CASP): *Ktunaxa Nation* BCSC, *supra* note 155 at para 1.

[1416] Although claims have been made in the popular press that the area is subject to a land claim lodged by the Ktunaxa Nation, their counsel responded in reply to a direct question from the Bench during the Supreme Court hearing that his clients are not actively pursuing any such claim: Peter Grant, Counsel for the Ktunaxa Nation, Webcast of the Hearing on 2016-12-01, "Ktunaxa Nation Council v British Columbia (minister of Forests, Lands and Natural Resource Operations) No 36664" (13 January 2017), *Supreme Court of Canada*, online: < http://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=36664&urlen=http%3a%2f%2fcivic.neulion.com%2fsccen%2fliveembed.php%3fclipid%3d3495283%2c000&urlfr=http%3a%2f%2fcivic.neulion.com%2fsccfr%2fliveembed.php%3fclipid%3d3495291%2c000&date=2016-12-01 > [Webcast, *Ktunaxa Nation*, Supreme Court].

[1417] A related problem that goes beyond the scope of the present thesis is the issue of overlapping claims. Such claims are not limited to competing Indigenous claims to (the use of) a particular territory, but also encompass overlapping claims founded on the sacred nature of specific natural sites. Dwight Newman, in the context of the Jumbo Glacier issue, refers to the example of backcountry skiers who hold the mountain in reverence, and cautions that their claims should not be dismissed too glibly: Dwight Newman, "Implications of the *Ktunaxa Nation* / Jumbo Valley Case for Religious Freedom Jurisprudence" in Newman, *Religious Freedom*, *supra* note 358, 309 [Newman, "Implications of *Ktunaxa Nation*"] at 312. He suggests that while both kinds of claims are legitimate, distinctions should be made "between the claims of groups whose members' individual integrity or whose group identity depends upon a site versus the claims of other groups that merely derive some benefits from a site (at 313, with reference to his book, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart Publishing, 2011).

the development while others vehemently oppose it.[1418] On an inter-community level, the development has created unlikely alliances among the opposition: environmental activists,[1419] gun lobbyists and Indigenous community members and local politicians all being opposed to the same project.[1420] In fact, of Invermere's population of 3,000 people, 79% came out against the development in a referendum.[1421]

On the other hand, the Government of British Columbia is strongly in favour of it: the development in question forms part of a major tourism drive on the part of the government, one that is intended to also create jobs and bring revenue to isolated areas.[1422] The Developer, architect Oberto Oberti calls the project "a dream that became a nightmare and then became a dream again."[1423]

There are 19 other ski resorts within a five-hour drive-radius.[1424]

The ensuing litigation has garnered international attention because it not only speaks to the fears of religious organizations that an overly restrictive interpretation of religious freedom may rebound

---

[1418] This, indeed, is one of the complicating angles of the *Ktunaxa Nation* case. Four Ktunaxa communities are united under the umbrella term "Ktunaxa Nation" and they jointly oppose the development; a different Ktunaxa community, the Shuswap Indian Band also claims that proposed development falls within their traditional territory, and they are volubly pro-development in the interests of economic self-sufficiency: see *Ktunaxa Nation* BCSC, *supra* note 155 at para 7. Also see Newman, "Implications of *Ktunaxa Nation*", *supra* note 1417 at 313–314 on the complexity of the bonds that link the various Ktunaxa communities, not all of whom share the same ethnic roots.

[1419] Sebastian observes that the Resort is to be constructed "on a receding glacier, in critical grizzly bear habitat.": Troy Sebastian, "Qat'muk" (22 November 2016), *patagonia*: <http://www.patagonia.com/blog/2016/11/qatmuk/>. Mr. Sebastian is a member of the Ktunaxa Nation Council and wrote this blog as an official Ktunaxa Nation message on the occasion of the 6th anniversary of the *Qat'muk Declaration* (*ibid*). Also see the interview with Grizzly Bear Biologist, Dr. Michael Proctor, in *Jumbo Wild*, *supra* note 1414 on reasons why this area constitutes critical grizzly bear habitat in the context of North America as a whole.

[1420] *Jumbo Wild*, *supra* note 1414.

[1421] *Jumbo Wild*, *supra* note 1414.

[1422] *Jumbo Wild*, *supra* note 1414.

[1423] Interview with Oberti, broadcast as part of *Jumbo Wild*, *supra* note 1414.

[1424] *Jumbo Wild*, *supra* note 1414.

on religious associations across the spectrum, but it also invites in the spectre of floodgate claims insofar as Indigenous sacred sites are concerned, notably in the United States and in Australia.[1425]

4.5.2.4.2 Contemplating the Fact Set

The proposed Jumbo Glacier Resort entails a network of 23 ski lifts and gondolas crisscrossing four glaciers in the Jumbo Valley, 55 km from Invermere in the heart of the Central Purcell Mountains, adjacent to the Purcell Wilderness Conservancy.[1426] While it would count as an average ski resort village with its planned contingent of 6,000 beds in the Valley,[1427] 369 hotel rooms, 240 town houses, 970 condominium units, 143 chalets, restaurants and retail stores, the ski infrastructure would operate on a grander scale.[1428] They would rise 11,000 feet from the ski village to a restaurant with 360° views of the Purcell Mountains.[1429]

This project development has been in the works for the past 26 years, since Oberti first lodged a formal proposal for the Jumbo Glacier Ski Resort with the BC Government.[1430] It has not been smooth sailing for him: among the obstacles he has encountered is an environmental assessment process that took more than 10 years to complete, and that imposed 195 conditions when it finally granted him a permit; the permit only being awarded to him in 2004, and *that* in the face of a 90% opposition to the project.[1431] In 2004, a thousand-strong protest march took place against the development.[1432] In 2008, protesters impeded construction workers from building the resort's first

---

[1425] See e.g. Andrés Allemand, "L'Esprit du Grizzli en appelle à la Cour supreme du Canada", (2 December 2016), *Tribune de Genèeve*, online: < http://www.tdg.ch/monde/esprit-grizzli-appelle-cour-supreme-canada/story/14647131>.

[1426] *Jumbo Wild*, *supra* note 1414.

[1427] See *Ktunaxa Nation* BCCA, *supra* note 357

[1428] *Jumbo Wild*, *supra* note 1414.

[1429] *Jumbo Wild*, *supra* note 1414.

[1430] *Jumbo Wild*, *supra* note 1414.

[1431] *Jumbo Wild*, *supra* note 1414.

[1432] *Jumbo Wild*, *supra* note 1414.

lift.[1433] In 2010, the Ktunaxa Nation issued the *Qat'muk Declaration*,[1434] pursuant to which they are fundamentally opposed to the project and any possibility of compromise is excluded.[1435] And, in 2012, a French group of potential investors were greeted both by protesters and large protest signs painted on the snow that were visible from the helicopter during the fly-over.[1436]

Project opponents argue that it threatens critical bear habitat and ignores the sacred value of the area to the Ktunaxa Nation, to whose creation story it is core. The Ktunaxa Nation poses severe opposition since they regard the area as sacred, being the home of the Grizzly Bear Spirit.[1437] They believe that a sacred covenant exists between them and the Grizzly Bear Spirit, in terms of which the Grizzly Bear Spirit will relay their "askings" to the Creator, and they, in turn, undertake to protect grizzly bears and their habitat.[1438] Grizzly bear are therefore of core importance to Ktunaxa spiritual beliefs and practices.[1439]

[1433] *Jumbo Wild*, *supra* note 1414.

[1434] Ktunaxa Nation, *Qat'muk Declaration* (15 November 2010). It "outlines the spiritual significance of Qat'muk and is an expression of Ktunaxa sovereignty and stewardship": Sebastian, *supra* note 1419.

[1435] The *Qat'muk Declaration inter alia* asserts the Ktunaxa Nation's sovereignty, emphasizes that they have never consented to this or any other development within Qat'muk, and "[a]sserts that [they] will not agree to any further development or sale of land associated with Qat'muk that would result in irreparable and irreversible harm to [that] sacred place and [their] spiritual connection with it:" Ktunaxa Nation, *supra* note 1434. Abella J commented during the Supreme Court Hearing on 1 December 2016 that this amounted to a veto of the project and was not conducive to negotiation: Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1436] *Jumbo Wild*, *supra* note 1414.

[1437] See Ktunaxa Nation, *supra* note 1434; Sarah Morales, "Qat'muk: *Ktunaxa* and the Religious Freedom of Indigenous Canadians" in Newman, *Religious Freedom*, *supra* note 358, 287; Sebastian, *supra* note 1419.

[1438] Interview with Pierre, *Jumbo Wild*, *supra* note 1414. This argument was specifically put to the Supreme Court on appeal by the Counsel for Ktunaxa Nation Council, Peter Grant: see Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1439] Sebastian, *supra* note 1419.

They have already lost their challenges at High Court[1440] and Appeal Court level;[1441] the matter was heard by the Supreme Court on December 1, 2016[1442] and the parties are presently awaiting the Court's ruling. It is the first sacred site case to reach Canada's highest court and it raises complicated Charter-based freedom of religion issues in conjunction with an asserted aboriginal right to spiritual practice under section 35 of the *Constitution*.[1443] It will likely turn on silence due to secrecy.[1444]

4.5.2.4.3 The Litigation

> I don't think this Court has ever held that section 2 protects a sacred site as opposed to a sincere religious belief and the practice thereof. So then in some ways this is an issue, a first instance (…) The trial judge has held that overnight accommodation in terms of Ktunaxa belief would desecrate the sacred site and the grizzly bear spirit would leave. There thus could never be any proportionate balancing.
>
> (…) Other interests are out of the picture if we extend section 2(a) to protect a sacred site. Wherever I go in this case I keep coming back to the 'no middle ground' and how that fits in with the Charter or even section 35, because all of those are built and premised -the section 2(a) right is premised on the possibility of balancing with other rights – if you look at the larger structure of the *Charter*, section 1 starts right off, saying, 'We're gonna give you all these rights, but don't get too excited – the Government can override them' …[1445]

[1440] *Ktunaxa Nation* BCSC, *supra* note 155; Ktunaxa Nation, *Ktunaxa Nation Appealing B.C. Supreme Court Decision on Qat'muk*, *supra* note 157.

[1441] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 352, Goepel J.

[1442] See "Docket: 36664", *Supreme Court of Canada*, online: <www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=36664> and Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1443] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK) 1982, c 11. See "Summary: 36664", *Supreme Court of Canada*, online: <www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas+36664>.

[1444] See in this regard *Tlowitsis Nation*, *supra* note 21.

[1445] MacLachlan CJ, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

The Ktunaxa Nation claim to have lived in the area for the past 10,000 years,[1446] or "400 generations".[1447] Neither the trial court nor the appellate division found reason to cast doubt on this claim, nor on the sincerity of their beliefs. What counted against them can be summarized in the following main points: (1) it appears that their objections were not equally strong during the entire project planning period, as they negotiated with the Developer between 2007–2009;[1448] (2) it was only when the negotiations broke down that they raised the objection that the development is completely unacceptable due to the sacredness of the site and the incompatibility that it would have with their spiritual beliefs;[1449] (3) their objection appears to be based on one man's vision rather than the whole community's spirituality;[1450] (4) there already are other activities in the Valley in question.[1451]

While the Ktunaxa are known to be very secretive about their religion,[1452] the following aspects have been widely reported. I therefore believe that including them here will not do any harm. Their objection to the development is primarily directed at the ski village, and it is this that distinguishes it from other activities in the Valley such as back-country skiing and heli-gliding.[1453] The reason is that they believe that Qat'muk, the dwelling place of the Grizzly Bear Spirit,[1454] is located at the heart of the Jumbo Valley,[1455] exactly where the development would be constructed.[1456] That means

---

[1446] *Jumbo Wild*, *supra* note 1414; Ktunaxa Nation, *Backgrounder: Ktunaxa Nation at the Supreme Court of Canada* (undated) at para 1.

[1447] Interview with Pierre, *Jumbo Wild*, *supra* note 1414.

[1448] See intervention by Moldaver J, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1449] Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416, per Moldaver J.

[1450] Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416, per Moldaver J.

[1451] Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416, per Abella J.

[1452] *Jumbo Wild*, *supra* note 1414; Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1453] Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416. The Ktunaxa Nation's Counsel also explained that although it is an old logging and forestry site on which permanent buildings have previously been constructed, these have never been used for overnight accommodation, which is the difficulty with the proposed development.

[1454] See Ktunaxa Nation, *supra* note 1434. Qat'muk is the place "where they go to dance": Sebastian, *supra* note 1419.

[1455] See Ktunaxa Nation, *supra* note 1434: "Qat'muk includes the entirety of the Toby-Jumbo watershed and the uppermost parts of the South Fork Glacier Creek, Horsethief Creek and Farnham Creek watersheds."

[1456] Peter Grant for Ktunaxa Nation Council, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

that there will be people who overnight there –a fact that distinguishes this operation from the other well-tolerated activities,[1457] and that would cause the Grizzly Bear Spirit to leave.[1458] Should the Grizzly Bear Spirit leave, it would render all of their spiritual practices and ceremonies devoid of meaning.[1459]

More specifically, this will be a year-round skiing operation.[1460] In terms of Ktunaxa belief the grizzly bears specifically chose the Qat'muk area because they knew that human beings would be absent in the dead of winter.[1461] This is because —

> when the grizzly bears have gone to sleep in the physical realm, they are active in the spiritual realm and going to that Qat'muk area to gather all the grizzly bear spirits, (…) Qat'muk – Jumbo– is a sacred place for the Ktunaxa people because we believe that this is where the Grizzly Bear Spirit is born and where the Grizzly Bear Spirit goes to die. And in the meantime, it is where the Grizzly Bear Spirit goes to dance. When we're dancing the Grizzly Bear Spirit is dancing and we're able to communicate and they are hearing our prayers, our 'asks', our songs and our asks are answered. They dance at the same time that we dance.[1462]

Their case is bolstered by the support of both environmental activists and scientists concerned about the Grizzly Bear's fate consequent to the proposed disturbance of critical bear habitat,[1463] but

---

[1457] See Ktunaxa Nation, *Qat'muk Stewardship Principles* (15 November 2010): "We will continue to share the designated *refuge area* and *buffer area* with non-Ktunaxa when such use is respectful of Ktunaxa spiritual values and consistent with our *Qat'muk Stewardship Principles*. The refuge and buffer area will not be shared with those who engage in activities that harm or appropriate the spiritual nature of the area. These activities include, but are not limited to: The construction of buildings or structures with permanent foundations; Permanent occupation of residences. To further safeguard spiritual values, no disturbance or alteration of ground will be permitted within the refuge area."

[1458] *Jumbo Wild*, *supra* note 1414; *Ktunaxa Nation* BCCA, *supra* note 357 at para 10; Peter Grant for Ktunaxa Nation Council, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1459] *Jumbo Wild*, *supra* note 1414; *Ktunaxa Nation* BCCA, *supra* note 357 at para 9; Peter Grant for Ktunaxa Nation Council, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1460] *Jumbo Wild*, *supra* note 1414; Peter Grant for Ktunaxa Nation Council, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1461] Interview with Pierre, *Jumbo Wild*, *supra* note 1414.

[1462] Interview with Pierre, *Jumbo Wild*, *supra* note 1414. Also see Sebastian, *supra* note 1419.

[1463] See Interview with Dr Michael Proctor, Grizzly Bear Biologist, , *Jumbo Wild*, *supra* note 1414; Judith Lavoie, "Jumbo Ski Resort Threatens Grizzly Bears from Southern B.C. Into U.S.: Scientists", (31 October 2014), *Huffpost*, online: <http://www.huffingtonpost.ca/desmog-canada/jumbo-ski-resort-grizzly-bears_b_6079352.html>. Scientific gripes include the fact that in awarding the environmental assessment certificate, the BC Government ignored the latest research that had been reported by Dr Proctor, "one of Canada's leading grizzly bear experts", and that the development

they face some serious hurdles in the usual socio-economic arguments advanced in favour of natural resource development projects: regional economic growth potential, job creation,[1464] infrastructure development, etc. It is a matter of both national and international importance: nationally, not less than 14 organizations filed *amicus curiae* briefs;[1465] internationally sacred sites have been in the news due to both the Dakota Access Pipeline/Standing Rock crisis[1466] and the progressive stance of the Government of New Zealand and the High Court of the Himalayan State of Uttrakhand, India, in respectively awarding legal personality to a national park[1467] and 'living legal personality' to a sacred river[1468] (New Zealand), and to two sacred rivers[1469] and the two glaciers that feed them[1470] (India).

"will diminish the viability of the regional population of grizzly bears" (Alton Harestad, former co-chair of the provincial Grizzly Bear Scientific Advisory Committee, as cited by Lavoie, *ibid.*).

[1464] For instance, the Shuswap First Nation reportedly supports the project because of its employment prospects: see "Contested Wilderness: Skiers v the Religious Rights of Canada's Indigenous Peoples" (26 November 2016) *The Economist*, online: < http://www.economist.com/news/americas/21710857-case-supreme-court-will-set-noteworthy-precedent-skiers-v-religious-rights >.

[1465] These spanned the spectrum: the State [Attorney Generals of Canada and for Saskatchewan], religious organizations [Canadian Muslim Lawyers Association; South Asian Legal Clinic of Ontario and Kootenay Presbytery (United Church of Canada); Evangelical Fellowship of Canada and Christian Legal Fellowship; Alberta Muslim Public Affairs Council]; human rights organizations [British Columbia Civil Liberties Association; Amnesty International Canada); First Nations and Indigenous rights organizations [Council of the Passamaquoddy Nation at Schoodic; Shibogama First Nations Council; Central Coast Indigenous Resource Alliance; Te'Mexw Treaty Association; Katzie First Nation; The West Moberly First Nations and Prophet River First Nation]; and Commerce [Canadian Chamber of Commerce].

[1466] See in this regard, Elizabeth Steyn, "'*Mni Wiconi* – Water is Life': The Significance of Standing Rock for the Ongoing Natural Resources/Indigenous Sacred Sites Debate", paper delivered at the Faculty of Law of Université de Montréal (27 March 2017) as part of a Workshop entitled, *Conversations About Indigenous Peoples and Their Rights to Land*; Elizabeth Steyn, "'Taking a Stand at Standing Rock': Native American Sacred Sites Versus Natural Resource Development Projects", paper delivered at McGill Faculty of Law (6 April 2017) as part of the *2017 Annual RDCG (*Regroupement Droit, Changements et Gouvernance*) Conference*.

[1467] In terms of the *Te Urewa Act, 2014* (NZ), 2014/51. The Te Urewa Park is a legal person (s 11), though not an expressly living one like the Whanganui River.

[1468] In terms of the *Te Awa Tutua (Whanganui River Claims Settlement) Act*, *2017* (NZ), 2017/7 (royal assent and commencement: 20 March 2017) the Whanganui River is a legal person (s 14) that is concurrently recognized as an "indivisible and living whole" entity (s 13) comprising both physical and metaphysical elements (s 12).

[1469] The Ganges and Yamuna Rivers, which are sacred to Hindus, in terms of *Salim v State of Uttarakhand*, Writ Petition (PIL) No 126 of 2014 (India, High Court of Uttarakhand at Nainital, 20 March 2017) Sharma J. This order has subsequently been stayed by the Supreme Court of India: see "Indian Supreme Court Rules Rivers Are Not People" (7 July 2017), *RTÉ*, online: <https://www.rte.ie/news/2017/0707/888557-india-rivers/>.

[1470] The Gangotri Glacier, which feeds the Ganges, and the Yamunotri Glacier, which feeds the Yamuna, in terms of *Miglani v State of Uttarakhand*, Writ Petition (PIL) No 140 of 2015 (India, High Court of Uttarakhand at Nainital, 30 March 2017) Sharma J.

On appeal before the Supreme Court, Ktunaxa Nation's counsel endeavoured to depict the matter as a racism/racial discrimination issue. Thus he argued in his opening statement that despite the fact that it was 2016, his clients were being denied the same rights as other Canadians for the simple reason that they are Aboriginal.[1471] Curiously, however, he did not seek to make out a case on the basis of the equality provisions of section 15 of the *Charter*.

The appeal was based on two grounds: breach of freedom of religion (section 2(a) of the 1982 Constitution) and breach of their Aboriginal right guaranteed by section 35, namely to exercise a religious practice/spiritual practice dependent on a sacred site.[1472] An interesting feature of the verbal argument portion of the proceedings was the emphasis placed by the Applicants' counsel on the importance of treating the two grounds distinctly, contrasted with the Bench's obvious reluctance to do so.[1473]

Thus the Ktunaxa Counsel argued that a different test and a different analysis applied in respect of the two sections, notably that section 2(a) required a proportional balancing of interests under *Amselem*[1474] and –contrary to the Hutterites' experience in that case– he suggested the Court would be in a position to make a finding that the Ktunaxa's spiritual interests weighed more heavily than socio-economic concerns such as have been put forward by the Minister.[1475] Insofar as the section 35 claim was concerned, he applied the test as formulated in *Van der Peet*[1476] and argued that in *Haida*[1477] the Supreme Court had spoken of the duty to consult as being graded on a continuum

---

[1471] Peter Grant for Ktunaxa Nation Council, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416. In the same vein he also told the Court that "The Applicants are being told their religious beliefs are less worthy than those of mainstream Canadians." Also see Morales, *supra* note 1437, 287: she argues specifically with reference to the treatment of the *Ktunaxa Nation* matter by the two lower Courts, that their narrow interpretation of s 2(a) of the Constitution effectively deprives Indigenous people of the Charter's protections (at 306–307).

[1472] Per CJ McLachlan, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1473] See Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1474] *Amselem*, *supra* note 1358.

[1475] See Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1476] *Van der Peet*, *supra* note 175.

[1477] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 [*Haida*].

according to the seriousness of the issues at stake, with full consultation being required for very serious cases.[1478]

The Ktunaxa Nation's counsel was furthermore at pains to emphasize that his clients were neither seeking to force their religious beliefs onto other Canadian citizens, nor did they wish to impose a veto on activities in the Qat'muk area, which constitutes only a small area of their traditional territory (though its most important portion).[1479] Instead, they were simply requesting the Court's aid to the extent that they needed it to continue with the exercise of their religious/spiritual beliefs.[1480] While nobody on the Bench overtly sought to take issue with the first leg of his argument, the veto-portion did attract attention.

From the questions directed at Ktunaxa Nation's counsel by the Bench, it would appear that reliance on a section 2(a) claim faces "a steep hill",[1481] notably insofar as the following points are concerned: (1) whether section 2(a) applies to a religious practice, as opposed to a religious belief;[1482] (2) the "all-or-nothing proposition" inherent in their claim, i.e. that it amounts to a veto right;[1483] (3) the fact that the sacred site objection was raised so late;[1484] (4) the fact that they had participated in

---

[1478] See Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416. He also pointed out that in *Haida* the Supreme Court referred to the New Zealand Consultation Guidelines, rather than those of British Columbia. This will be of importance in the context of Chapter 8 ("Creating Context-Sensitive Frameworks").

[1479] Peter Grant for Ktunaxa Nation Council, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1480] Peter Grant for Ktunaxa Nation Council, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1481] Peter Grant for Ktunaxa Nation Council, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1482] McLachlan CJ seemed doubtful, but did not request Ktunaxa Nation's Counsel to address the Court on this issue: see Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416. *Big M* appears to suggest that it might: "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, *and the right to manifest religious belief by worship and practice* or by teaching and dissemination.": *Big M*, *supra* note 1356 at 336–337, per Dickson J (as he then was) [emphasis added].

[1483] This was raised by McLachlan CJ and Abella J, both of whom questioned the pertinence of performing a proportionality analysis in the context of the s 2(a) claim when faced with an absolute position: see Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1484] Justice Moldaver observed that while the Counsel for Ktunaxa Nation drew a parallel in his factum between Qat'muk and the development at Kootenay Falls, in the latter case the Ktunaxa shared details of their religion within nine months of the project initiation date — as opposed to 9 years in this case, and asked, "What does the difference say about the strength of the claim?": Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

negotiations with the government between 2007–2009 with a view to identify accommodating measures, which flies in the face of the absolutist sacred site claim now being made.[1485]

The main difficulty with attempting to protect Indigenous sacred sites under the present Canadian legal framework was succinctly formulated by Justice Brown as follows during the course of the *Ktunaxa Nation* Supreme Court hearing:

> What I am trying to understand is how do we channel analytically a freedom of religion claim that is really tied to an aboriginal claim based in land use.[1486]

This, indeed, goes to the heart of the matter. Western logic and categorization patterns dictate that these are separate matters, with property rights usually trumping religious freedom rights. We need look no further than the US *Lyng*[1487] case, which serves as their unfortunate precedent on Indigenous sacred sites on federal lands. In that matter Justice Sandra Day O'Connor, for the Supreme Court, famously said —

> Whatever rights the Indians may have to the use of this area, however, those rights do not divest the government of its right to use what is, after all, *its* land.[1488]

[1485] This was raised on a number of occasions by different judges. Ktunaxa Nation's Counsel advanced 5 discrete reasons for their participation in the negotiation process: (1) in an endeavour to secure the protection of the grizzly bear population, in accordance with the covenant; (2) in an attempt to resolve the issue without recourse to the Courts, as the Ktunaxa Nation are known for their reluctance to litigate; (3) relatedly, the importance of upholding secrecy for the Ktunaxa Nation – this becomes difficult when the courts are involved; (4) in terms of their understanding of the law on consultation post *Haida*, they had no choice but to engage in the consultation process if they wanted to be accommodated; and (5) in sum, had their negotiations been able to effect the protection of the grizzly bear habitat, they would not have been forced to expose their spiritual practices the way it ultimately transpired: Peter Grant, Counsel for Ktunaxa Nation, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416. I respectfully submit that a more certain course of action might have been to simply argue on the basis of *Amselem* that their religious believes had evolved over time, and that "[b]ecause of the vacillating nature of religious belief, a court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom": *Amselem*, *supra* note 1358 at para 53; also see at para 71. Overt reliance on Amselem might have circumvented a second point of difficulty: the fact that the prohibition in respect of overnight accommodation that is core to the Ktunaxa Nation's objections can be traced back to the epiphany of a single Elder: see *Amselem*, *supra* note 1358 at para 46.

[1486] Per J Brown, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1487] *Lyng*, *supra* note 787.

[1488] *Lyng*, *supra* note 787 at 453.

On the other hand, as I argued in Part I above, for Indigenous peoples the world over land and spirituality are essentially intertwined,[1489] or at least far more interrelated than for Westerners. This is one of main reasons why I consider that the extant Canadian legal framework, like those of the United States and Australia, is not at present equipped to give a fully nuanced consideration to the protection of Indigenous sacred sites. Indeed, test cases such as these are not free from peril in a legal system that adheres to the doctrine of precedent,[1490] as the *Lyng*[1491] saga continues to demonstrate.[1492]

In casu, Ktunaxa Nation's counsel argued with coherent logic that the two claims needed to be treated distinctly due to *inter alia* the fact that the legal test for each differs: *Amselem*[1493] governs section 2(a) claims, while *Van der Peet*[1494] sets out the test for the establishment of aboriginal rights

---

[1489] I do not wish to be seen as making a reductive, essentialist statement here: the exact details of an Indigenous community's bond with their ancestral or territorial land will necessarily vary from one to another.

[1490] See here the excellent reflection by Newman, "Implications of *Ktunaxa Nation*", *supra* note 1417 at 310, on the significance of the *Ktunaxa Nation* litigation in Canadian freedom of religion jurisprudence.

[1491] *Lyng*, *supra* note 787 [The incidental effect of a government action on religious exercise alone is not enough to give rise to a Free Exercise claim, even if it is extreme.].

[1492] *Lyng* has been consistently followed by the Ninth District Court –notably in *Navajo Nation*, *supra* note 37 [The government's decision to allow artificial snow made from wastewater effluent on a sacred mountain did not impose a substantial burden under *RFRA* because it did not force the tribe to choose between exercising their religion and receiving a government benefit, and it did not coerce them to act contrary to their religion under threat of criminal or civil sanction] and *Snoqualmie Indian Tribe v Fed Energy Regulatory Comm'n*, 545, F 3d 1207, 1214–15 (9th Cir 2008) ["The Tribe's arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant to whether the hydroelectric project either forces them to choose between practicing their religion and receiving a government benefit or coerces them into [foregoing] exercise of their religion under fear of civil or criminal sanction"]–, and now also by the DC District Court in refusing the two preliminary motions for injunction brought by respectively the Standing Rock Sioux (*Standing Rock Sioux Tribe v US Army Corps of Engineers*, F Supp 3d (2016), 2016 WL 4734356 (DDC, 9 Sept 2016), Boasberg J [*Standing Rock I*] *Standing Rock Sioux Tribe v US Army Corps of Engineers*, F Supp 3d (2017) (DDC, 7 March 2017), 2017 WL 908538, Boasberg J [*Standing Rock II*]) and the Cheyenne River Sioux in an attempt to stop construction of the Dakota Access Pipeline, or at least the passing of oil through it. Although in the latter two cases they had a sympathetic audience in Judge Boasberg, he considered himself bound by *Lyng* and concluded: ""Just as the Ninth Circuit and other courts must follow *Lyng* until the Supreme Court instructs otherwise, this Court must do the same" (*Standing Rock II*, *ibid*, at para 13).

[1493] *Supra* note 1416.

[1494] *Van der Peet*, *supra* note 175.

under section 35.[1495] However, as Justice Abella pointed out, analytical precision might not bring relief for his clients:

> Here's the issue, though: [a section 2(a) claim] could well collide with their substantive rights under section 35. If what you are inviting us to do is to discreetly examine section 2(a) claims the way we examine claims for all Canadians, then that involves a balancing of their asserted religious right versus other interests. What if they lose on that based on our jurisprudence on freedom of religion? As the Hutterites did. What are you left with then under section 35 to consult over? You have extinguished the right under 2(a). So actually, you have asserted it, you have lost, then you move to 35 – *does that mean that the consultation process doesn't include concerns about spiritual claims*?[1496]

Ktunaxa Nation's counsel attempted to deflect this issue by referring to the differences that apply to sections 2(a) and 35, insofar as the test and analysis are concerned.[1497] Thus, he argued, the Supreme Court held in *Haida*[1498] that section 35 requires a graduation of the duty to consult consistent with the seriousness of the infringement and the harm – where these are significant, full consultation is required.[1499] In the matter at hand, the infringement clearly is of a very serious nature, as it would render the entirety of the Ktunaxa Nations spiritual practice meaningless if the Grizzly Bear Spirit left.[1500]

But Chief Justice McLachlin in turn emphasized the fact that the Ktunaxa Nation belief in terms of which the sacred site would be desecrated by overnight accommodation, causing the Grizzly Bear

---

[1495] Peter Grant for Ktunaxa Nation, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416. He lamented the fact that Aboriginal matters tend to automatically invoke the section 35 treatments in Canadian courts, pointing out that Indigenous Canadians "are entitled to the Charter provisions of every other Canadian." (*Ibid.*)

[1496] Per Abella J, Webcast, *Ktunaxa Nation*, Supreme Court [emphasis added].

[1497] Peter Grant for Ktunaxa Nation, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1498] *Haida*, *supra* note 1477.

[1499] Peter Grant for Ktunaxa Nation, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1500] See Peter Grant for Ktunaxa Nation, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

Spirit to leave, was a position that allowed for "'no middle ground"' and thus precluded the possibility of balancing with other rights, which informs the very structure of the Charter:[1501]

> You say you are not asking –but I think you are asking– that this Court treat it as a sacred site — which is an all-or-nothing proposition. You mentioned the Temple on the Mountain. Different religions have sacred sites and you say this is one. First of all, does section 2 actually go that far: does it protect a *practice* rather than a *right*? And if we want to buy your argument that it does protect a sacred site, how do we fit that into the *Charter* which is premised from the beginning to the end on the idea of compromise? Or section 35, which is also premised on that idea? This is the intellectual or structural difficulty that I am struggling with.[1502]

It appears to me that here the Chief Justice has touched on the core issue that the Ktunaxa Nation are likely to encounter in their pursuit of a remedy, whether under section 2(a) or section 35. It is axiomatic that there must be compromise in a system that does not rank human rights claims in an order of preference; concurrently, the Supreme Court has held very clearly that compromise is crucial to consultation under section 35:

> Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process.[1503]

4.5.2.4.4 Analysis

The Ktunaxa Nation's lawyer has at least twice made analogies to depict Qat'muk in terms of a concept that his audience would understand: Temple Mount[1504] and St Joseph's Oratory in

---

[1501] See Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416. She emphasized that the Charter rights are of necessity limited, noting, "Section 1 starts right off, saying, 'We're gonna give you all these rights, but don't get too excited, the government can override them" (*ibid*).

[1502] Per McLachlan CJ, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

[1503] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] SCC 74 at para 2.

[1504] During oral argument to the Bench: see Peter Grant for Ktunaxa Nation, Webcast, *Ktunaxa Nation*, Supreme Court, *supra* note 1416.

Montreal.[1505] While this certainly helped to establish the notion of Qat'muk as a sacred site in their minds, the question arises how much it has aided their understanding of it in anything other than the surface Western sense that the concept evokes. As I argue elsewhere,[1506] there are fundamental differences between Western and Indigenous notions of sacred sites. Here, three things bear pointing out:

First, the very notion of sacred sites is indicative of Western classification patterns: Indigenous conceptions of their 'sacred sites' may not be easily translatable to Westerners,[1507] in that the term 'sacred sites' is either too narrow[1508] or too generic.[1509] It makes no provision for a gradation in terms of varying degrees of sacredness.[1510] It is also completely inadequate to portray the notion of sacred geographies, as discussed in Part I hereof.

Second, to Westerners, sacred sites are mostly relationally sacred,[1511] whereas Indigenous peoples the world over appear to consider their sites to be for the most part intrinsically sacred[1512] (consider again Theodoratus and LaPena's notion of "places of power").[1513] This has various implications,

---

[1505] Pieta Woolley, "The Fight for Qat'muk" (April 2007), *UC Observer*, online: <http://www.ucobserver.org/faith/2017/04/fight_qatmuk/> records him drawing the analogy of Disneyworld being constructed on top of St Joseph's.

[1506] Elizabeth Steyn, "The Winnemem Wintu, Spiritual Warfare and Legal Formalism, or: The Bureaucrat's Guide to Native American Sacred Sites", Paper delivered at the 2017 Annual Meeting of the American Association of Geographers (AAG) (Boston, 8 April 2017) at 6–8.

[1507] Thus the *Qat'muk Declaration* states: "the Ktunaxa language does not translate well into other languages and consequently our spiritual relationship with Qat'muk may not be fully understood by others": See Ktunaxa Nation, *supra* note 1434. Also see Hubert, *supra* note 31 at 10; Mohs, *supra* note 13 at 192.

[1508] See Carmichael, Hubert & Reeves, *supra* note 14 at 6. Here, they specifically refer to Wintu geography, as documented by Theodoratus & LaPena, *supra* note 114 at 20. Also see Hubert, *supra* note 31 at 16.

[1509] See Mohs, *supra* note 13 at 192.

[1510] Hubert, *supra* note 31 at 10. Also see *ibid* at 16–17 on the Adnyamathanha people of the Flinders Ranges in South Australia who consider the whole of the land to be sacred but nonetheless have discrete "especially sacred places" that impose individual rules of conduct.

[1511] See Hubert, *supra* note 31 at 12.

[1512] See e.g. Theodoratus & LaPena, *supra* note 114 at 22; Radimilahy, *supra* note 113 at 82; Matunga, *supra* note 19 at 220.

[1513] *Supra* note 114.

most importantly here that to Westerners churches can be consecrated and deconsecrated,[1514] while Indigenous sacred sites offer no such relocation possibility because they are of necessity tied to the landscape.

Third, Westerners mainly associate the concept of sacred sites with structures erected on land,[1515] while Indigenous peoples mostly refer to the landscape itself.[1516] This has serious consequences, because Westerners appear to be more easily dismissive of sacred sites that take the form of an undisturbed landscape than they would be of, for instance, an old temple. I therefore argue that it is dangerous to use church analogies in the course of sacred sites litigation. The spectacular lack of success with which Indigenous sacred sites have thus far met, both in the United States and in Canada, would appear to bear me out.[1517]

[1514] See Hubert, *supra* note 31 at 13.

[1515] See e.g. Hubert, *supra* note 31 at 12. Cooney, *supra* note 131 at 35 suggests that the construction of monuments could signify that a site is sacred.

[1516] Ludvig, *supra* note 150 at 727; Theodoratus & LaPena, *supra* note 114. But see also Radimilahy, *supra* note 113 at 83 on ancestral tombs and altars in Madagascar.

[1517] See e.g. *supra* note 21 on the litigation strategy of the Tlowitsis-Mumtagila in *Tlowitsis Nation*.

4.5.3 Aboriginal and Treaty Rights: Section 35, *Constitution Act, 1982*

> Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification.[1518]

4.5.3.1 Background: Indigenous Spirituality in North America – Time and Space

There are 5 points of importance to be borne in mind with relation to Indigenous North American spirituality and notions of time: (1) Indigenous history is cyclical, embedded in ritual and myth, and attaches importance to places and relationships. (2) It is flexible –a living document– and does not know time and space limitations like Western history does. (3) Storytelling, rituals and symbolic records such as wampum belts, petroglyphs and rock paintings play a cardinal role. (4) These symbolize rather than report, which can pose challenges to a non-Indigenous, western audience. (5) Documentation of such stories is contentious, *inter alia* because it 'freezes' them.

Insofar as Indigenous North American spirituality and notions of space are concerned, there also are 5 points to be borne in mind: (1) Land often gives cultural meaning and is at the base of a community's social life – this can be linked back to the importance of cultural continuity for Indigenous identity. (2) For many Indigenous peoples, there is an intertwining of social and physical geography in that their way of life is tied up in the land: it constitutes their past, present and future heritage. (3) Permanent environmental landmarks often become spiritual points of reference, and

---

[1518] *Sparrow*, *supra* note 1227 at 1110.

as such fulfil an anchoring function for the community in question. (4) There is a paradigmatic clash between Judeo-Christian religious traditions and Native American ones. The former are commemorative, individualistic and consider natural resources to be exploitable for the good of mankind. The latter are affirmation-based and focus on the collective and the interrelatedness of all beings.[1519] (5) The same tract of land can have both a spiritual and a profane purpose.

4.5.3.2 Background: Aboriginal Title

Aboriginal title (known as 'native title' in Australia and 'customary title' in Aotearoa New Zealand) plays an important role in three of my selected jurisdictions: Canada, Australia and Aotearoa New Zealand. The position in the United States is complex and disputed.[1520] As Part II will demonstrate, the application of this concept and its reach have had different results in the legal systems under consideration.

In Canada, the 1973 decision of the Supreme Court of Canada in *Calder v Attorney-General of British Columbia*[1521] postulated the recognition of "land rights based on Aboriginal title originating in traditional use and occupancy of the land" by the common law.[1522] This led the Canadian government to establish a federal policy for the negotiation and settlement of land claims on the twin basis of the Comprehensive Claims Policy[1523] and the Specific Claims Policy.[1524] A specific

---

[1519] This clearly is a rather reductive statement of itself. It does, however, contain a kernel of truth.

[1520] See GN Barrie, "The United Nations Declaration on the Rights of Indigenous People: Implications for Land Rights and Self-Determination" [2013]:2 J South African Law 292 [Barrie, "UNDRIP"] at 300–301 and the sources cited by him at footnote 64. For a detailed explanation, see *infra* at note 1838.

[1521] *Calder*, *supra* note 1213.

[1522] "Calder v Attorney-General of British Columbia (1973)", *ATNS Project*, online: <http://www.atns.net.au/agreement.asp?EntityID=2359>.

[1523] Comprehensive claims are founded on "the assertion of continuing title to land and resources": "Agreement Making with Indigenous Peoples: Background Material", *ATNS Project*, online: <http://www.atns.net.au/page.asp?PageID=1#aust>.

[1524] Specific claims relate to "Canada's breach or non-fulfilment of lawful obligations found in treaties, agreements or statutes (including the *Indian Act* (1876))": "Specific Claims Policy 1973", *ATNS Project*, online: <http://www.atns.net.au/agreement.asp?EntityID=2360>. It has since been substantially reformed by the *Specific Claims Resolution Act* RSC 2003 c 23.

tripartite treaty process was established in respect of the Province of British Columbia in 1993 for purposes of implementing this federal policy.[1525]

In this country, "existing aboriginal rights" have furthermore been constitutionally recognized since the advent of the *Constitution Act, 1982*. Section 35 reads as follows:

> RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA
>
> Recognition of existing aboriginal and treaty rights
>
> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> Definition of "aboriginal peoples of Canada"
>
> (2) In this Act, 'aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> Land claims agreements
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> Aboriginal and treaty rights are guaranteed to both sexes
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Yet even though they are constitutionally entrenched, such aboriginal rights are not absolute: they may be extinguished[1526] and are subject to infringement, provided that such infringement is "in

---

[1525] *Ibid.*

[1526] Borrows, *Indigenous Constitution*, *supra* note 147 at 265. However, Barrie argues that subsequent to *Delgamuukw*, *supra* note 550, aboriginal title is no longer subject to unilateral extinction by the federal government: it must either be voluntarily surrendered by the Indigenous people in question, or s 35(1) of the *Canada Act 1982* requires amendment: Barrie, "UNDRIP", *supra* note 1520 at 299. Also see *Halsbury's Laws of Canada, Aboriginal 2016* (Canada: LexisNexis, 2016) [*Halsbury's Aboriginal*], HAB-1 at 92: "Subsequent to 1982 and s. 35(1), aboriginal rights cannot be extinguished by legislation". But cf the unequivocal phrasing of the Supreme Court in *Sparrow* (1990), *supra* note 1227 at 1099: "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."

furtherance of a legislative objective that is compelling and substantial" and "consistent with the special fiduciary duty relationship between the Crown and aboriginal peoples."[1527]

The concept of aboriginal title is neutral as to the intrinsic sacredness of a site: the fact that a site is sacred does not afford it greater protection than one that is not.[1528] In 1997, the Supreme Court of Canada described aboriginal title as "a collective title to land held by all members of an aboriginal nation" in the seminal case of *Delgamuukw v British Columbia*.[1529] Yet it was only in 2014, in the historic *Tsilhqot'in v British Columbia*[1530] decision that an Indigenous people managed to formally establish aboriginal title in Canada.

4.5.3.3 Aboriginal and Treaty Rights as Potential Avenue of Sacred Site Protection

> The Chippewas of the Thames are not entitled to a one-sided process, but rather, a cooperative one with a view towards reconciliation. Balance and compromise are inherent in that process (*Haida*, at 50).[1531]

***R v Sparrow*, [1990] 1 SCR 1075** was the first case to test the scope of section 35(1) of the *Constitution Act, 1982*[1532] and it laid down the test for ways in which the Crown may regulate or infringe upon aboriginal rights *post* 1982.[1533] At issue was the aboriginal right of the Musqueam Band of Indians to fish – salmon fishery not being confined to a fish source for the society, but also playing an

---

[1527] *Delgamuukw*, *supra* note 550 at 1107–1108. *In casu* such "compelling and substantial" legislative objective was held to include matters like "the development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims" (*ibid* at 1111).

[1528] Ross, *First Nations*, *supra* note 34 at 19. But consider in this regard Fonda, *supra* note 1357 at 1: "historical Aboriginal cultures did not have as marked a conceptual separation between sacred and secular, or between culture, language and identity, or between spirituality and the land on or through which it is expressed as did most European cultures. These things were, and for many contemporary Aboriginal peoples, are all interrelated in Aboriginal worldviews."

[1529] *Delgamuukw*, *supra* note 550 at 1115.

[1530] *Tsilhqot'in Nation v British Columbia* 2014 SCC 44 [*Tsilhqot'in*].

[1531] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, [2017] SCC 41 (26 July 2017) Karakatsanis and Brown JJ [*Chippewas of the Thames*] at para 60.

[1532] *Sparrow*, *supra* note 1227 at 1083.

[1533] *Halsbury's Aboriginal*, *supra* note 1526, HAB-1 at 92.

important role in the belief systems and ceremonies of Salish people according to the testimony of the expert witness, an anthropologist.[1534] Thus, explained the Court,

> [t]he salmon were held to be a race of beings that had, in 'myth times', established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual.[1535]

The Court's first important finding was that regulation of an aboriginal right does not necessarily amount to its extinguishment:[1536] while this may have reflected the position prior to 1982,[1537] it was now up to the Crown to demonstrate "a clear and plain intention to extinguish the Indian aboriginal right to fish."[1538] The Court furthermore cautioned that regulation should not be confounded with extinguishment: the mere fact of regulation does not imply the extinguishment of an aboriginal right.[1539]

Next, the Court proceeded to delineate the scope of the Musqueam right to fish:

> The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner.[1540]

The importance of *Sparrow* for present purposes is therefore not so much the section 35(1) infringement test as delineated by the Supreme Court, but the lesser noted scope of the aboriginal

---

[1534] *Sparrow*, *supra* note 1227 at 1094–1095.

[1535] *Ibid*, at 1095.

[1536] *Ibid*, at 1097.

[1537] *Ibid*, at 1098.

[1538] *Ibid*, at 1099.

[1539] *Ibid*, at 1098.

[1540] *Ibid*, at 1099.

right there afforded constitutional recognition and affirmed by the Court: "the existing aboriginal right to fish for food and social and ceremonial purposes."[1541] I would argue that this opens the door to both way of life- and Indigenous spirituality-related claims. In this context, I refer specifically to the discussion above at 2.4.3.3.1 ("Indigenous Conceptions of the Sacred – The Role of Ritual – North America: Native American and First Nations Traditions).

To return to *Sparrow*: the Court emphasized that section 35 does not result in the recognition of aboriginal rights that are absolute,[1542] but rather it has as consequence the fact that "federal power must be reconciled with federal duty" by "demand[ing] the justification of any government regulation that infringes upon or denies aboriginal rights."[1543] Context and a case-by-case approach are important when considering section 35(1), so that "the contours of a justificatory standard [is] defined in the specific factual context of each case."[1544]

The enquiry commences with the question whether the pertinent legislation acts to interfere with an existing aboriginal right.[1545] If so, it constitutes a *prima facie* infringement of section 35(1).[1546] As usual, the party averring the infringement bears the burden of proof.[1547] Three questions must be asked here: (1) Is the limitation unreasonable? (2) Does the regulation impose undue hardship? (3) Are the right holders deprived from their favoured means of exercising the right because of the regulation?[1548]

The next phase of the enquiry considers whether such *prima facie* interference of section 35(1) is justified. For these purposes, the departmental regulatory objective is scrutinized to determine

---

[1541] *Ibid*, at 1101 [my emphasis].

[1542] *Ibid*, at 1109: "Rights that are recognized and affirmed are not absolute."

[1543] *Ibid*, at 1109.

[1544] *Ibid*, at 1111.

[1545] *Ibid*, at 1111.

[1546] *Ibid*, at 1111.

[1547] See *ibid* at 1112.

[1548] See *ibid* at 1112.

whether there is a legitimate legislative objective.[1549] Importantly, the Court considered that an objective such as natural resource conservation or management would be valid,[1550] but that "in the public interest" represented an overly broad criterion.[1551] Should there be a valid legislative objective, the Court considers the second part of the justificatory analysis, *viz* – the honour of the Crown, in view of "[t]he special trust relationship and the responsibility of the government vis-à-vis aboriginals".[1552] While this justificatory standard admittedly places a substantial burden on the Crown, the Court considered it necessary with a view to ensuring that Indigenous peoples' rights are taken seriously.[1553] An interesting feature of *Sparrow* is that while the Court emphasized the need to ask further questions such as whether the infringement in cause was as limited as possible for purposes of achieving the desired result; whether fair compensation was available in expropriation contexts; and whether consultations with Indigenous communities had taken place with regards to the conservation measures that were being implemented, it was careful to remain within the context-specific approach previously outlined, cautioning that the aforegoing did not constitute an exhaustive list.[1554]

In the process of delineating the infringement test, the *Sparrow* Court issued a warning that is equally pertinent to the sacred site problematic:

> Fishing rights are not traditional property rights. These are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts to property as they develop their understanding of what the reasons for judgment in *Guerin*, *supra*, at p. 38[2], referred to as the "*sui generis*" nature of aboriginal rights."[1555]

[1549] *Ibid* at 1113.

[1550] *Ibid*, at 1113-1114.

[1551] *Ibid*, at 1113.

[1552] *Ibid*, at 1114.

[1553] *Ibid*, at 1119.

[1554] *Ibid*, at 1119.

[1555] *Ibid*, at 1112. It is important to note that *Guerin* was not concerned with conflicting Indigenous notions of property, but rather the apparent inability of traditional property law to account for the "distinctive fiduciary obligation on the

Van der Peet took up the theme of aboriginal rights having a *sui generis* nature, with Lamer CJ holding that a consequent adaptation of the common law rules of evidence is in order when proving aboriginal rights, so as to account for their *sui generis* nature.[1556] The Court had the occasion to consider more closely the exact form that such modifications could take in *Delgamuukw*, a year later.[1557]

In *Delgamuukw*, the Supreme Court distinguished between aboriginal *rights* and aboriginal *title*.[1558] While aboriginal rights and aboriginal title might overlap, the two are not synonymous, the burden of proof is not identic in the two cases, and the existence of one is not a prerequisite for the other.[1559] Thus aboriginal title is necessarily a right in land,[1560] and the relationship of (common law) aboriginal title to section 35(1)-protected aboriginal rights is defined in terms of activities.[1561] There is, said the Court, a spectrum, and the determinative factor is the proximity of the people and the land in question. [1562]

The reasoning in *Delgamuukw* is particularly important here, not only because it stood as the sole beacon of aboriginal title rights recognition -even if not extended *in casu*–[1563] for a long time, but because it notably dealt with the bond between Indigenous communities and their land, as well as

---

part of the Crown to deal with the land for the benefit of the surrendering Indians" in conjunction with such land's "general inalienability": at 382.

1556 *Van der Peet*, *supra* note 175 at 202. For an analysis of the *sui generis*-concept as ascribed to Aboriginal rights in Canadian jurisprudence, see John Borrows & Leonard I Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make A Difference?" (1997) 36 Alberta L Rev 9. Also see Michael Coyle, "Marginalized by *Sui Generis*? Duress, Undue Influence and Crown-Aboriginal Treaties" (2009), online: <ssrn.com/abstract=1344110>.

1557 *Delgamuukw*, *supra* note 550 at 1028.

1558 See *Delgamuukw*, *supra* note 550 at 1027.

1559 See *Delgamuukw*, *supra* note 550 at 1027. Here, Lamer CJ referred to his judgments in *Adams* and *Côté*, where he had expressly rejected the contention that "claims to aboriginal rights must also be grounded in an underlying claim to aboriginal title."

1560 As emphasized by the Court: see *Delgamuukw*, *supra* note 550 at 1027.

1561 The Court's emphasis, with reference to *Van der Peet*: *Delgamuukw*, *supra* note 550 at 1027.

1562 *Delgamuukw*, *supra* note 550 at 1094–1095.

1563 A new trial was ordered, *inter alia* because of trial court errors in the treatment of the factual evidence: 1079.

the use of sacred oral histories, performances and symbols as evidence in the courts. One of the immediately striking features of this case is the format that evidence took on in this case:

> At the British Columbia Supreme Court, McEachern C.J. heard 374 days of evidence and argument. Some of the evidence was not in a form which is familiar to common law courts, including oral stories and legends. Another significant part was the evidence of experts in genealogy, linguistics, archaeology, anthropology, and geography.[1564]

It is the very format of the evidence proffered to establish aboriginal title, its admissibility and its weight that I consider of particular importance for present purposes.

The claimants sought to establish their bonds to the land *inter alia* by means of some physical and tangible signs thereof, in the form of carved totem poles, distinctive regalia, the Gitksan Houses' "*adaawk*" (sacred oral traditions)[1565], the Wet'suwet'en Houses' "*kungax*" (sacred performances)[1566], as well as a feast hall –

> The most significant evidence of spiritual connection between the Houses and their territory is a feast hall. This is where the Gitksan and Wet'suwet'en peoples tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands. The feast has a ceremonial purpose, but is also used for making important decisions. The trial judge also noted the *Criminal Code* prohibition on aboriginal feast ceremonies, which existed until 1951.[1567]

Insofar as the probative value of oral history is concerned, the honourable Lamer CJ commenced by citing a lengthy passage from the *Report of the Royal Commission on Aboriginal Peoples* on the nature of aboriginal oral histories. Important elements highlighted in this passage are its non-linear essence; the fact that it is not human-centered, as it deems humans to be but one of the constituent parts of the natural order of the universe; that as an oral tradition it involves legends, narratives, and

---

[1564] *Delgamuukw*, *supra* note 550 at 1028.

[1565] Described by the Court as being "a collection of sacred oral tradition about their ancestors, histories and territories": *Delgamuukw*, *supra* note 550 at 1031.

[1566] This is the House's individual "spiritual song or dance or performance which ties them to their land": *Delgamuukw*, *supra* note 550 at 1031.

[1567] *Delgamuukw*, *supra* note 550 at 1032.

accounts handed down over the course of generations; and that it is "less focussed on establishing objective truth".[1568] The cited passage furthermore explains that the repetition of oral histories serves a broader purpose than written history does in Western societies: "It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige".[1569] Chief Justice Lamer noted two aspects that were particularly problematic in terms of Western rules of evidence: (1) courts seek to establish the historical truth, and (2) these oral traditions largely consist hearsay, thus they are in conflict with the general rule against the admissibility of hearsay.[1570] Importantly he held that even in the face of these difficulties procedural fairness required that such oral histories be accommodated:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a longstanding practice in the interpretation of treaties between the Crown and aboriginal peoples (…). To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights that they have (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis.[1571]

In the court of first instance, the oral histories had been presented for two purposes: (1) the Gitksan presented the *adaawk* to demonstrate the existence of a land tenure system that covered the entire claimed territory in the internal Gitksan law; and (2) the Wet'suwet'en offered their *kungax* to illustrate the proximity of the bond between them and the land.[1572] The Supreme Court considered

---

[1568] *Report of the Royal Commission on Aboriginal Peoples, Vol 1: Looking Forward, Looking Back* (1996) at 33, cited in *Delgamuukw*, *supra* note 550 at 1067–1068.

[1569] *Ibid.*

[1570] *Delgamuukw*, *supra* note 550 at 1068–1069.

[1571] *Delgamuukw*, *supra* note 550 at 1069. For some wonderful suggestions in this regard, see Jean Leclair, "Of Grizzlies and Landslides" (2005) 4 Public Archaeology 109 at 111–116.

[1572] *Delgamuukw*, *supra* note 550 at 1072.

the exclusion of these histories by the trial judge to have been sufficiently serious that a new trial was required, since these oral histories were "of critical importance to the appellants' case".[1573]

The main difficulty that I foresee with sacred site protection claims based on aboriginal rights protection under section 35(1) lies in the pre-contact requirement imposed by the Supreme Court in *Van der Peet*. In essence, the applicant has to prove that the aboriginal right relied on existed prior to contact with European society and that it has continued to exist thereafter (albeit not uninterruptedly). Although the honourable Lamer CJ sought to avoid a "frozen rights" approach by not insisting on the element of no interruption, having to meet this burden of proof would effectively place the applicant Indigenous community in the position of having to demonstrate that their spiritual practices have not evolved since pre-contact times. This runs contrary to the Supreme Court's explicit views in *Amselem* that religious practices evolve,[1574] which would raise difficult questions, such as why Indigenous spiritual practices may not evolve and what that says about the equal treatment and ultimately the human dignity of Indigenous peoples in Canadian jurisprudence.[1575]

In 2004, the Supreme Court moved away from the infringement approach based on *Sparrow* and imposed the duty to consult and accommodate on the Crown in the *Haida*[1576] and *Taku River*[1577] decisions.[1578] The Supreme Court subsequently confirmed that the duty to consult applies to an

---

[1573] *Delgamuukw*, *supra* note 550 at 1079.

[1574] *Amselem*, *supra* note *supra* note 1358 at para 53; also see at para 71.

[1575] *Cf* John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 American Indian Law Review 37 at 63: "Canadian courts have not yet come to terms with the fact that, like others, Aboriginal people are traditional, modern and post-modern. Physical and cultural survival depends as much on attracting legal protection for contemporary activities, as it does on gaining recognition for traditional practices. The courts need to recognize that Aboriginal rights attach to Aboriginal activities, whether making moccasins or marketing computers. It is not specific practices that are necessarily important to the definition of Aboriginal rights; what counts in determining Aboriginal rights is whether these practices contribute to the survival of the group."

[1576] *Haida*, *supra* note 1477.

[1577] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] SCC 74.

[1578] See *Prophet River FCA*, *supra* note 1607 at para 34–36.

infringement of historic treaty rights (*Mikisew*),[1579] as well as modern ones (*Little Salmon/Carmack*s[1580]).

The effect of establishing aboriginal rights is that it would invoke the duty to consult on the part of the state in respect of the affected area. *Haida*[1581] is the *locus classicus* regarding the duty to consult. In essence the Court there held that there is a sliding scale, meaning that the greater the impact on the Indigenous community and the stronger that community's claim, the more comprehensive the duty to consult becomes.[1582] In *Tsilhqot'in*,[1583] the Supreme Court clarified the position where aboriginal title has been asserted but not yet established: consultation must take place in accordance with section 35 and, if appropriate, the community's interests should be accommodated.[1584] The Court went on to delineate the State's duties once aboriginal title has been established as follows:

> Once Aboriginal title is established, s. 35 of the *Constitution Act*, *1982* permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group[.][1585]

The duty to consult constitutes a topic on its own in Canadian Aboriginal law, and there is a formidable literature on the topic.[1586] In principle, however, there is a problem with sacred sites and

---

[1579] *Mikisew*, *supra* note 1207. See *Prophet River FCA*, *supra* note 1607 at para 38.

[1580] *Beckman v Little Salmon/Carmacks First Nation*, [2010] SCC 53. See *Prophet River FCA*, *supra* note 1607 at para 38.

[1581] *Haida*, *supra* note 1477.

[1582] *Haida*, *supra* note 1477 at paras 39 and 43–45.

[1583] *Tsilhqot'in, supra* note 1530.

[1584] See *Tsilhqot'in, supra* note 1530 at para 2. For an interesting take from a property rights angle, see the discussion of this case in Brenna Bhandar, "Critical Legal Studies and the Politics of Property" in Susan Bright & Sarah Blandy, eds, *Researching Property* Law (Palgrave, 2015) 60.

[1585] *Tsilhqot'in, supra* note 1530 at para 2.

[1586] See e.g. P G McHugh, "Doctrinal Pathways in Canada and Australia – The Devil in the Detail of a Maturing Jurisprudence" in *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford Scholarship Online, 2011) 106 at 147–157; Sari Graben & Abbey Sinclair, "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board" (2015) 65 U Toronto LJ 382; Zena Charowsky, "The Aboriginal Law Duty to Consult: An Introduction for Administrative Tribunals" (2011) 74 Sask L Rev 213; Michael Coyle, "From Consultation to Consent: Squaring the Circle?" (2016) 67 U N B LJ 235; Martin Papillon & Thierry Rodon, "Proponent-Indigenous Agreements and the Implementation of the Right to Free, Prior, and Informed Consent in Canada" (2016) Environmental Assessment

consultation that is illustrated very well by the case study below: communities tend not to want to negotiate about spiritual matters, notably when these fulfill an identitary role. That means that they wish to exercise a veto, which is not conducive to consultation as understood in Canadian law. Indeed, in *Haida* the Court said:

> This [consultation and negotiation] process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.
>
> This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" … "an adjustment or adaptation to suit a special or different purpose … a convenient arrangement; a settlement or compromise" (…) The accommodation that may result from pre-proof consultation is just this –seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.[1587]

A veto stance might be in line with UNDRIP, and –indeed, the Ktunaxa Counsel above made a reference to UNDRIP[1588]– but here again we face three issues. First, it is far from certain that the Trudeau Government will actually implement UNDRIP in the in its fullest sense; second, the enforceability of UNDRIP is far from certain; and third, even UNDRIP's supporters are ambivalent as to whether its free prior and informed consent (FPIC) requirement constitutes a veto right or not. In sum, vetoes are not popular because of their absolutist nature.

Review, online: <dx.doi.org/10.1016/j.eiar.2016.06.009>; Sara Kate Battersby, "The Duty to Consult: What Aotearoa New Zealand Can Learn from Canada" (2013) 4 Te Tai Haruru Journal of Maori and Indigenous Issues 2; Thomas Isaac & Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41:1 Alberta Law Review 49; Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011).

[1587] *Haida*, *supra* note 1477 at para 48–49.

[1588] Although, rather curiously, he did not expressly plead *UNDRIP*'s sacred site protection provisions.

As a final comment, in *Chippewas of the Thames* the Supreme Court recently clarified that a regulatory agency such as the National Energy Board (NEB) may perform the Crown's consultation duty through a regulatory process without it being in conflict of interest, even when this is done implicitly.[1589] In this case the Chippewas of the Thames First Nation had pleaded that the planned pipeline reversals would adversely impact their Aboriginal and treaty rights, *inter alia* "the right to access and preserve sacred sites in their traditional territory."[1590] They also claimed Aboriginal title to lands throughout their traditional territory.[1591]However, traditional Western property rights won the day, as the Court considered the fact that "virtually all of the required construction would take place on previously undisturbed lands owned by Enbridge and on Enbridge's right of way."[1592] This economic paradigm appears to have been a deliberate choice on the part of the Court: the Chippewas of the Thames First Nation had objected to the fact that their constitutionally protected Aboriginal and treaty rights were being weighed by the NEB against "a number of economic and public interest factors";[1593] however, the Court expressly held on the basis of *Haida*[1594] that such a balancing formed part and parcel of accommodation.[1595]

Citing *Rio Tinto*,[1596] the Court held that the Chippewas of the Thames First Nation could not use the consultation process to address past grievances[1597] –the fact that they had never been consulted about the pipeline itself–[1598] and that the adverse effects of the proposed reversals had been correctly

---

[1589] *Chippewas of the Thames*, *supra* note 1531 at para 34. The Court referred here to *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] SCC 43 McLachlin CJ [*Rio Tinto*]at para 58.

[1590] *Chippewas of the Thames*, *supra* note 1531 at paras 7, 53.

[1591] *Chippewas of the Thames*, *supra* note 1531 at para 7.

[1592] *Chippewas of the Thames*, *supra* note 1531 at paras 13, 53.

[1593] *Chippewas of the Thames*, *supra* note 1531 at para 58.

[1594] *Haida*, *supra* note 1477 at para 50.

[1595] *Chippewas of the Thames*, *supra* note 1531 at para 59.

[1596] *Rio Tinto*, *supra* note 1589 at paras 53–54.

[1597] *Chippewas of the Thames*, *supra* note 1531 at para 41.

[1598] *Chippewas of the Thames*, *supra* note 1531 at paras 11 and 17.

assessed by the NEB as "likely to be minimal".[1599] The Chippewas of the Thames First Nation had argued that the effects "could even be catastrophic in the event of a pipeline spill."[1600] Much emphasis was placed on the fact that they had received participation funding from the NEB[1601] and had participated in both written and verbal presentations to the NEB.[1602] These actions, so the Court held, constituted awareness on their part that the Crown had elected to consult via the NEB, even if it had not expressly been clarified.[1603] The Court accordingly held that "the consultation undertaken in this case was manifestly adequate."[1604] The NEB appeared to put a lot of faith in Enbridge's sense of responsibility and likely compliance with the NEB conditions and the Court saw no reason to differ.[1605]

4.5.3.4 Illustration: Desktop Study 2 – Prophet First Nation, West Moberly First Nations and Site C Dam, British Columbia

With respect to the appellants' claims regarding the duty to accommodate, it must be remembered that the Crown's consultation and accommodation efforts should not be deemed unreasonable merely because immitigable impacts are identified. As articulated in *Haida Nation*, the identification of such impacts is a factor indicating the requirement of deep consultation and accommodation, but this does not necessarily require that a different substantive outcome be reached: "the focus … is not on the outcome, but on the process of consultation and accommodation" (para. 63). The duty to consult and accommodate does not afford First Nations a "veto" over the proposed activity:

[1599] *Chippewas of the Thames*, *supra* note 1531 at para 23.

[1600] *Chippewas of the Thames*, *supra* note 1531 at para 40.

[1601] *Chippewas of the Thames*, *supra* note 1531 at paras 18, 52.

[1602] *Chippewas of the Thames*, *supra* note 1531 at paras 46, 50, 52.

[1603] *Chippewas of the Thames*, *supra* note 1531 at para 46.

[1604] *Chippewas of the Thames*, *supra* note 1531 at paras 43, 51.

[1605] See e.g. *Chippewas of the Thames*, *supra* note 1531 at para 56: "Similarly, the NEB assessed the increased risk of a spill or leak from Line 9 as a result of the project. It recognized the potential negative impacts that a spill could have on traditional land use, but found that the risk was low and could be adequately mitigated. Given Enbridge's commitment to safety and the conditions imposed upon it by the NEB, the NEB was confident that Line 9 would be operated in a safe manner throughout the term of the project." Also see at paras 55, 57.

Mikisew at para. 66. Here, the appellants have not been open to any accommodation short of selecting an alternative to the project; such a position amounts to seeking a "veto". They rightly contend that a meaningful process of consultation requires working collaboratively to find a compromise that balances the conflicting interests at issue, in a manner that minimally impacts the exercise of treaty rights. But that becomes unworkable when, as here, the only compromise acceptable to them is to abandon the entire project.[1606]

4.5.3.4.1 Introducing the Desktop Study

Site C Dam would constitute the third dam and hydroelectric generating facility on the Peace River in British Columbia:[1607] a $8.335 billion project for the construction of a 1,100 MW capacity generating facility over a period of some 8 years.[1608] It would be situated around 7 km from Fort St John. The project is being developed by British Columbia Hydro and Power Authority, a Crown corporation.[1609] Key project components include a reservoir with a total surface area of 93 square kilometers, which would involve the flooding of some 5,550 hectares of land in an area measuring approximately 83 kilometres and with an average width of 2-3 times the current river.[1610] The flooding of the Peace River Valley would impact at least seven First Nations directly: the Blueberry River, MacLeod Lake and Saulteau First Nations, as well as the members of the Treaty 8 Tribal Association (Doig River, Halfway River, Prophet River and West Moberly First Nations).[1611] The

---

[1606] *Prophet River First Nation v British Columbia (Environment)*, 2017 BCCA 58 Lowrie J [*Prophet River* BCCA] at para 65.

[1607] BC Hydro, *Environmental Impact Statement Executive Study* (BC Hydro, 2013) at 10; *Prophet River* BCCA, *supra* note 1606 at para 2 ; *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15 Boivin JA [*Prophet River* FCA] at para 7.

[1608] "Site C to provide more than 100 years of affordable, reliable clean power | BC Newsroom", online: <http://www.newsroom.gov.bc.ca/2014/12/site-c-to-provide-more-than-100-years-of-affordable-reliable-clean-power.html>; *Prophet River* BCCA, *supra* note 1606 at para 2.

[1609] *Prophet River* BCCA, *supra* note 1606 at para 2; *Prophet River* FCA, *supra* note 1607 at para 4.

[1610] BC Hydro, *supra* note 1607 at 10; *Prophet River* FCA, *supra* note 1607 at para 7. Previous hydroelectric developments have already flooded 70% of the Peace River Valley; this development would flood approximately half of the remaining 30%: *Prophet River* FCA, *supra* note 1607 at para 7.

[1611] BC Hydro, *supra* note 1607 at 16. Note that BC Hydro has conducted consultations with 29 First Nations and Métis groups in British Columbia, Alberta and the Northwest Territories, in addition to two non-treaty groups in British Columbia: *ibid* at 33. Rather curiously, in December 2014 the BC Minister of Aboriginal Relations and Reconciliation announced that the province had entered into a $ 500,000 investment under the First Nations Clean Energy Business Fund with the Tahltan Nation "to acquire an ownership interest in the clean energy project and share in revenues from

land in question forms part of their traditional territories which were surrendered to the Crown under the terms of Treaty 8,[1612] subject to their "right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered" and provided that the land may be "taken up from time to time for settlement, mining, lumbering, trading or other purposes".[1613]

When it was announced that construction of Site C Dam would commence in the summer of 2015,[1614] four of the affected First Nations had already filed for judicial review of the CIG and the provincial Minister's decisions: Doig River, Prophet River, West Moberly and McLeod Lake First Nations.[1615] It should be noted that the First Nations appear to be divided on this issue, with some preferring compensation for flooded lands.[1616] Of importance is the fact that West Moberly First

---

the sale of power to BC Hydro" – Tahltan Nation clearly does not fall among the core group of First Nations identified by BC Hydro for purposes of its IS. See John Rustad, "Reconciliation with First Nations in B.C.", (30 December 2014), online: *Ministry of Aboriginal Relations and Reconciliation* <http://www2.news.gov.bc.ca/news_releases_2013-2017/2014ARR0045-001963.htm>.

1612 Treaty 8 dates back to 21 June 1899 and covers the greater part of Northern Alaska, Northwestern Saskatchewan, Northeastern British Columbia, and the Southwest portion of the northwest Territories: *Prophet River* FCA, *supra* note 1607 at para 3.

1613 *Prophet River* BCCA, *supra* note 1606 at para 3.

1614 See BC Hydro, *supra* note 1607 at 82; "Site C Clean Energy Project", online: <https://www.bchydro.com/energy-in-bc/projects/site_c.html>. The First Nations Summit immediately issued a statement denouncing the decision as "an affront to the cultivation of constructive government-to-government relations between the provincial government and the BC First Nations": see First Nations Summit, "Approval of Site-C Dam project a major step backwards in Provincial Government relations with BC First Nations" (2014) at 1. The First Nations Summit, an NGO in Special Consultative Status with ECOSOC, "speaks on behalf of First Nations" involved in treaty negotiations with British Columbia: *ibid.* It had already passed a unanimous resolution in October 2014 in support of the Treaty 8 Tribal leadership's opposition to the project, concurring with "their assessment that the proposed project is a threat to their ability to exercise their constitutionally-protected Treaty rights, the survival of their culture and their people": *ibid.* Consequently, the First Nations Summit "supports the Treaty 8 Tribal Association's position that alternative clean energy options such as geothermal, wind and other small hydro-electric projects, that are more economical, create less risk and can be built in partnership with local communities, be considered instead of an antiquated approach to meeting BC's future power needs that Site-C represents": *ibid.*

1615 See "First Nations launch Federal Court challenge of B.C.'s Site C dam - The Globe and Mail", online: <http://www.theglobeandmail.com/news/british-columbia/first-nations-launch-federal-court-challenge-of-bcs-site-c-dam/article21568662/>. On First Nation discontent, also see First Nations Summit, *supra* note 1614 and Justine Hunter, "Some things change when it comes to B.C. dams. Some remain the same", (2014), online: *Globe Mail* <http://www.theglobeandmail.com/news/british-columbia/some-things-change-when-it-comes-to-dams-some-remain-the-same/article22175016/>.

1616 See "First Nations split over BC Hydro's Site C dam megaproject (with video)", online: <http://www.vancouversun.com/news/First+Nations+split+over+Hydro+Site+megaproject+with+video/9262380/story.html#__federated=1>. It is not only the First Nations who are divided: see Justine Hunter, "BC Premier Plays Wedge Politics with Site C Dam" (4 October 2015), *The Globe and Mail*, online: <

Nation argued all along that it has sacred sites in the proposed flooded area, both in the form of burial grounds and other sites, and started threatening litigation as long ago as 2010.[1617]

4.5.3.4.2 Contemplating the Fact Set

The BC Hydro Impact Study (IS) did not consider impacts on sacred sites *per se*, but a perusal of the IS indicates that these are pertinent in two categories of which mention is made: "current use of lands and resources for traditional purposes"[1618] and "heritage resources".[1619] The latter category specifically includes burial sites. Although the IS concludes that "[t]he creation of the reservoir would result in the loss of some important multi-use, cultural areas and valued landscapes, including sites at Attachie, Bear Flats and Farrell Creek",[1620] proposed mitigation measures do not go much further than "commemora[ting] lost and/or inundated places"[1621] and the "recording of stories and history associated with" such sites.[1622] Insofar as "heritage resources" are concerned, mitigation measures basically amount to reburial of remains found and commemoration thereof.[1623]

Under the British Columbia *Environmental Assessment Act*,[1624] the development was subject to a provincial environmental impact assessment (EIA) and ministerial approval; under the *Canadian*

---

https://www.theglobeandmail.com/news/british-columbia/bc-premier-plays-wedge-politics-with-site-c-dam/article26646321/ >.

1617 On Indigenous burial grounds as sacred sites, see the report for the Ipperwash Inquiry prepared by Darlene Johnston, *Respecting and Protecting the Sacred* (2006) at 6–14, online: < https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Johnston_Respecting-and-Protecting-the-Sacred.pdf >.

1618 See BC Hydro, *supra* note 1607 at 31, 34 and 55–57.

1619 BC Hydro, *supra* note 1607 at 32 and 81–82.

1620 BC Hydro, *supra* note 1607 at 34.

1621 BC Hydro, *supra* note 1607 at 56.

1622 BC Hydro, *supra* note 1607 at 56.

1623 BC Hydro, *supra* note 1607 at 82.

1624 SBC 2002, c43.

Environmental Assessment Act,[1625] it was also subject to a federal EIA and approval by the Governor in Council (GIC).[1626] These processes were undertaken conjointly by a three-person panel, the Joint Review Panel (JRP),[1627] whose mandate it was to investigate "the environmental, economic, social, health and heritage effects of the project, including a consideration of the mitigation of adverse effects" to guide the Crown in its costs-benefits weighing exercise when determining whether the project should succeed.[1628]

The JRP identified the project benefits as being a large increase in energy supply over the long-term at "a price that would benefit future generations"[1629] and with the production of significantly "less greenhouse gas emissions than any comparable viable alternatives".[1630] However, project costs would be high and it was uncertain when the increased energy supply would actually be needed.[1631] Importantly, the JRP recognized –

that the creation of the reservoir would mean significant adverse environmental and ecological consequences, particularly as would *impact the treaty rights of Aboriginal peoples with respect to hunting, trapping and fishing,* as well as the end of agriculture on the Peace River Valley bottom lands, and the *inundating of valuable paleontological, archaeological and historic sites*.[1632]

The JRP also determined that "the effects on fishing, hunting and trapping could not be mitigated, nor could some of the effects of other traditional uses of the land."[1633]

[1625] 2012, SC 2012, c 19, s 52.

[1626] See *Prophet River* FCA, *supra* note 1607 at para 8.

[1627] See *Prophet River* FCA, *supra* note 1607 at paras 8–10.

[1628] For a detailed description of the three-year process, see *Prophet River* BCCA, *supra* note 1606 at paras 6–9.

[1629] *Prophet River* BCCA, *supra* note 1606 at para 10.

[1630] *Prophet River* BCCA, *supra* note 1606 at para 10.

[1631] *Prophet River* BCCA, *supra* note 1606 at para 10.

[1632] *Prophet River* BCCA, *supra* note 1606 at para 10.

[1633] *Prophet River* FCA, *supra* note 1607 at para 13.

BC Hydro undertook the consequently arising consultation duty as agent of the Crown in a joint process on behalf of the federal and provincial agencies.[1634] Prophet First Nation and West Moberly First Nations were among the 29 Aboriginal groups who engaged to differing degrees with this consultation process: in their case, they received more than $5.8 million in participation funding, they "maintained a high level of active engagement throughout"[1635] and they addressed the federal and provincial ministers individually in writing "stating clearly the basis for their opposition to the project."[1636] Of importance is the fact that the JRP specifically desisted from pronouncing itself on the question whether the project would amount to an infringement of Treaty 8.[1637]

4.5.3.4.3 The Litigation

Federal[1638] and provincial[1639] project environmental authorizations were issued on the same day in October 2014[1640] and on 16 December 2014 the BC provincial government approved the project.[1641] The provincial Environmental Assessment Certificate contained 77 conditions with which BC Hydro would have to comply.[1642] Prophet First Nation and West Moberly First Nations responded with immediate judicial review applications: in the Federal Court of Canada for the decision taken to issue the Order in Council; in the Supreme Court of British Columbia(BCSC) for the decision

---

1634 *Prophet River* BCCA, *supra* note 1606 at para 11.

1635 *Prophet River* BCCA, *supra* note 1606 at para 11.

1636 *Prophet River* BCCA, *supra* note 1606 at para 11.

1637 *Prophet River* BCCA, *supra* note 1606 at paras 12–13.

1638 A federal Order in Council, issued based on ministerial recommendation: see *Prophet River* BCCA, *supra* note 1606 at para 16.

1639 Environmental Assessment Certificate # E14-02, issued by the provincial Minister of Environment and the Minister of Forests, Lands and Natural Resource Operations: see *Prophet River* BCCA, *supra* note 1606 at para 16.

1640 *Prophet River* BCCA, *supra* note 1606 at para 16; *Prophet River* FCA, *supra* note 1607 at paras 18–19.

1641 The First Nations Summit promptly responded with a news release entitled, "Approval of Site-C Dam Project a Major Step Backwards in Provincial Government Relations with BC First Nations" (16 December 2014).

1642 *Prophet River* BCCA, *supra* note 1606 at para 16.

that gave rise to the provincial Environmental Assessment Certificate.[1643] They lost in both *fora*,[1644] appealed both matters[1645] and lost both appeals.[1646] The Supreme Court has refused to hear their further appeal.[1647]

Although West Moberly First Nations had said at various reprises in the press that it has sacred sites –including burial grounds– in the areas to be inundated,[1648] the nature of their objection was somewhat vaguely formulated as "an Area of Critical Community Interest" in the provincial court *a quo*.[1649] While Justice Sewell does record that Prophet First Nation's "key use of the Project area is for spiritual and cultural sites that will be inundated by the proposed reservoir",[1650] he only ever refers to it again as "traditional use"[1651] or "cultural (heritage)"[1652] and never enters into any specific discussion thereof. This angle appears to have been abandoned or not to have been seriously pursued on appeal.[1653] Among various grounds of review, the following two were considered particularly pertinent by the British Columbia Court of Appeal (BCCA): (1) the provincial minister and the GIC should have determined whether the project would constitute an unjustified infringement of their treaty rights before granting the approval; and (2) because the Crown's duty

---

[1643] See *Prophet River* BCCA, *supra* note 1606 at para 17.

[1644] See *Prophet River First Nation v British Columbia (Environment)*, 2015 BCSC 1682 Sewell J; *Prophet River First Nation v Canada (Attorney General)*, 2015 FC 1030 Manson J.

[1645] See *Prophet River* BCCA, *supra* note 1606 at paras 18–19 on the federal appeal.

[1646] For the federal appeal, see *Prophet River* FCA, *supra* note 1607.

[1647] See Carol Linnitt, "First Nations Case Against Site C Won't Be Heard by Supreme Court of Canada" (29 June 2017) *DesmogCanada*, online: < https://www.desmog.ca/2017/06/29/first-nations-case-against-site-c-struck-down-supreme-court-canada>.

[1648] See e.g. Mark Hume, "First Nations in Northern BC Worry Site C Dam Will Obliterate Their Heritage" (28 August 2015) *The Globe and Mail*, online: < https://www.theglobeandmail.com/news/british-columbia/site-c/article26154330/>; Linnitt, *supra* note 1647.

[1649] *Prophet River* BCCA, *supra* note 1606 at para 10.

[1650] *Prophet River* BCCA, *supra* note 1606 at para 8.

[1651] See e.g. *Prophet River* BCCA, *supra* note 1606 at paras 44, 56, 60, 62, 72. It may be that he was simply following the language used in the EIS, it being judicial review proceedings.

[1652] See e.g. *Prophet River* BCCA, *supra* note 1606 at para 50, 60, 62

[1653] See *Prophet River* BCCA, *supra* note 1606.

of consultation and accommodation had not been properly performed, the Order in Council and the provincial Certificate should be set aside.[1654]

The BCCA upheld the ruling of the Court of first instance that the applicants had erred in their election of summary proceedings and that a breach of treaty rights could only be properly decided in action proceedings, since the necessary factual findings cannot be made in the former.[1655] The BCCA furthermore held that it was not incumbent on the provincial minister or the GIC to make a treaty rights infringement determination either:

While there can be little question that the exercise of ministerial discretion cannot stand if constitutionally impaired, to say the Crown, or ministers of the Crown, as opposed to the court, must make a binding determination –something that would itself amount to a reviewable decision– at first instance of whether the Crown is unjustifiably infringing Aboriginal treaty rights would appear to be a somewhat novel proposition. Issues of treaty infringement, like issues of Aboriginal territorial claims, are not determined by ministers of the Crown.[1656]

It was more pertinent, said the Court, to inquire as to the duties of the Crown when faced with the exercise of ministerial discretion in a project that had the potential to infringe on treaty rights.[1657] The Court relied on *Mikisew*,[1658] which applied the *Haida*[1659] consultation standard to a project affecting treaty –as opposed to aboriginal– rights and observed–

the Court described the Crown's duty to be one of consultation and accommodation, the extent of which was to be driven by the context with regard for the measure of the impact the project would be expected to have on the apparent treaty rights involved. The governing question is always what

---

1654 *Prophet River* BCCA, *supra* note 1606 at para 17.

1655 See *Prophet River* BCCA, *supra* note 1606 at para 23, 37.

1656 *Prophet River* BCCA, *supra* note 1606 at para 29. Also see *Prophet River* FCA, *supra* note 1607 at para 23 on the position of the Federal Court *a quo*

1657 *Prophet River* BCCA, *supra* note 1606 at para 34.

1658 *Mikisew*, *supra* note 1207.

1659 *Haida*, *supra* note 1477.

is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people affected. In all the Court said, there is no suggestion that, before exercising ministerial discretion in granting an approval for a project, a determination must be made as to whether the project will constitute an unjustifiable infringement of treaty rights, nor is such a suggestion to be found in any of the governing authorities.[1660]

Insofar as the consultation and accommodation *in casu* was concerned, the Court agreed with the BCSC that it had been adequate:[1661] 'deep consultation' had taken place;[1662] a slew of meetings were held with the applicants over the years;[1663] their participation was fully funded;[1664] efforts were made to address mitigation measures subsequent to the JRP Report findings, but these were rejected by the applicants who saw no alternative to the project not proceeding.[1665] The JRP report findings included the "recognition that the project would have a number of impacts on their treaty rights, including their current use of land and resources for hunting, trapping and fishing, which in large measure cannot be mitigated."[1666] The Court did not agree with the applicants that this pointed to a consultation process that did not "demonstrably promote reconciliation"[1667], instead criticizing them for not coming up with any alternatives of their own.[1668] It is clear that the Court attached great significance to the JRP's conclusion "that the project was the least expensive and that its cost advantages would increase in the future."[1669]

[1660] *Prophet River* BCCA, *supra* note 1606 at para 34.

[1661] See *Prophet River* BCCA, *supra* note 1606 at para 39, 53.

[1662] *Prophet River* BCCA, *supra* note 1606 at para 39, 53.

[1663] 177 meetings over the course of 7 years: see *c* 41.

[1664] *Prophet River* BCCA, *supra* note 1606 at para 41, 53.

[1665] *Prophet River* BCCA, *supra* note 1606 at para 41.

[1666] *Prophet River* BCCA, *supra* note 1606 at para 55.

[1667] See *Prophet River* BCCA, *supra* note 1606 at para 56. The applicants relied here on *Chartrand v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 at paras 68–69.

[1668] See *Prophet River* BCCA, *supra* note 1606 at para 59.

[1669] See *Prophet River* BCCA, *supra* note 1606 at para 60.

Ultimately, the Court came to the conclusion that the "Crown's consultation and accommodation efforts should not be deemed unreasonable merely because immitigable impacts are identified",[1670] instead faulting the applicants for their position that amounted to "seeking a veto",[1671] which made the consultation process "unworkable".[1672] In consequence, the Court upheld the finding of the Court of first instance that "there is no sound basis on which to conclude the process of consultation in which the appellants were engaged was other than adequate in the sense of being reasonable in all the circumstances."[1673]

In the Federal Court of Appeal (FCA), the appellants appealed the dismissal of their application for judicial review of the GIC's decision. Interestingly, they did not attack the sufficiency of the consultation process in this forum – which placed the BCCA in a somewhat awkward position.[1674] The GIC's decision in question wat that "although the Site C Project would likely cause significant adverse environmental effects –including adverse effects on the Aboriginal peoples *(sic)* use of lands and resources for traditional purposes– these effects were justified in the circumstances pursuant to subsection 52(4) of the [*Canadian Environmental Assessment Act*] 2012."[1675] The Federal District Court's (FDC) finding was that the CIG had not been under an obligation to determine whether their treaty rights had been unjustifiably infringed under subsection 35(1) of the Constitution Act, 1982, and that the Crown had complied with its duty to consult and accommodate.[1676] While the FCA upheld the FDC's ruling,[1677] it pointed out with reference to *Grassy Narrows*[1678] that a treaty that has been rendered meaningless by Crown infringement would not leave the appellants without

---

[1670] *Prophet River* BCCA, *supra* note 1606 at para 65.

[1671] *Prophet River* BCCA, *supra* note 1606 at para 65.

[1672] *Prophet River* BCCA, *supra* note 1606 at para 65.

[1673] *Prophet River* BCCA, *supra* note 1606 at para 67.

[1674] See *Prophet River* BCCA, *supra* note 1606 at para 18.

[1675] *Prophet River* FCA, *supra* note 1607 at para 5.

[1676] *Prophet River* FCA, *supra* note 1607 at para 20.

[1677] See *Prophet River* FCA, *supra* note 1607 at paras 74–77, 82.

[1678] *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 [*Grassy Narrows*].

remedy, as an action for treaty infringement would arise.[1679] Of course, this is a circular argument in the context of sacred sites, as the sacred site cannot be compensated in monetary value or substituted with another piece of land.[1680] Note, however, that the Court here equally did not make a finding of treaty infringement, preferring to leave it to action proceedings.[1681]

4.5.3.4.4 Analysis

Although they only obliquely deal with Indigenous sacred sites, the *Prophet River* cases provide an excellent illustration of problems that are bound to arise in sacred site protection endeavours when it comes to the infringement of aboriginal or treaty rights: in both these cases the duty to consult and accommodate is triggered. The objective of this duty being reconciliation, it requires of the parties that they negotiate in good faith and in a spirit of compromise. Should, however, one of the parties have an inflexible position that does not allow for compromise, there is no point to the negotiations. Somewhat curiously, the State's complete inability to accommodate is not considered to amount to an inflexible position. The question must therefore be asked: is it true negotiation and compromise if the compromise is inevitably on the part of the Indigenous people and involves them consenting to the project development going ahead? Or, if they do not consent, they are reproached for having fully participated in the process with government funding and thus prevented from having the decision revisited – even where the extent of their participation had been to strenuously object to the project all along? This brings to mind a very sophisticated version of chess where the applicant-players are issued solely with minions at game start, only to be told, upon their inevitable defeat, that the State has won fair and square as per the rules of the game.

Sacred sites, as previously noted, do not invite compromise. They are an absolute, meaning that they bring about veto positions. These are not reconcilable with the duty to consult and accommodate as presently understood in Canadian jurisprudence and thus section 35(1) does not

---

[1679] *Prophet River* FCA, *supra* note 1607 at para 60.

[1680] See e.g. *Prophet River* BCCA, *supra* note 1606 at paras 77–78 on Prophet River First Nation and West Moberly First Nations' declarations to the pertinent Ministers that accommodation would simply not be possible.

[1681] See *Prophet River* FCA, *supra* note 1607 at para 78.

at present offer any concrete form of protection to Indigenous sacred sites. Should the Canadian State make good on the Trudeau Government's undertaking to fully implement *UNDRIP* as per the Recommendations of the Truth and Reconciliation Committee, the Free and Prior Informed Consent (FPIC) requirement may substantially change the rules of the game.[1682]

The discussion of *Prophet River* points to fundamental tensions in Canada's relationship with and treatment of the Indigenous peoples who reside within its borders. If they are expected to negotiate about what they regard as their rights and they do not find themselves in a substantively equal bargaining position in terms of bargaining power or final say, is it really to be expected that these underlying tensions will dissipate and vanish? Be that as it may, it is clear that insofar as sacred sites are concerned, negotiation is axiomatically problematic – which renders the whole consultation and accommodation route very difficult as a potential mechanism for dealing with the protection of Indigenous sacred sites. The notions of compromise and flexibility that are inherent to the *Canadian Charter*'s rights protections also render section 2(a) problematic as balancing is an integral part of the limitation exercise.

4.6 Drawing Conclusions

From the investigation of Canadian law in this Chapter, a number of conclusions may be drawn:

First, Indigenous sacred sites may ground forms of worship for which no physical structures are needed[1683] or that require the practice to be carried out at a different location, lest the site be desecrated.[1684] This concretizes in two ways in Western courts: (1) in the absence of structures to protect, courts are less likely to consider a sacred site as constituting a 'serious' religious space

---

[1682] On the pertinence of *UNDRIP* for Canada, see Karine Gentelet, Doris Farget & Christopher Campbell-Duruflé, "Le Canada et la *Déclaration des Nations Unies sur les droits des peoples autochtones*: valeur et pertinence" (2010) 23:1 Nouvelles pratiques sociales 130.

[1683] E.g. trance-dancing and other ceremonial practices for the Winnemem Wintu: see below at 5.5.2.4 ("Illustration: Desktop Study 3: The Winnemem Wintu and the Raising of Shasta Dam, Northern California, United States").

[1684] See the citation from the *factum* of West Moberly First Nations and Prophet First Nation to the *Ktunaxa Nation* matter, *supra* note 1382.

worthy of intervention; and (2) faced with religious freedom-based claims from Indigenous groups, the courts are less likely to translate these into valid demands for maintaining sometimes extensive third party spaces in a pristine space for the purposes of religious practice that is not even perceivable.

Second, the *Ktunaxa Nation* case study demonstrates the dangers of pleading sacred site cases on a freedom of religion basis in Canada as opposed to a section 35 Aboriginal right. It raises the question whether a sacred site issue –where the parties have an absolutist position in principle - can really be argued as a Charter right, when the Charter is premised on the notion of balancing of interests and compromise. While the Supreme Court has yet to rule in this matter, it may turn out to be quite problematic.

Third, in the facts of *Ktunaxa Nation* we see another difficulty that often complicates sacred sites disputes: overlapping claims staked by different Indigenous Nations. How will this be addressed satisfactorily if the parties each have an absolute position, one *pro* and the other *contra* development?

Fourth, *Ktunaxa Nation* illustrates a new international trend, also recently seen at Standing Rock, *viz* where environmental and other activists join forces with Indigenous activists against a development on the basis that stopping it is in their mutual interest. *Ktunaxa Nation* was particularly interesting in that it united parties from opposite sides of the spectrum, such as environmental activists and trappers in the same cause.

Fifth, *Ktunaxa Nation* provides an example of how strongly natural resource development projects speak to governments: although 79% of the Invermere population had voted had voted against the development in a local referendum, the provincial government simply went ahead – to the extent of incorporating a phantom council – Jumbo Glacier , population zero, with its own mayor, provincial budget, and voting powers.

Sixth, it is doubtful whether the Canadian legal framework is at presently equipped to give a fully nuanced consideration to the protection of Indigenous sacred sites. In the *Ktunaxa Nation* Supreme Court hearing, Justice Brown pointed out the analytical difficulties involved in dealing with a freedom of religion claim that really is tied to an Aboriginal claim in land use. This forms a jarring

contrast with the more holistic Indigenous view that sees land and spirituality as being essentially intertwined.

Seventh, in Canada, sacred site protection claims -whether under section 2 (a) or section 35- are liable to encounter the core issue that there must be compromise in a system that does not rank human right claims in an order of preference (section 2(a)) and that considers compromise as being key to consultation (s 35).

Eighth, there are fundamental differences between Indigenous and Western notions of sacred sites. Three things bear pointing out: (1) Indigenous notions of their 'sacred sites' may not be easily translatable to Westerners, in that the terms 'sacred sites' is either too narrow or too generic. It makes no provision for a gradation in terms of various degrees of sacredness, when we know that all Indigenous sacred sites are not considered to be sacred to the same degree. It is completely inadequate to portray the notion of sacred geographies, as discussed in Part I. (2) To most Westerners, sacred sites are mostly relationally sacred, whereas Indigenous peoples mostly consider their sites to be intrinsically sacred. This means that Western churches can be consecrated and deconsecrated, while Indigenous sacred sites cannot be so relocated because they are of necessity tied to the landscape. (3) Westerners mainly associate the notion of sacred sites with structures erected on land, while Indigenous peoples mostly refer to the landscape itself. It is therefore dangerous to use church analogies in the course of sacred sites litigation.

Ninth, the Site C case study demonstrates the problems that are bound to arise in sacred site endeavours when it comes to the infringement of Aboriginal or treaty rights: in both instances the duty to consult is triggered. The objective of this duty being reconciliation, parties are required to negotiate in good faith and in a spirit of compromise. Here, the Indigenous parties were criticized as being inflexible for failing to negotiate even though it was clear that the State had a complete inability to accommodate their concerns. The question must necessarily be posed whether this amounts to equal negotiation and compromise.

Tenth, sacred sites do not invite compromise. They are an absolute, meaning that they bring about veto positions. These are not reconcilable with the duty to consult and accommodate as understood in Canadian jurisprudence and thus section 35(1) does not at present offer any concrete form of protection to Indigenous sacred sites. Should the Canadian State make good make good on the

federal Government's undertaking to fully implement *UNDRIP* as per the recommendations of the Truth and Reconciliation Committee, the FPIC requirement may substantially change the rules of the game.

Eleventh, the discussion of the Site C case study points to fundamental tensions in Canada's relationship with and treatment of the Indigenous peoples who reside within its borders. If they are expected to negotiate about what they regard as their rights and they do not find themselves in a substantively equal bargaining position in terms of bargaining power or final say, is it really to be expected that these underlying tensions will dissipate and vanish?

Twelfth, it is clear that insofar as sacred sites are concerned, negotiation is axiomatically problematic – which renders the whole consultation and accommodation route very difficult as a potential mechanism for dealing with the protection of Indigenous sacred sites. The notions of compromise and flexibility that are inherent to the *Canadian Charter*'s rights protections also render section 2(a) problematic as balancing is an integral part of the limitation exercise.

Thirteenth, I am therefore not convinced that either section 2(a) (freedom of religion) or section 35(1) (aboriginal and treaty rights) offers a sound mechanism for effecting Indigenous sacred site protection in Canadian law in its present guise. There simply are too many problems of cultural cross-translation when it comes to the way in which the law and the courts conceive of Indigenous sacred sites, and, well-intentioned as it may be, Canadian Aboriginal law all too often still reflects reductionist and essentialized views.[1685]

Fourteenth, from the discussion of the *Ktunaxa Nation* and *Site C* desktop studies, two things are clear: first, that the Canadian Courts and the Indigenous community in question have not to date found a mutually agreed cultural paradigm from which to approach the protection of Indigenous

---

[1685] I am reminded here of Jean Leclair who, in 2011, expressed the following sentiment: "As the case law now stands, I tend to agree with Professor Ghislain Otis when he claims that the Court's reasoning is premised on a 'neo-colonial ideology.'": Jean Leclair, "The Substance and Scope of Aboriginal Rights in Canadian Constitutional Law" (Beijing, China, October 2011) at 15. Also see in this sense, Gordon Christie, "A Colonial Reading of Recent Prudence: *Sparrow*, *Delgamuukw* and *Haida Nation*" (2005) 23 Windsor YB Access Just 17.

sacred sites,[1686] and second, that, to date, the Canadian courts have given little consideration to foreign[1687] and international law[1688] when dealing with sacred site cases.

It is my respectful submission that it is high time for a change on both of these fronts. Only in this way will it become possible for our courts and our Indigenous communities to have an inclusive dialogue that truly reflects the multicultural spirit of our Constitution[1689] and our stated commitment of embracing diversity in our midst while seeking to reconcile the divisions created by our colonial past.[1690]

[1686] *Cf* Borrows, who observes, "What constitutes a "fact" is largely contingent on the language and culture out of which that information arises. The people who decide what a fact is define it from within the matrix of relationships they share with others. Non-aboriginal judges do not usually share the same language and relationships as Aboriginal peoples. Variations between these groups help encode the same facts with different meanings depending on the culture. Therefore, the cultural specificity of facts may make it difficult for people from different cultures to concur. This discrepancy creates an enormous risk of misunderstanding and lack of recognition when one culture submits its facts to another culture for interpretation.": John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37 Osgoode Hall LJ 537 at para 17.

[1687] This is not an absolute statement. Particularly the Supreme Court does refer to foreign law on occasion in this field, e.g. in *Delgamuukw* there was mention –though not discussion– of Australia's celebrated *Mabo* case and in *Haida* the Court preferred the New Zealand Consultation Guidelines to those of the Province of British Columbia.

[1688] Thus Amnesty International won leave to intervene in both the BCCA and the FCA, but neither Court took up their arguments on the applicability of international law in Canada: see *Prophet River First Nation v Canada (Attorney General)* Court File A-435-15 (9 March 2016) (Written Representations of the Proposed Intervener Amnesty International); Open letter from Amnesty International to Justin Trudeau and Christy Clark (18 November 2015) Ref TG AMR 20/2902/2015.

[1689] See here the interesting reflection by Augie Fleras, "Beyond Multiculturalism: Managing Complex Diversities in a Postmulticultural Canada" in Shibao Guo & Lloyd Wong, eds, *Revisiting Multiculturalism in Canada: Theories, Policies and Debates* (Rotterdam, Sense, 2015) 311.

[1690] *Cf The First Nation of Nacho Nyak Dun v Yukon (Government of), 2014 YKSC 69*, 2014 [*Nacho Nyak Dun*] at 182 "I have concluded that the process adopted by the Government of Yukon to create the Government approved plan was not based upon a contextual interpretation of s.11.6.0. Nor did it enhance the goal of reconciliation. It was an ungenerous interpretation not consistent with the honour and integrity of the Crown." Also see *Mikisew*, *supra* note 1207 at 393: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and nonaboriginal *supra*peoples and their respective claims, interests and ambitions."

Chapter 5: United States of America

> La conduite des Américains des Etats-Unis envers les indigènes respire au contraire le plus pur amour des formes et de la légalité. […] Les Espagnols, à l'aide de monstruosités sans exemples, en se couvrant d'une honte ineffaçable, n'ont pu parvenir à exterminer la race indienne, ni même à l'empêcher de partager leurs droits ; les Américains des Etats-Unis ont atteint ce double résultat avec une merveilleuse facilité, tranquillement, légalement, philanthropiquement, sans répandre de sang, sans violer un seul des grands principes de la morale aux yeux du monde. On ne saurait détruire les hommes en respectant mieux les lois de l'humanité.[1691]

***

> [I]n *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1903), […] it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.[1692]

[1691] Alexis de Tocqueville, *Oeuvres, papiers et correspondances: Édition definitive publiée sous la direction de J-P Mayer, Tome I, De la démocratie en Amérique*, 3rd ed, J-P Mayer, ed (Paris: Gallimard, 1951) at 354–355.

[1692] *Lone Wolf v Hitchcock*, 187 US 553, 23 S Ct 216, 47 L Ed 299 (1903) White J [*Lone Wolf*] at 568.

5.1 Introduction

Because of the fact that I treated the Indigenous peoples of Canada and the United States jointly under "North America", I am raising parallel issues in this Chapter as a basis of departure. It is in wrapping up the Chapter with some conclusions that I will reflect on the differences that have appeared from the study of United States law, and especially, from contemplating the two case studies.

In this Chapter I follow a structure as symmetrical as possible to the preceding one. This is because I am setting up Chapters 4 thru 7 for comparison in Chapter 8. Thus I commence with a non-exhaustive Timeline that is intended to contextualize the issues and the progress made to date (5.2), followed by a look at the legal *mentalité* of the United States (5.3). This, I do with reference to their legal family/legal tradition (5.3.1), constitutional tradition (5.3.2), approach to and relationship with Indigenous peoples (5.3.3), and approach to International law (5.3.4). Next, I present a non-exhaustive summary of sources pertinent to sacred site protection in the United States (5.4), before launching into a discussion of their legal response to the issues at hand (5.5). Since the US presents us with a highly regulated, complex legal regime, the positive law provisions are discussed in this Chapter not in terms of available mechanisms, but rather as technical streams to be taken in accordance with the facts at hand. By way of example, a federally recognized tribe is treated differently from one that does not enjoy federal recognition (5.5.2), who the owner of the disputed land is –federal, state, private or tribal party– makes for different laws of application (5.5.3); the nature of the sacred site itself may play a role in determining what the appropriate steps to take are (5.5.4). In respect of each of these three categories a case study is discussed, so as to illustrate what the impact of these variables are on sacred sites protection (5.5.2.4; 5.5.3.4; 5.5.4.5). Finally, I end off the Chapter with some conclusions as aforesaid (5.6).

5.2 Timeline

> The story of US Indian law cannot be told without a clear perspective of the past, for it is immersed in dramatic historical events and complex, long-standing relationships between culturally distinct and sovereign peoples. US Indian law has evolved into a labyrinth of legal doctrines and policies, often changeable, inconsistent, and ambiguous. It has been complicated by the often conflicting policies and rules of judicial, executive, and legislative authorities. Despite the formalities of the rule of law, the treatment of Native Americans has at times gravely tested the morality and constitutionalism of the US system of government. [1693]

Table III: Brief Historical Survey – United States

DATE	DETAILS
1778	**Treaty with the Delawares, 1778, 7 Stat 13.:** The first written treaty between the United States and a Native American tribe "agreed to an end to hostilities, pledged mutual assistance in just wars, and made arrangements for trade and trials of crimes between the two governments."[1694]
1784	**Treaty with the Six Nations, 1784, 7 Stat 15 (Treaty at Fort Stanwix):** *Cohen's Federal Indian Law* traces the origins of Indian policy back to this treaty, the preamble of which stipulated that "the United States received the Indian tribes 'into their protection"' – wording that has been held to lie at the root of "the federal government's obligation to Indian tribes as dependent wards."[1695]
1787	***United States Constitution* (September 17, 1787):** Immediately pertinent aspects include (1) The Commerce Clause, which authorizes Congress to regulate inter-state commerce, as well as that with foreign nations and with Indian tribes.[1696] (2) The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1697] While there is no case law evaluating potential Native American legal challenges to the first clause,[1698] such claims based on the second clause have been largely unsuccessful.[1699] (3)

[1693] Benjamin J Richardson, "The Dyadic Character of US Indian Law" in Richardson, Imai & McNeil, *supra* note 1246, 51 [Richardson, "Dyadic Character"] at 51.

[1694] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at § 1.02, 18.

[1695] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at § 1.02, 20.

[1696] *US Const*, Art I, § 8, cl 3.

[1697] *US Const*, amend I.

[1698] Cohen's Handbook of Federal Indian Law 965 n. 154 (2012.

[1699] Anderson et al (2015) p. 773. They note that "[t]he land-based and holistic features of Indian spiritual practices have often been viewed with scepticism and misunderstanding." (*ibid*

	The Fifth Amendment provides that the federal government may take private property "for public use" upon the payment of "just compensation".[1700] (4) The Fifth Amendment equally provides that no person shall be deprived of property without due process of law. [1701]
1790	**Trade and Intercourse Act: Act of July 22, 1790, 1 Stat 137:** Section **4** prohibits the purchase of lands from Indians or Tribes (unless done by the federal government) and is the foundation for modern land claims for land that was taken without federal consent.[1702]
1812	**The War of 1812 with Great Britain** saw most Indian tribes aligning themselves with Great Britain, as a consequence of their dissatisfaction about treaties.[1703] All Indians who had engaged in hostilities against the United States obtained a general amnesty under the terms of peace that ended the War of 1812.[1704]
1817-1848	During **the Removal Era: 1817–1848** tribes were displaced from heavily populated regions, mostly to the west of the Mississippi.[1705]
1823	***Johnson v M'Intosh* 21 US (8 Wheat) 543, 5 L Ed 681 (1823):** the first case in the famous "Marshall trilogy". Chief Justice Marshall ruled that private purchases from the Indians were not valid.[1706]
1828	**Andrew Jackson wins the presidential election** and in his first Congressional address "declared that it was folly for Indians to claim lands 'merely because it had seen them from the mountain or passed them in the chase' and that he had rejected the tribes' plea for federal protection and informed them 'that their attempt to establish an independent government would not be countenanced by the Executive of the United States, and advised them to emigrate beyond the Mississippi or submit to the laws of those States.'"[1707]
1830	The ***Indian Removal Act*, Act of May 28, 1830, 4 Stat 411** served as "final confirmation that the tribes could not hope for aid from either the President or from Congress. The tribes had no alternative but to bring their claims to court."[1708]

[1700] *US Const*, amend V. Anderson et al note in this regard: "if Congress authorizes the Corps of Engineers to take Indian reservation land to use in a dam project along a river, the amelioration of flooding easily satisfies the public use requirement; the tribe will receive just compensation, but has no way to stop the taking, and the Corps is probably under no obligation to consider alternative approaches that would limit or avoid the taking of Indian land": Anderson et al (2015) p. 169-170.

[1701] *US Const*, amend V.

[1702] See e.g. *County of Oneida v Oneida Indian Nation*, 470 U.S. 266 (1985). and Anderson et al (2015) p. 45-46.

[1703] Cohen (2012) § 1.03[3] p. 40.

[1704] See Cohen (2012) § 1.03[3] p. 41.

[1705] See Anderson et al (2015) p. 50, 79; Cohen (2012) § 1.03[4][b] p. 51.

[1706] See Anderson et al (2015) p. 36-37.

[1707] Cited by Anderson et al (2015) p. 53.

[1708] Anderson et al (2015) p. 54.

1831	***Cherokee Nation v Georgia* 30 US (5 Pet) 1, 8 L Ed 25 (1831)** is the second case in the "Marshall trilogy" and the first of the "Cherokee cases" that constituted a "constitutional crisis" in the relationship between the Supreme Court and the President & the State of Georgia.[1709] The Court held by a majority that they constitute a nation, but not a foreign one, and that as such the Supreme Court therefore had no jurisdiction to hear the application (while federal district courts did not have general federal jurisdiction until 1875, the Supreme Court had original jurisdiction over disputes between states and foreign nations).[1710] *Cherokee Nation* is deemed to be the origin of the federal trust relationship, which holds that the federal government is the trustee of the Indian tribes.[1711]
1832	***Worcester v Georgia* 31 US 515, 8 L Ed 483 (1832):** the third case in the "Marshall trilogy". holding that "Indians" are "domestic dependent nations" and thus fall outside of state legislative jurisdiction.[1712]
1840s-1880s	**The Reservation Period: 1840s to 1880s** concentrated Native American people on reservations "where they could be groomed for civilization under control of federal Indian agents"[1713]
1861-1865	**The Civil War** had a variety of impacts on Native Americans, from land grabs to shifts in policy.[1714]
1862	With the **Act of July 5, 1862, § 1, 12 Stat 512 (codified at 25 USC § 72)** Congress authorized the President to abrogate all treaties of tribes hostile to the United States.[1715]
1868	**Last US treaties** were signed with the Navajos, the Eastern Band of Shoshones, the Bannocks, and the Nez Perce.[1716]
1870s	**Indian Boarding Schools:** "Education was viewed as the single most important tool in nineteenth-century assimilation and 'civilization' policy. And Indian education has remained a central element of Indian policy ever since. Schooling was intended to provide Indian children with a substitute for a civilized home life. The full brunt of re-education was directed toward Indian children, who were shipped away from the reservation or brought together at reservation schools.

[1709] See Anderson et al (2015) p. 54.

[1710] *Ibid.*

[1711] Anderson et al (2015) p. 62.

[1712] See Anderson et al (2015) p. 71.

[1713] Anderson et al " (2015) p. 79. Also see *ibid* at 86.

[1714] See Cohen (2012) § 1.03[7] p. 65.

[1715] See Cohen (2012) § 1.03[7] p. 65.

[1716] See Cohen (2012) § 1.03[8] p. 69.

	The philosophy was most simply expressed by Richard Henry Pratt, the founder of Carlisle School: 'Kill the Indian and Save the Man.'"[1717]
1871	**The Appropriations Act of Mar 3, 1871, § 1, 16 Stat 544 (codified as carried forward at 25 USC 71)** brought an end to treaty-making.[1718]
1876	**Sitting Bull's victory over Custer's forces** at the battle of Little Big Horn: June 25, 1876
1880s-1920s	**Allotment and Assimilation Period: 1880s – 1920s:** "Legislators, courts, and historians agree: allotment was an unmitigated disaster. Between 1887 and 1934, a period of just forty-seven years, it cut the Indian land base by two-thirds, from 138 million to 48 million, with 84% of the remaining tribal land located on unallotted reservations in Arizona, New Mexico, Utah, Wyoming, and Montana."[1719]
1887	***General Allotment Act* of 1887 ("Dawes Act")** "was an act of various motivation. Allotment, humanitarian reformers believed, was necessary if the Indian was to participate fully in the American system. Land speculators and frontier settlers saw allotment as a sure-fire scheme to open up Indian lands for more productive use and ultimate transfer to non-Indian owners."[1720]
1903	***Lone Wolf v Hitchcock*, 187 US 553, 23 S Ct 216 (1903)** serves as authority for Congress's power to abrogate treaties with Indians: "the Supreme Court held the trust relationship to be the source of the plenary power to dispose of assets as Congress saw fit. The Court stated that 'Congress possesse[s] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be employed, even though opposed to the strict letter of a treaty with the Indians' (at 556)"[1721]
1905	***United States v Winans*, 198 US 371, 25 S Ct 662, 49 L Ed 1089 (1905)** confirmed the ongoing validity of treaties until abrogated by Congress.[1722]
1908	***Winters v United States*, 207 US 564 (1908)** serves as authority that a treaty grants to the treaty holders not only the right to the reservation lands, but also to sufficient water to fulfill the purposes of the reservation, meaning that off-reserve land-owners may not divert water from a river that borders the reservation.[1723]
1919	**Congress forbade the use of executive orders creating reservations: Act of June 30, 1919 § 27, 41 Stat 3 (codified at 43 USC § 150).** Executive order reservations and treaty-based

[1717] Cohen (2012) § 1.04 p. 76. Also see Anderson et al (2015) p. 124, 126.

[1718] See Cohen (2012) § 1.02 p. 23; § 1.03[9] p. 70; Anderson et al (2015) p. 79.

[1719] Anderson et al (2015) p. 108. Also see Anderson et al (2015) p 79, 105.

[1720] Cohen (2012) § 1.04 p. 73.

[1721] Richardson (2009) p. 54, n 27.

[1722] See the discussion in Anderson et al (2015) p. 120.

[1723] Discussed in Anderson et al (2015) p. 124.

	reservations are extended the same treatment, save for the fact that executive order reservations are not considered to be held by registered title.[1724] This means that dispossessing a tribe of its executive order reservation is not considered to constitute an unfair taking for purposes of awarding compensation under the Fifth Amendment.
1920s-1940s	**Indian New Deal Period – late 1920s through 1940s:** was marked by a "shift (…) away from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture. It was a time of affirmation of the Indian civilization so strongly condemned in the previous era. This reversal of attitude was reflected in new protection for Indian rights, support for federally defined tribalism, and encouragement of historical and anthropological concerns such as arts, crafts, native rituals, tourism, and traditional economic systems."[1725]
1928	**Publication of *The Problem of Indian Administration* ("The Meriam Report")**, a two-year non-governmental study undertaken by the Brookings Institute, that highlighted the desperate living conditions of Native Americans and became a catalyst for change.[1726]
1934	***U.S. Indian Reorganization Act* (IRA) 48 Stat 984 (1934) *("Wheeler-Howard Act")*, 25 USC § 472**, sometimes referred to as the "Indian Magna Carta",[1727] had as objective to bring an end to the alienation of Indian lands and to empower tribes to repurchase their former tribal domains and to purchase additional acreage. [1728]
1935	**The *Historic Sites Act* of 1935** targeted the conservation and protection of national heritage during the course of large scale development projects.[1729]
1940s-1960s	**Termination Period: 1940s – 1960s:** "In the narrow sense, termination was an experiment imposed on a small number of tribes that ended, in virtually all respects, the special relationship between those tribes and the federal government. Other policies of the termination era had much broader implications, however. Those tribes not directly terminated were subjected to a series of laws that transferred important areas of responsibility from the Bureau of Indian Affairs to other federal agencies and to the states. Vast acreages of Indian land were allowed to pass out of Indian hands, while Indians were encouraged to seek employment off the reservation."[1730]
1946	**The Indian Claims Commission Act of 1946 (ICCA), c 959, s 2, 60 Stat 1049, 1050 (Aug 13, 1946)** created a special process and tribunal for tribes wanting to bring monetary claims against the

[1724] See Anderson et al (2015) p. 230.

[1725] Cohen (2012) § 1.05 p. 79-80.

[1726] Cohen (2012) § 1.05 p. 80. Also see Anderson 128-129.

[1727] (King: 133).

[1728] See Cohen (2012) § 1.05 p. 81-83; Anderson et al (2015) p. 80, 130; (King: 113).

[1729] See Bradley L Garrett, "Drowned Memories: The Submerged Places of the Winnemem Wintu" (2010) 6:2 Archaeologies 346 at 351.

[1730] Cohen (2012) § 1.05 p. 86. Also see Cohen (2012) § 1.05 p. 84-85; Anderson et al (2015) p. 80, 139; Felix S Cohen, *The Erosion of Indian Rights 1950-1953: A Case Study in Bureaucracy,* (1952-1953) 62 Yale L J 348.

	US for "takings of land, failures to provide promised treaty funds, other violations of law and 'claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.'[1731]
1953	***House Concurrent Resolution* 108 ("the Termination Act")** affected 109 tribes and bands.[1732]
1955	***Tee-Hit-Ton Indians v. United States*, 348 US 272, 75 S Ct 313, 99 L Ed 314 (1955):** The Court held that the federal government may extinguish aboriginal title without falling foul of the Fifth Amendment's Takings Clause.[1733]
1960s–Present	**Self-Determination Period: 1960s to Present:** "Congress and the Executive began the policy of 'self-determination without termination,' encouraging tribal control of governmental services and tribal resources, economies and culture, and negotiation with tribes regarding tribal problems. […] The period has been accompanied by what some see as an era of judicial backlash, in which the Supreme Court undermines tribal sovereignty in the face of congressional recognition of sovereignty.": Anderson et al (2015) 80. Also see Anderson et al (2015) 152-154.
1977	***Delaware Tribal Bus. Comm. v. Weeks,* 430 US 73, 85 (1977):** "Laid to rest the idea [*Lone Wolf*] that relations between the U.S. and the Indian tribes are a political matter, not amenable to judicial review: "In particular, the Court has held that in taking federally recognized tribal property, the United States must provide fair compensation for the property, and that the Court should scrutinize the factual record to determine whether it has done so."[1734]
1977	***Badoni v. Higginson*, 455 F Supp 641 (D Utah 1977):** failed attempt by the Navajo people to protect the Rainbow Bridge on the basis of a free exercise claim after the construction of Lake Powell began giving tourists easy access to this sacred site.[1735]
1978	***Code of Federal Regulations*, Title 25: Indians 25 CFR § 83.7**: stipulates the mandatory criteria for federal recognition as an Indian tribe.[1736]
1978	The ***Indian Child Welfare Act* of 1978 (ICWA). 25 USC §§ 1901–1931** aimed to address the elevated rate of child removals from reservation communities through increased tribal jurisdiction over child protection matters. It was an important example of self-determination legislation.[1737]

[1731] Anderson et al (2015) p. 132, 208. For an in-depth discussion, see Earl M Maltz, "Brown and Tee-Hit-Ton" (2004) 29 American Indian Law Review 75.

[1732] For a detailed discussion, see Anderson et al (2015) p. 141; (King: 136.

[1733] Anderson et al (2015) p. 629-630.

[1734] *United States v. Sioux Nation,* 448 U.S. 337, 413 (1980) at 416-417.

[1735] See Anderson et al (2015) p. 805 for a detailed discussion.

[1736] For a discussion of the process, see Cohen's Handbook of Federal Indian Law 153-160 (2012).": Anderson et al (2015) p. 270-1.

[1737] Anderson et al (2015) p. 153.

1978	***American Indian Religious Freedom Act* of 1978, ("AIRFA"):** its objective was to affirm the freedom of belief of Native American peoples and to give clear policy guidelines for the protection of their religious protection. It has, however, proved largely ineffective.[1738]
1979	***Archaeological Resources Protection Act* of 1979, (ARPA)**: federal land managers (this includes Indian tribal governments on federal Indian trust reservation land) must notify and consult with Indian tribes when there is archaeological work that may endanger any sites that are of cultural or religious importance to them.[1739]
1980	The ***National Historic Preservation Act*** amendments enable tribes to protect sacred sites on reservation lands by working with the federal government on historic preservation issues. It also makes available potential funding for the preservation of such cultural and historical heritage.[1740]
1980	***United States v. Sioux Nation,* 448 U.S. 337, 413 (1980):** The scope of *Tee-Hit-Ton* was limited to a great extent, in that the Supreme Court affirmed that 'federally recognized' aboriginal title was protected by the Takings Clause.[1741]
1988	***Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439, 108 S Ct 1319, 99 L ed 2d 534 (1988)**: the Supreme Court held that the First Amendment's Free Exercise Clause does not prohibit the Government from permitting timber harvesting in or constructing a road through a National Forest that has traditionally been used for religious purposes by the members of three American Indian tribes in northwestern California..[1742]
1990	***National Indian Forest Resource Management Act* of 1990 (PL 101-630), 25 USC §§ 3101–3120:** this is self-determination legislation that enables greater tribal involvement in and control over forest resource management if the tribe so desires.[1743]
1990	***Native American Graves Protection and Repatriation Act* of 1990 (NAGPRA):** was enacted with the objective of recovering Native American human remains, funerary and sacred objects, and objects of cultural patrimony from federal agencies and museums funded by the federal government.[1744]

[1738] See Carmichael, 1994; Cooper (2008) p. 31; Franklin & Bunte (1994) p. 254; Anderson et al (2015) p. 153; Anderson et al (2015) p. 783-784.

[1739] See Franklin & Bunte (1994) p. 255; Cohen's Handbook of Federal Indian Law 1285-88 (2012); Anderson et al (2015) p. 823.

[1740] Franklin & Bunte (1994) p. 255.

[1741] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1057.

[1742] See Anderson et al (2015) p. 774-784; *See* Scott Hardt, Comment, *The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis*, 60 U. Colo. L. Rev. 601, 657 (1989); Cohen's Handbook of Federal Indian Law 970, n. 187 (2012).

[1743] Anderson et al (2015) p. 635.

[1744] See Cooper, 2008 p. 7; Anderson et al (2015) p. 154, 821-822; Garrett, *supra* note 1729 at 353.

1990	***Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872, 110 S Ct 1595, 108 L Ed 2d 876 (1990) : "**Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug."[1745]
1991	***Peyote Way Church of God, Inc. V Thornburgh*, 922 F 2d 1210, 1281 (5th Cir 1991):** "state exemption of members of Native American Church, whose membership was limited to those of Native American descent, from laws criminalizing Peyote possession did not violate equal protection where state exemption was similar to congruent federal exemption."[1746]
1992	***Amendment: National Historic Preservation Act* [NHPA]** has *inter alia* the effect of adding 'properties of traditional and cultural value to an Indian tribe' to those that are eligible for inclusion in the National Heritage Register.
1992	**US** ratifies the ***International Covenant on Civil and Political Rights,* (adopted 16 December 1966, entered into force 23 March 1976) [ICCPR]**
1993	***Religious Freedom Restoration Act* [RFRA]: "**Congress responded to the *Smith* decision by enacting the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1-2000bb-4 [RFRA]. The RFRA restored the substantial burden/compelling state interest test that the Court had articulated in *Sherbert v Verner*, 374 US 398 (1963) by providing that even a rule of general applicability may not substantially burden a person's exercise of religion unless the government shows that 'application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'"[1747]
1993	***Wilson v Block*, 708 F 2d 735 (DC Cir 1993)**: Navajo and Hopi religious practitioners brought a free exercise challenge to the first significant expansion of the Snowbowl. The Court determined that the expansion of the ski area did not substantially burden the plaintiffs' exercise of their religion.
1994	***Federally Recognized Tribe List Act* of 1994 (Public Law 103-454)**
1995	***Pueblo of Sandia v United States*, 50 F 3d 856 (10th Cir 1995)**: The Tenth Circuit held that the National Forest Service violated the *National Historic Preservation Act* [NHPA] by failing to evaluate Pueblo's cultural and religious use of canyon.[1748]

[1745] *Smith*, per Scalia J, at 787.

[1746] Anderson et al (2015) p. 201.

[1747] Anderson et al (2015) p. 791.

[1748] See Anderson et al (2015) p. 824.

1996	***Executive Order 13007*, 61 Fed Reg 26,771 (May 24, 1996) – *Protection of Indian Sacred Sites*** in terms of which federal agencies must "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners."[1749]
1996	US ratifies the ***International Convention on the Elimination of All Forms of Racial Discrimination***
1997	***City of Boerne v Flores*, 521 US 507 (1997):** "In *City of Boerne v Flores*, 521 US 507 (1997), the Supreme Court held that RFRA was unconstitutional as applied to states because Congress had exceeded its powers under section five of the fourteenth amendment. With respect to federal agencies, however, RFRA is valid because it draws on the constitutional authority to create those agencies."[1750]
1998	***Bear Lodge Multiple Use Ass'n v Babbit* 2 F Supp 2d 1448 (D Wyo 1998); *aff'd* 175 F 3d 814 (10th Cir 1999) (holding that the plaintiffs lacked standing); *cert denied* 529 US 1037 (2000):** The federal district court rejected a claim that a voluntary ban against the climbing of Devil's Tower (Bear Butte) during June –the peak tribal religious activity season– violated the establishment clause.[1751]
2000	***Religious Land Use and Institutionalized Persons Act* of 2000, 42 USC § 2000cc, *et seq* [RLUIPA]:** RLUIPA prohibits state and local governments from imposing substantial burdens on the exercise of religion through prisoner or land-use regulations unless those burdens are the least restrictive means of achieving a compelling interest.
2001	***Wyoming Saw Mills, Inc v United States Forest Service*, 179 F Supp 2d 1279 (2001), aff'd, 383 F 3d 1241 (10th Cir 2004):** "The National Forest Service's Historic Preservation Plan for the Medicine Wheel National Landmark and Medicine Mountain (HPP) provides protection for a prehistoric site consisting of a circular array of rocks eighty feet in diameter with a large rock pile in the center and 'spokes' radiating therefrom. The Medicine Wheel HHP requires consultation with tribes before allowing activities that would harm the Wheel's spiritual values, and closes a road within view of the Wheel." [1752] It was upheld against a logging association's establishment clause challenge.
2002	***Natural Arch and Bridge Society v Alston*, 209 F Supp 2d 1207, 1212 (D Utah 2002), *aff'd*, 98 Fed Appx 711 (10th Cir 2004):** The National Park Service (NPS)'s General Management Plan (GMP) in respect of the Rainbow Bridge, a site sacred to the Navajo, was challenged by the Natural Arch and Bridge Society on establishment grounds. The Court upheld the GMP, citing the voluntary nature of the visitor restrictions that it contained.
2004	***Bonnichsen v United States*, 217 F Supp 2d 1116 (D Or 2002), *aff'd and remanded*, 367 F 3d 864 (9th Cir 2004)**: the battle for the return of the 9,300 year-old skeleton of the 'Kennewick man' to the tribes was won by the scientists when the Ninth Circuit upheld the decision of a federal district

[1749] See the discussion in Anderson et al (2015) p. 803.

[1750] Anderson et al (2015) p. 791.

[1751] For a discussion, see Lloyed Burton & David Ruppert, "Bear's Lodge or Devil's Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands", 8 Cornell JL & Pub Pol'y 201 (1999).

[1752] Anderson et al (2015) p. 806.

	court that there was not a sufficiently close cultural affiliation between the present day tribes and the skeleton.
2005	***Indian Tribal Energy Development and Self-Determination Act* of 2005 [ITEDSA]** reduces the role of the federal government in tribal leasing and development decisions and institutes a single legal regime to govern energy and mineral resources. It is typical self-determination legislation.[1753]
2006	In ***Grace Methodist Church v City of Cheyenne*, 451 F 3d 643, 662 (10th Cir 2006)** the Tenth Circuit "defined 'substantial burden' to include denying an individual 'reasonable opportunities to engage in those activities' that are important to an individual's religion, and found that RLIUPA relaxed the definition of religious exercise under *Lyng* and RFRA."[1754]
2008	***Navajo Nation v United States Forest Service*, 535 F 3d 1058 (9th Cir 2008) (*en banc*)**: The use of artificial snow made with recycled wastewater on a portion of public mountain sacred to the Navajo does not constitute a substantial burden on the exercise of their religion.
2009	***Glamis Gold, Ltd v United States of America*, 2009:** Glamis (now Goldcorp Ltd.) lodged an unsuccessful NAFTA complaint when its environmental permission was revoked after a federal cultural revision of the process and intervention by the California governor on the basis that it would "irreparably damage sites sacred to the Quechan Indian tribe".
2010	**United States reverses its opposition to UNDRIP:** On December 16, 2010 the US Department of State announced its support of UNDRIP,[1755] motivating its decision to review its position as both a "response to calls from many tribes, individual Native Americans, civil society, and others in the United States"[1756] and an indication of its desire to "be a better model for the international community in protecting and promoting the rights of indigenous peoples".[1757]

[1753] See Anderson et al (2015) p. 637–639.

[1754] Anderson et al (2015) p. 793-802.

[1755] See released its "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples. Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples", (2010), online: <http://www.state.gov/s/tribalconsultation/declaration/>.

[1756] *Ibid*, at 1.

[1757] *Ibid*, at 15.

5.3 Background: Uncovering the *Legal Mentalité* of the United States

> If I stand alone in the Senate, I want to put upon record my prophecy in this matter, that when thirty or forty years have passed and these Indians shall have parted with their title, they will curse the hand that was raised professedly in their defense to secure this kind of legislation and if the people who are clamoring for it understood Indian character, and Indian laws, and Indian morals, and Indian religion, they would not be here clamoring for this at all.[1758]

5.3.1 Legal Family/Legal Tradition

As another English law descendant, US law has a common law system and follows the doctrine of precedent — albeit not in exactly the same way as English law does.[1759]

There are both similarities and differences in its treatment of its Indigenous peoples when compared with that of Canada: while it followed similar assimilationist policies and had an important treaty-making tradition, the last US treaties were concluded in 1868.[1760] *Cohen's Federal Indian Law* calls inherent powers of sovereignty "[p]erhaps the most basic principle of all [American] Indian law".[1761] However, these powers are limited and subject to governmental extinguishment.[1762]

[1758] Senator Teller, as cited by DS Otis in a 1934 history of allotment written for the Bureau of Indian Affairs (Francis P. Prucha ed., 1973), cited by Anderson et al, *supra* note 386 at 106–107.

[1759] See De Cruz, "Comparative Law", *supra* note 240 at § 9 on variances in the United States and England.

[1760] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 69. Holding a ratified treaty is one of the simpler ways of meeting the qualification criteria for "Indian tribe" status. See below at 5.5.2.1 ("Federally Recognized Tribe").

[1761] *Ibid* at 207.

[1762] *Ibid* at 206–207.

5.3.2 Constitutional Culture

The United States is a federal constitutional republic. Although it was initially subject to British sovereignty it gained its independence in 1776. It is thus a former British colony, but it is not a member of the Commonwealth of Nations.

The United States has the oldest *Constitution* (1787) of the four jurisdictions studied, and it is the only codified one. The US Bill of Rights was added to the Constitution 4 years after its enactment.[1763] The liberal-democratic[1764] Constitution is known for its rigidity (Art V)[1765] — since 1787 it has only been amended 27 times. The doctrine of separation of powers forms one of its cornerstones.[1766] The landmark case of *Marbury v Madison*[1767] established judicial review of unconstitutional acts by the legislature in 1803, but fundamental rights enforcement only really took off during the course of the twentieth century.[1768] The US Constitution was widely considered to be the most liberal law of its time, as it was adopted by the Founding Fathers in the context of the "revolutionary goal of the American colonists" that "was external and political in nature."[1769]

It has neither a Human Rights Commission nor a Human Rights Tribunal, the Supreme Court having jurisdiction over matters constitutional.

[1763] For a contextual discussion, see Grimm, *supra* note 908 at 109.

[1764] See *ibid* at 126.

[1765] See *ibid* at 111.

[1766] See *ibid* at 109.

[1767] *Marbury v Madison*, 5 US 137 (1803).

[1768] See Grimm, *supra* note 908 at 112.

[1769] *Ibid* at 119.

5.3.3 Approach to and Relationship with Indigenous Peoples

> The fate of Native American faiths in the United States directly corresponds to the fate of Native Americans, including persecution, attempts to force religious and cultural assimilation, and limitations on sovereignty.[1770]

5.3.3.1 Self-Identification and State Identification

The daily lives of the Indigenous peoples of America are regulated by a well-developed body of "Indian Law", one to which concepts such as "Indian", "Indian tribe"[1771] and "Indian country"[1772] are central.[1773] These concepts have never had a single, static, all-encompassing, all-purpose definition and that federal and tribal understandings vary.[1774] Adopting such terms is thus unavoidably part of a discussion of their legal position. However, I employ them strictly as markers of legal standing. That is to say—"Indian" is a legal construct for purposes of US law: not a statement of fact,[1775] an identity construct or a reflection of socio-anthropological theory.[1776]

[1770] Elizabeth A Sewell, "Religious Liberty and Religious Minorities in the United States" in Courtney & Smith, *supra* note 1273, 339 at 352.

[1771] The question of what constitutes an "Indian tribe" is dealt with at length below at 5.5.2.1 ("Federally Recognized Tribe"), as it goes to the heart of the desktop study undertaken in 5.5.2.4 ("Illustration: Desktop Study 3 – The Winnemem Wintu and the Raising of Shasta Dam, Northern California").

[1772] See below at 5.5.3 ("Tribal, Federal or Private Land"). A sacred site situated in "Indian country" (broadly speaking: reservation jurisdiction areas) is subject to a different statutory regime from one located off-reservation. In this study, I pursue off-reservation sacred sites (i.e. non-Indian country). See below at 5.5.3.1 for the statutory regime applicable to sacred sites situated in Indian country.

[1773] Anderson et al, *supra* note 386 at 251; Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 130.

[1774] See *ibid* at 130–131. The authors observe that "these terms have served to delineate jurisdictional authority, legal responsibilities, and property rights through much of federal Indian law.": *ibid* at 130.

[1775] Thus some federally recognized tribes are legal entities only (e.g., a consolidated tribe made up of different tribes who occupy the same reservation; a politically confederated group that has received legal recognition along with its constituent tribes; Native Americans organized thus under the *U.S. Indian Reorganization Act* (IRA) 48 Stat. 984 (1934) *("Wheeler-Howard Act")*, 25 USC § 472 [*IRA*] irrespective of linguistic, cultural or political affiliation; or the so-called "California Mission Indians") or "represent fragments of previously unified peoples", such as the great Sioux nation who was federally divided in order to weaken it militarily: Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 133.

[1776] Anderson et al, *supra* note 386 at 251. Federal definitions of "Indian" that require membership of an Indian tribe do not constitute impermissible racial discrimination under the equality provisions of the Constitution, as it is a political

The reason would appear to be found in the particular thinking that underlies these definitions: in essence, an "Indian" is a member of a federally recognized "Indian tribe".[1777] Federal recognition of a tribe does not mean that a tribe exists, but is predicated upon the peculiar notion of "domestic dependent nations"[1778] that characterizes US Indian law—it indicates that a government-to-government relationship exists between the United States and the tribe in question.[1779] Tribal status is determined according to whether name of the tribe appears on the Department of the Interior's Federally Recognized Tribes List. This is a complex and contentious area of law discussed in more detail in the context of Chapter 5 ("United States of America").[1780] Whether a person is recognized as a member of a given Indian tribe, is governed largely by the laws of the tribe in question.[1781] Tribal membership requirements vary widely in terms of blood quantum (ancestry percentage) requirements.[1782]

---

rather than a racial classification: *Morton v Mancari*, 417 US 535 (1974) at 551–555. See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 181.

[1777] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 131. But the position is not quite so simple. While there seems to be an increasing willingness on the part of the federal government to associate being "Indian" with membership under tribal law (*ibid* at 171) different courts have imposed varying criteria in respect of a number of statutes and thus far a consistent overall definition has not emerged: see *ibid* at 176–183. The common test for purposes of federal criminal statutes appears to have two components — Indian descent and recognition as an Indian by a federally recognized tribe, although the requisite ancestry percentage is not clear: *ibid* at 177.

[1778] The *locus classicus* is *Cherokee Nation*, *supra* note 1821 at 17: "Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."

[1779] Anderson et al, *supra* note 386 at 251; Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 105. State law therefore does not generally apply within the territory of an Indian tribe, except insofar as Congress has consented thereto: see *ibid* at 492–496 on "the *Worcester* rule". Also see *ibid* at 25–26 on the utilization of "terms familiar to modern diplomacy" in Indian treaties.

[1780] See specifically at 5.5.2.1 ("Federally Recognized Tribe").

[1781] The courts have consistently held this to be one of an Indian tribe's most fundamental powers: Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 175 and see the authority cited at n 25 on the same page.

[1782] *Cohen's Federal Indian Law* provides the following broad summary of the position: "[it] typically turns on descent from an individual on a base list or roll, possession of a specified degree of ancestry from such an individual, domicile at the time of one's birth, or some combination of these criteria": *ibid* at 173. For a detailed discussion of the key rules pertaining to descent, multiple membership and disenrollment, see Kirsty Gover, "Tribalism Constitutionalized: The Tribal Governance of Membership in Australia, Canada, New Zealand, and the United States", c 2 of her *Tribal*

There is no single, universally valid definition of "Indian" for purposes of federal Indian law: it is a political, rather than racial classification that is context-dependent. There is no set list of qualifications or minimum overall blood percentage—in fact, it is possible to be Indian for some purposes and not for others.[1783] It also is apparent that Indian and federal views differ on the meaning of being "Indian".[1784] Thus, in the 2010 census, 5.2 million individuals indicated that they were American Indian/Alaska Native (1.7% of the population),[1785] either alone or in combination with some other race.[1786] Of this group, 2.9 million (0.9%) claimed American Indian/Alaska Native as sole descent. Yet, as of 2005, only around 2 million individuals were officially enrolled in a federally recognized American Indian tribe or an Alaska Native village.[1787]

5.3.3.2 Evolving Approach

Elizabeth A Sewell observes that the United States "has always been one of the most religiously diverse countries in the world" and asserts that the most striking feature of its religious pluralism is "the historical depth of its denominational breadth". Upon scrutinizing the substantiating data that she offers for this contention, however, it soon becomes clear that this statement only holds water

---

Constitutionalism: States, Tribes, and the Governance *of Membership* (Oxford Scholarship Online: Oxford University Press, January 2011), DOI < 10.1093/acprof:oso/9780199587094.001.0001> at 67-107. Matthew Fletcher points to the "crisis of identity" lived by American Indian tribes – while it is not possible to "rationally devise a boundary between who is an American Indian and who is not", the individual federally recognized tribes have each managed to come up with legal membership criteria: the consequent Court-sanctioned arbitrariness of "Indian" status is striking. See Matthew LM Fletcher, "Tribal Membership and Indian Nationhood" (2013) 37 Am Indian L Rev 1 at 1.

[1783] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 170–172.

[1784] *Ibid* at 132; cf also "[2] Tribal Definitions" and "[4] Federal Definitions" at 176–183.

[1785] Native Americans accounted for 1.5 percent of the total United States population in the 2000 census: Kukutai, *supra* note 95 at 49 n 3.

[1786] Melissa Nobles, "The Challenge of Census Categorization in the Post-Civil Rights Era" in Eisenberg & Kymlicka, *Identity Politics*, *supra* note 96, 31 has highlighted the important role of census demographics in US civil rights legislation (at 32).

[1787] Anderson et al, *supra* note 386 at 6–7.

so long as "religious diversity" is defined in Christian terms.[1788] Native American religions, per definition, are thus excluded.

This provides a fairly apt illustration of the treatment that Native Americans have experienced, and often still experience, in the United States. American Indian law insists on categorizing Native American communities into federally recognized (and non-recognized) "Indian tribes"[1789] and then awards benefits (both on tribal and individual level) according to "Indian tribe" status: this creates a climate fertile for division and competition. Not all recognized tribes have reservations — but only recognized tribes have reservations.[1790] Only federally recognized tribes may operate casino's; only federally recognized tribes are exempt from state taxes and state jurisdiction; federally recognized tribes have a right to be consulted where pertinent Native American interests are affected.[1791] It is fair, then, to say that the very structure of Native American existence in the United States is determined by tribal status.

The Federally Recognized Tribes List is a public list that has been updated and published by the Secretary of the Interior (DOI) an annual basis since 1994.[1792] It builds on the formal federal recognition procedure for Indian tribes as established by the Bureau of Indian Affairs of the DOI as an administrative process in 1978.[1793] Prior to the inception of the list a tribal group's federal

---

[1788] She states that at 51.3% "all Protestant Christians barely made up a majority of the population", the remaining 48.7% consisting of "a broad smattering of other Christian denominations, Jews, Buddhists, Muslims, Hindus, Native American religions and individuals unaffiliated with any religion (16.1%)." She then provides the figure for Roman Catholics (23.9%) — i.e., Christians make up at least 75.2%, there are 16.1% who subscribe to no religion, and Jews, Buddhists, Muslims, Hindus, Native American religions, and all the rest, therefore together make up *at most* 8.7%: see Sewell, *supra* note 1770 at 249–250.

[1789] This is almost as simplistic as the school lesson recalled by Winona LaDuke: "When I was in grade school, I was taught there were Plains Indians (warlike), Woodlands Indians (democratic), and Pueblo Indians (pacifistic, and that's about all": LaDuke, "Secessionist View", *supra* note 320 at 11.

[1790] See below at 5.5.3 ("Tribal, Federal or Private Land").

[1791] See below at 5.5.2 ("The Federal Recognition Criterion?).

[1792] In terms of the *Federally Recognized Tribes List Act* of 1994, 25 USC §§ 479a, 479a-1.

[1793] 25 CFR Part 83. Both substantive and procedural concerns have been raised with regards to this administrative process followed. Substantive concerns include uneven standards of proof, unequal treatment of different groups, bias against particular groups and the influence of "unwritten, improper policy considerations": Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 159. Procedural concerns comprise issues such as high costs, long delays and inconsistent results: *ibid.*

existence had depended on the existence of treaty relations or another formal political act acknowledging the tribal status of such group, such as a statute or a ratified agreement.[1794]

At this point the notion of "Indian tribe" as utilized in federal American Indian law needs to be circumscribed further. It does not mean that a tribe exists,[1795] but rather that there is a government-to-government relationship between the tribe and the US.[1796] It is also the source of the federal trust responsibility towards the tribe.[1797] Federal recognition of a tribe establishes tribal status for federal purposes such as health services, and recognition of tribal sovereignty in matters such as child welfare, gaming and the environment.[1798] Federal and tribal understandings of the concept "Indian tribe" do not necessarily mesh[1799] — an "Indian tribe" can for federal purposes be purely a legal entity, or a mere fragment of a previously unified larger group, or it can even be made up of different tribes occupying the same reservation.[1800]

Federal recognition is a political and constitutive act[1801] that grants the tribe and its members access to "a panoply of benefits and services."[1802] *Cohen's Federal Indian Law* aptly summarizes the conflicting value structures underlying federal and tribal conceptions of tribal status in the following terms, "This legal status cannot, of course, deny historical or cultural evidence about tribal existence; nevertheless, this evidence has no legal significance in the context of federally recognized political and legal existence."[1803]

[1794] *Ibid* at 140.

[1795] Anderson et al, *supra* note 386 at 135–136.

[1796] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 134; Anderson et al, *supra* note 386 at 251.

[1797] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 134 n 19.

[1798] *Ibid* at 131; Anderson et al, *supra* note 386 at 1.

[1799] *Ibid* at 251; Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 130.

[1800] *Ibid* at 133. Thus, for instance, the federally recognized Redding Rancheria "comprises the descendants of selected families of the Wintu, Pit River, and Yana tribes": Lalouche, *supra* note 1918 at 9.

[1801] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 134.

[1802] HR Rep No 103-781, 103rd Cong. 2d Sess, 1994, 3, cited in Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 134.

[1803] *Ibid* at 135–136.

Since it is a political act, no court has yet overturned a congressional or executive determination of tribal status[1804] and the "arbitrariness" standard proposed by the US Supreme Court in *United States v Sandoval*[1805] only ventures to suggest that Congress cannot define tribal status so as to create a tribe out of a completely disparate group of individuals –there certainly has been no suggestion of any obligation towards federal recognition.[1806]

There presently are 566 federally recognized Indian tribes, of which 229 are Alaska Native tribes that mostly live in remote areas.[1807] A great many others find themselves in legal limbo.[1808]

5.3.4 Approach to International Law

In Chapter 3, we learnt the following about the United States' approach to International law: (1) it is a complex field that distinguishes between treaties and three types of executive agreements; (2) treaties are concluded by the Executive and approved by a two-thirds majority of the Senate; (3) treaties can be either self-executing, or non-self executing; (4) non-self –executing treaties require implementing legislation in order to enter into force; (5)the US Supreme Court has held that Acts of Congress are on full parity with treaties, meaning that an earlier treaty will be subrogated by a later statute insofar as they are in conflict; (6) they also are on full parity as being "the supreme law of the land"; (7)there is authority to the effect that customary international law forms part of US law, but this is a controversial area and it is likely that domestic legislation will prevail in the event

---

[1804] *Ibid* at 138.

[1805] *United States v Sandoval*, 231 US 28, 46 (1913).

[1806] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 138–139. I deal with this matter in detail in Chapter 5 on US positive law and it is an important aspect of my desktop study on the Winnemem Wintu tribe's ongoing struggle against the raising of Shasta Dam in the State of California. Hence I will not launch into the associated intricacies here.

[1807] Anderson et al, *supra* note 386 at 2.

[1808] See e.g. "List of Unrecognized Tribes in the United States", *Wikipedia*, online: <en.wikipedia.org/wiki/List_of_unrecognized_tribes_in_the_United_States>; "Tribes Forced to Prove Existence", *Manataka American Indian Council*, online: <www.manataka.org/page240.html>; Helen Oliff, "Can Tribes Be Unrecognized" (9 July 2013) *Partnership with Native Americans*, online: < http://blog.nativepartnership.org/can-tribes-be-unrecognized/>.

of a conflict; (8) there also is no unanimity over the use of foreign jurisprudence in the interpretation of domestic legislation or constitutional requirements.

5.4 Summary of Sources

Table IV: Overview of the Legal Framework of the United States

UNITED STATES	
Express Constitutional Protection	
Implicit Constitutional Protection: Fundamental Rights Protection	Freedom of Religion First Amendment (1791) to the *United States Constitution* (1787): Free Exercise Clause (avoiding restrictions imposed by Establishment Clause) *Sherbert v Verner*, 374 US 398 (1963) *Wisconsin v Yoder*, 406 US 205 (1972) *Badoni v Higginson*, 455 F Supp 641 (D Utah 1977) *American Indian Religious Freedom Act* [*AIRFA*] of 1978, Pub L 95-341, Aug 11 1978, 92 Stat 469, 42 USC §§ 1996, 1996a *Sequoyah Valley v Tennessee Valley Authority*, 620 F2d 1159 (6th Cir), cert denied, 449 US 953 (1980) *Crow v Gullet*, 541 F Supp 785 (DSD 1982) *Wilson v Block*, 708 F2d 735 (DC Cir 1983) *United States v Means*, 858 F2d 404 (8th Cir 1988) *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439, 108 S Ct 1319, 99 L Ed 534 (1988) *Manybeads v United States*, 730 F Supp 1515 (D Ariz 1989) *Havasupai Tribe v United States*, 752 F Supp 1471 (D Ariz 1990) *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872, 110 S Ct 1595, 108 L Ed 2d 876 (1990) *Religious Freedom Restoration Act* [*RFRA*], Pub L 103-141, 107 Stat 1488, Nov 16 1933, 42 USC § 2000bb *et seq* *Bear Lodge Multiple Use Association v Babbitt*, 2 F Supp 2d 1488 (D Wyo 1998) aff'd, 175 F3d 814 (10th Cir 1999) *City of Boerne v Flores*, 521 US 507 (1997) *Cholla Ready Mix, Inc v Civish*, 382 F3d 9669 (9th Cir 2007) *Access Fund v US Department of Agriculture*, 499 F3d 1036 (9th Cir 2007)

	Navajo Nation v United States Forest Service, 535 F 3d 1058 (9th Cir 2008) (*en banc*) *Burwell v Hobby Lobby Stores, Inc*, 134 S Ct 25751, 2671 (2014) *Standing Rock Sioux Tribe v US Army Corps of Engineers*, F Supp 3d (2016), 2016 WL 4734356 (DDC, 9 Sept 2016) [*Standing Rock I*] *Standing Rock Sioux Tribe v US Army Corps of Engineers*, F Supp 3d (2017) (DDC, 7 March 2017), 2017 WL 908538 [*Standing Rock II*]
Implicit Constitutional Protection Minority Rights Protection	
Statutory Provisions: Sui Generis Legislation	*Native American Graves Protection and Repatriation Act* [*NAGPRA*], Pub L 101-601, Nov 16 1990, 104 Stat 3084, 25 USC § 3001 *et seq* *Bonnichsen v United States*, 217 F Supp 2d 1116 (D Or 2002), aff'd and remanded, 367 F.3d 864 (9th Cir 2004) *Executive Order 13007*, 61 Fed Reg 26771, May 24 1996: Indian Sacred Sites *Te-Moak Tribe of Western Shoshone Indians of Nevada v US Department of the Interior*, 565 Fed Appx 665 (9th Cir 2014) *Religious Land Use and Institutionalized Persons Act* [*RLIUPA*], Pub L 106-274, Sept 22 2000, 114 Stat 803, 42 USC § 2000cc *et seq*
Statutory Provisions: American Indians (Non-Exhaustive)	*Indian Commerce Clause* (*US Constitution* Art I, § 8, cl 3) *Indian General Allotment Act of 1887* ["*Dawes Act*"], Feb 8 1887, C 119, 24 Stat 388 *Indian Reorganization Act* [*IRA* / "*Wheeler-Howard Act*"], June 181934, C 576, 48 Stat 984 (codified as carried forward at 25 USC § 461) 18 USC C 53 – Indians *Code of Federal Regulations,* Title 25: Indians (1978): 25 CFR § 83.7: Mandatory criteria for federal acknowledgement as an Indian tribe
Statutory Provisions: General Legislation (Non-Exhaustive)	**Heritage Legislation** *Administrative Procedure Act of 1946* (*APA*), Pub L 79-404, 60 Stats 237 (1946) *Convention on Cultural Property Implementation Act,* Pub L 97-446, title III, Jan 12 1983, 96 Stat 2350, 19 USC 2601 *Archaeological Resources Protection Act*, as amended, Pub L 96-95, §2, Oct 31 1979, 93 Stat 721, 16 USC 470aa-mm *National Park System and Related Programs: Establishment and General Administration,* Pub L 113-287, § 3, Dec 19 2014, 128 Stat 3254, 54 USC § 100101 *et seq*

	National Park System and Related Programs: Outdoor Recreation Programs, Pub L 113-287, § 3, Dec 19 2014, 128 Stat 3254, 54 USC § 200101 *et seq* *National Park System and Related Programs: Historic Preservation*: Pub L 113-287, § 3, Dec 19 2014, 128 Stat 3254, 54 USC § 300101 *et seq* *Preservation of Historical and Archaeological Data*: Pub L 113-287, § 3, Dec 19 2014, 128 Stat 3254, 54 USC § 312501 *et seq* **Environmental Legislation** *National Environmental Policy Act of 1969* [*NEPA*], Pub L 91-190, Jan 1 1970, 83 Stat 852, 42 USC § 4321 *et seq* *Clean Water Act (CWA)*, 33 USC § 1251 *et seq* (1972) *Rivers and Harbors Act (RHA)*, 33 USC § 408 *Flood Control Act*, 35 USC § 701 *et seq* **Land Legislation** *Public Lands: Federal Land Policy and Management* 43 USC C 35 § 1701-1787 **Other** Fifth Amendment: Due Process and Just Compensation provisions (*US Constitution*) *Government Organization and Employees: Administrative Procedure*, Pub L 89-554 §1, Sep 6 1966, 80 Stat 378, 5 USC §§ 500-559 *Government Organization and Employees: Judicial Review*, Pub L 89-554 §1, Sep 6 1966, 80 Stat 378, 5 USC §§ 701-706
Common Law Provisions: Aboriginal Title	*Johnson v M'Intosh* 21 US (8 Wheat) 543, 5 L Ed 681 (1823) *Cherokee Nation v Georgia* 30 US (5 Pet) 1, 8 L Ed 25 (1831) *Worcester v Georgia* 31 US 515, 8 L Ed 483 (1832) [Jointly: The "Marshall Trilogy"] *Mitchell v United States,* 34 US 711 (1835) *Tee-Hit-Ton Indians v United States*, 348 US 272, 75 S Ct 313, 99 L Ed 314 (1955)
Common Law Provisions: Treaty Rights	*The Indian Removal Act*, Act of May 28, 1830, 4 Stat 411 Act of July 5, 1862, C 135, § 1, 12 Stat 528 (codified as carried forward at 25 USC § 72) *The Appropriations Act* of Mar 3, 1871, C 120, § 1, 16 Stat. 566 (codified as carried forward at 25 USC § 71) House Concurrent Resolution No 108 (1953) ["*the Termination Act*"] *Lone Wolf v Hitchcock*, 187 US 553, 23 S Ct 216 (1903) *United States v Winans,* 198 US 371, 25 S Ct 662, 49 L Ed 1089 (1905) *Winters v United States*, 207 US 564 (1908)

	Shoshone Tribe v United States, 299 US 476 (1937) *United States v Shoshone Tribe*, 304 US 111, S Ct 794, L Ed 1213 (1938) *Menominee Tribe of Indians v United States*, 391 US 404, 88 S Ct 1705, 20 L Ed 2d 697 (1968)

5.5 The Legal Response of the United States to Developments that (Potentially) Impact on Indigenous Sacred Sites

5.5.1 Introduction

5.5.1.1 Background: Indigenous Spirituality in North America

Both as a reminder, and as an introduction to the legal position discussed hereafter, the following core points were made regarding Indigenous conceptions of the Sacred in North America in the context of 2.4.3 above ("Indigenous Conceptions of the Sacred"): (1) issues of cross-cultural translation arise when Indigenous sacred sites are commemorated under heritage legislation or equated to Western places of worship. (2) The risks inherent in condensing all tribal experience into a single North American Native tradition ("the one, true Indian Spirit", as Nabokov put it[1809]). (3) One should also be wary of not equating tribal religions with non-tribal universalistic faiths: there are important structural differences between them. (4) The important reinforcing and validating role of rituals for a tribal community – and the legacy of the "negative acculturation processes" that took the form of Residential Schools, the banning of religious dances, etc. (5) Three main reasons were advanced for secrecy about sacred sites in the North American context: (a) the existence of ancestral and/or spiritual prohibitions to disclosure; (b) fears deriving from prior prosecution for beliefs; (c) modern-day fears around increased tourism and desecration of sacred sites.

[1809] See *supra* at note 776.

There are 5 points of importance to be borne in mind with relation to Indigenous North American spirituality and notions of time: (1) Indigenous history is cyclical, embedded in ritual and myth, and attaches importance to places and relationships. (2) It is flexible –a living document– and does not know time and space limitations like Western history does. (3) Storytelling, rituals and symbolic records such as wampum belts, petroglyphs and rock paintings play a cardinal role. (4) These symbolize rather than report, which can pose challenges to a non-Indigenous, western audience. (5) Documentation of such stories is contentious, *inter alia* because it 'freezes' them.

Insofar as Indigenous North American spirituality and notions of space are concerned, there also are 5 points to be borne in mind: (1) Land often gives cultural meaning and is at the base of a community's social life – this can be linked back to the importance of cultural continuity for Indigenous identity. (2) For many Indigenous peoples, there is an intertwining of social and physical geography in that their way of life is tied up in the land: it constitutes their past, present and future heritage. (3) Permanent environmental landmarks often become spiritual points of reference, and as such fulfil an anchoring function for the community in question. (4) There is a paradigmatic clash between Judeo-Christian religious traditions and Native American ones. The former are commemorative, individualistic and consider natural resources to be exploitable for the good of mankind. The latter are affirmation-based and focus on the collective and the interrelatedness of all beings.[1810] (5) The same tract of land can have both a spiritual and a profane purpose.

5.5.1.2 American Indian Law

> This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support."[1811]

[1810] This clearly is a rather reductive statement of itself. It does, however, contain a kernel of truth.

[1811] Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970), cited in Anderson et al (2015) p. 150-151.

Cohen's Federal Indian Law observes that federal policies –as reflected in the statutory framework– have changed over time insofar as the religious freedom of Indigenous peoples in America is concerned and notes that whereas "[r]eligious freedom is deeply connected to any policy of self-determination and cultural survival [,] [t]he replacement of traditional native worship with Christian rituals and beliefs was a long-term goal of many Indian reformers and much of nineteenth- and twentieth-century Indian acculturation policy."[1812] Assaults on Indigenous religions cited in *Cohen's Federal Indian Law* include the banning of the sun dance and other religious ceremonies; difficulties relating to resource utilization, sacred celebrations and eagle feathers; issues pertaining to sacramental peyote use; and issues arising from the protection of sacred sites.[1813]

If we deconstruct the statutory framework presently pertinent to the protection of Indigenous sacred sites in the pursuit of natural resource development projects in the United States it appears that there are three interlinked dimensions at play: first, whether the Indigenous community in question qualifies as a federally recognized "Indian tribe" or not; second whether the (proposed) project is on-reservation or off-reservation; and third, the type of sacred site that is under threat. Each of these aspects provides one or more pieces for resolving the puzzle of the extent to which it may be possible to protect a particular site[1814] and how to practically go about it. As was the case with Canada, I will utilize physical desktop studies to illustrate the structural difficulties that arise in these contexts.

[1812] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 103.

[1813] *Ibid.*

[1814] This casuistic legal approach to the protection of Indigenous sacred sites evidently conflicts with the more holistic approach that would appear to underlie traditionalist Indigenous religious and cultural conceptions.

5.5.2 The Federal Recognition Criterion

> The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes. Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.[1815]

By its very nature, American Indian law is federal.[1816] *Cohen's Federal Indian Law* traces the federal power to regulate Indian affairs back to the text and structure of the Constitution,[1817] with reference to *Lara*.[1818] Two clauses are of particular importance here: the Indian commerce clause[1819] and the treaty clause.[1820]

American Indian law is constructed around the key concepts of "Indian", "Indian tribe" and "Indian country". It construes "Indian tribes" to be "dependent foreign nations."[1821] The concept of "dependent foreign nations" juxtaposes two somewhat paradoxical ideas: trust responsibility and tribal sovereignty.

[1815] 25 CFR vol 1 § 83, "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe" (2012) [*Federal Recognition Regulations*] at § 83.2, "Purpose".

[1816] On Federal Indian Law, see M A Jaimes-Guerrero (Juaneño/Yaqui), "The Metaphysics of Federal Indian Law and US Colonialism of American Indians" in Richard A Grounds, George E Tinker & David E Wilkens, eds, *Native Voices: American Indian Identity & Resistance* (Lawrence, Kansas: University Press of Kansas: 2003) 77.

[1817] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 383.

[1818] *United States v Lara*, 541 US 193, 200 (2004) [*Lara*].

[1819] US Const art I, § 8, cl 3. On the Indian commerce clause and the various *Trade and Intercourse Acts* that were enacted to give effect to it, see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 35–38.

[1820] US Const art II, § 2, cl 2: Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 386–389.

[1821] See Anderson et al, *supra* note 386 at 1 and Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 206–211 on the notion of "tribal sovereignty".

The doctrine of trust responsibility is "one of the cornerstones of Indian law".[1822] The doctrine of trust responsibility holds that the federal government is the trustee of its wards, the Indian tribes, and therefore has fiduciary duties towards them.[1823] It has a threefold origin: the language employed in early treaties, statutes such as the *Trade and Intercourse Acts* and opinions of the Supreme Court, notably the "Marshall Trilogy" [1824] (*M'Intosh*,[1825] *Cherokee Nation*, [1826] and *Worcester*).[1827]

In essence, tribal sovereignty –"the most basic principle of all Indian law"– is that their tribal authority is an original power, not one derived from statute.[1828] Though pre-existing, it has been limited by the tribe's inclusion within the territorial boundaries of the US and it may be divested by Congress.[1829]

Relationships with the tribes are based on a complicated combination of treaties and "treaty-substitutes" in the form of Acts of Congress and executive orders. Treaties were only valid once ratified by the Senate – and not all negotiated treaties were ratified.[1830] Treaty-making came to an end in 1871 with the adoption of the *Appropriations Act*.[1831] While treaties had required only ratification by the Senate, agreements with Indians made after this date require the approval of both houses (i.e. they must be Acts of Congress). A third possibility existed until it was terminated by

---

[1822] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 412. On the interaction between the doctrine of federal trust responsibility and international law, see S James Anaya (Purepecha/Apache), "International Law and U.S. Trust Responsibility toward Native Americans" in Grounds, Tinker & Wilkens, *supra* note 1816, 155.

[1823] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 207.

[1824] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 412–413.

[1825] *Johnson v M'Intosh*, 21 US 543 (1823) [*M'Intosh*].

[1826] *Cherokee Nation v Georgia*, 30 US (5 Pet) 1, 8 L Ed 25 (1831) [*Cherokee Nation*].

[1827] *Worcester v Georgia*, 31 US 515 (1832) [*Worcester*].

[1828] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 207.

[1829] *Ibid.* In respect of tribal sovereignty, see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 8–12 on the important formative role played by Francisco de Victoria's theory of Indian title.

[1830] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 24. Also see *ibid* on the sometimes questionable methods employed in 'negotiating' such treaties.

[1831] *Appropriations Act of March 3, 1871*, § 1, 16 Stat 544 (codified at 25 USC § 71) [*Appropriations Act*].

Congress with the adoption of the Act of 30 June 1919.[1832] Reservations created by Executive Order generally have the same validity and status as those created by treaty or statute, but the courts have consistently held that Executive Orders do not create compensable property rights[1833] and that such reservations may therefore constitutionally be taken without compensation.[1834] Recognized title (treaty or statute), on the other hand, means a right to compensation upon extinguishment under the takings clause of the Fifth Amendment,[1835] even if such right is qualified.[1836]. Historical context therefore is of great importance where a tribe lays claim to a particular tract of land.[1837]

Such treaties and treaty substitutes are interpreted against the background of Aboriginal title[1838] and the doctrine of discovery.[1839] Four opinions rendered by the Marshall Court significantly shaped the US concept of Aboriginal title: *Johnson v M'Intosh*,[1840]; *Cherokee Nation*;[1841] *Worcester v Georgia*;[1842] and

---

[1832] Act of 30 June 1919, § 24, 41 Stat 3 (codified at 42 USC § 150 under the heading "Executive Orders"): see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 69–71 and 407.

[1833] *Hynes v Grimes Packing Co,* 337 US 86, 101 (1949); *Confederated Bands of Ute Indians v United States*, 330 US 169 (1947); *Sioux Tribe v United States*, 316 US 317, 325 (1942): Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1013.

[1834] *Karuk Tribes v Ammon*, 209 F 3d 1366, 1374 (Fed Cir 2000), aff'g *Karuk Tribe v United States*, 41 Fed Cl 468 (1998): see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 70–71, 407 and 1059–1061.

[1835] *Sioux Nation*, *supra* note 515.

[1836] *Lone Wolf*, *supra* note 1692: see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 409–410 and 1057–1058; *supra* note 386 at 169–170.

[1837] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 999.

[1838] "Original Indian title, also known as aboriginal Indian title, refers to land claimed by virtue of its possession and exercise of sovereignty rather than by virtue of letters of patent or any formal conveyance": Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 999.

[1839] The *locus classicus* is *Worcester*, *supra* note 1838 at 516: "This principle, acknowledged by all Europeans, because it was in the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it. It regulated the right given by discovery among European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell."

[1840] *M'Intosh*, *supra* note 1825.

[1841] *Supra* note 1821.

[1842] *Worcester*, *supra* note 1827.

Mitchel.[1843] Aboriginal title may be extinguished, provided that the intent to do so is clearly expressed on the face of the pertinent statute or treaty.[1844] Until extinguishment, aboriginal title is "sacred as the fee simple of the whites".[1845] However, in *Tee-Hit-Ton*[1846] the Supreme Court held that it does not constitute "property" within the meaning of the Fifth Amendment and that extinguishment accordingly does not give rise to compensation obligations.[1847]

One important result of the treaty tradition has been the development of special canons of construction which require that treaties be understood as the tribes understood them and that ambiguities be construed in favour of the tribes.[1848]

The US has fiduciary duties towards these "dependent foreign nations". Anderson et al argue that tribal sovereignty lies at the heart of the legal status of Indian tribes and identify three main ways in which it operates: it is constitutive of their government-to-government relationship with the United States, it restricts the authority that states may exercise over tribes and their territories, and it gives tribes the capacity to create their own domestic laws.[1849] Although the bilateral federal/tribal relationship usually excludes the state in whose physical boundaries the "Indian tribe's" tribal lands may be situated, it would appear possible for the federal government to delegate a form of its trust responsibility to the state, and for that state to then construct a type of relationship with the tribe

---

[1843] *Mitchel v United States*, 34 US 711 (1835) [*Mitchel*].

[1844] *Tee-Hit-Ton Indians v United States*, 348 US 272 (1955) [*Tee-Hit-Ton*]; *Lone Wolf*, *supra* note 1692; also see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1054 notes 34 and 35.

[1845] *Mitchel*, *supra* note 1843 at 746*;* also Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 999–1004.

[1846] *Tee-Hit-Ton*, *supra* note 1844.

[1847] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1055–1056 notes that the rule in *Tee-Hit-Ton* has the subject of criticism, but argues that it is of limited pertinence in modern US Indian law due to the fact that most tribal property originated in treaty or statute, in conjunction with the equitable and legal remedies that have since developed for breach of trust responsibility. Desktop study 3 discussed at 5.5.2.4 ("The Winnemem Wintu and the Raising of Shasta Dam — California, United States") provides an example of tribal property that did not originate in treaty or statute— its origins lie in an unratified treaty substituted by an Executive Order.

[1848] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 24. See *ibid* at 113–123 for a detailed explanation of the special canons of construction.

[1849] Anderson et al, *supra* note 386 at 1.

in question, though *Cohen's Federal Indian Law* seems sceptical about the legitimacy of such purported delegation.[1850]

Non-recognition of a tribe does not mean that the tribe does not exist in factual terms – but that it does not have a relationship with the US federal government.[1851] The impacts are at once wide-ranging and momentous, both for the tribe and for its individual members. As a tribe, it is not identified as a political entity whose culture and sovereignty is respected and protected by the federal government.[1852] For the tribe, federal recognition thus takes on crucial dimensions, such as whether the law will recognize its powers of self-government and whether it will be able to rely on the *Nonintercourse Act*[1853] for purposes of protecting its territory.[1854] As individuals they do not qualify for federal benefits and employment preferences that are based on the "member of an Indian tribe" criterion; they fall under state –rather than federal or tribal– criminal jurisdiction; they are not exempt from state taxation, do not qualify for child welfare, or for benefits offered by another federal civil authority; they cannot share in the profits of tribal economic developments such as gaming; and they have no entitlement to inherit trust or restricted lands.[1855]

Insofar as the subject matter of the research problem is concerned, the federally recognized tribe, or membership of such a tribe, is the base unit for the application of multiple pieces of legislation[1856] – meaning that claims founded on the provisions of such legislation risk being dismissed for lack of standing.

[1850] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 530–533.

[1851] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 135–136.

[1852] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 171.

[1853] *Nonintercourse Act*, c 161, § 161, 4 Stat 730, 25 USC 177 (1834).

[1854] Anderson et al, *supra* note 386 at 251.

[1855] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 171.

[1856] E.g., the *Indian Self-Determination and Education Assistance Act*, 25 USC §§ 450 et seq [*ISDEA*] at 450–450n and 455–458e, as well as the *Indian Child Welfare Act*, 25 USC § 1901 et seq: see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 181–182. This is not always the case: e.g., there is a blood quantum requirement in the *Indian Health Care Improvement Act of 1976*, 25 USC § 1601 et seq: see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 182–183.

Given the fiduciary duties underlying federal recognition of tribes and the critical consequences of non-recognition, one might expect that the fact of such recognition would amount to more than a capricious bureaucratic exercise. One might be wrong.[1857]

As noted above, the concept "Indian tribe" is—at least from the federal perspective—a legal construct that indicates the existence of a government-to-government relationship between the tribe and the US. Since this chapter is concerned with the positive law, we do not consider the matter here from an "Indian" identity or socio-anthropological perspective.

In terms of American Indian law, a tribe could potentially have one of three statutes: (1) federally recognized tribe, (2) terminated tribe or (3) non-federally recognized tribe. Since only federally recognized tribes enjoy federal protection of their sovereignty, religion and culture, it is important to understand the mechanics at work here. We will accordingly consider each of the three categories in turn.

5.5.2.1 Federally Recognized Tribe

A federally recognized tribe is one that enjoys formal recognition as a political entity by the US government and that accordingly stands in a government-to-government relationship of *quasi*-sovereignty with it as a "domestic dependent nation".[1858] That is, it is recognized as a nation, but not an independent one, for it finds itself within the territorial boundaries of the US.[1859] It is accordingly for the most part not subject to state jurisdiction.[1860] Recognition is both a formal political and a constitutive act.

[1857] *Cf* Anderson et al, *supra* note 386 at 252: "Which groups fall within this definition is sometimes as much the product of federal fiat or outside pressure as anything else. (…) The decision to recognize a group as a tribe at all might also be an accident of history."

[1858] *Cherokee Nation*, *supra* note 1821 at 17.

[1859] *Ibid.*

[1860] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 134.

In the political sense it establishes a government-to-government relationship between the tribe and the US and it is the source of the federal trust responsibility towards the tribe.[1861] Congress derives its power for this political act from the Indian commerce clause.[1862] The executive branch has a delegated authority for these purposes, which authorized it to adopt the 1978 administrative process for federal recognition of tribes subsequently entrenched by the *Tribe List Act*.[1863]

It is a constitutive act because it "institutionalizes the tribe's quasi-sovereign status", together with accompanying powers such as the power to tax and establishes an independent judiciary.[1864] It is also determinative of the tribe's eligibility for "a panoply of benefits and services" provided by the Department of Interior's Bureau of Indian Affairs (BIA), meaning that it "establishes tribal status for all federal purposes".[1865] While judicial deference is the norm, the BIA's determinations are subject to judicial review in terms of the Administrative Procedure Act (APA).[1866]

Essentially, a list of federally recognized tribes was introduced by the Department of the Interior in 1978 and has been published on an annual basis since 1994. There presently are 566 federally recognized tribes, a figure that includes 229 Alaska Native tribes mostly living in remote areas.[1867]

However, there is no single, uniform definition of "tribe" that is used across all statutes.[1868] The issue has largely been resolved from the federal point of view by the introduction in 1994 of the Federally Recognized Tribes List.[1869] Importantly, this 1994 Act provides that no tribe recognized

---

[1861] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 134 n 19.

[1862] *US Constitution*, art 1, § 8, cl 3): see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 136.

[1863] *Federally Recognized Indian Tribe List Act of 1994*, Pub L No 103-454, tit I, 108 Stat 4971, 25 USC §§ 479a, 479a-1 (1994) [*Tribe List Act*].

[1864] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 134 n 20.

[1865] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 134.

[1866] Administrative Procedure Act, 5 USC 551 et seq (1946): Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 179.

[1867] Anderson et al *supra* note 386 at 3–4, 251–252. The most recent version of the list can be found at 18 Fed Reg 1942 (2015).

[1868] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 131.

[1869] *Tribe List Act*, *supra* note 1863.

in accordance with the provisions of the Act may be terminated except by an Act of Congress.[1870] The authors later point out that this has as consequence that the omission of a tribe's name from the list cannot result in its termination[1871] —an aspect that will be of importance for purposes of the desktop study at 5.5.2.4 below ("The Winnemem Wintu and the Raising of Shasta Dam").

Federal recognition can theoretically be obtained in one of three ways: (1) by following the administrative procedures set out in part 83 of the *Code of Federal Regulations*; (2) through an Act of Congress; or (3) by a decision of a federal US court. This means that there are administrative, legislative and judicial mechanisms available to tribal groups wishing to obtain federal recognition. All three such mechanisms have historically been employed.[1872]

The first mechanism involves petitioning the Secretary of the Interior for inclusion on the list of federally recognized tribes published annually.[1873] The Secretary of the Interior has since 1978 prescribed an administrative process for tribes to petition for tribal recognition status. Prior to the inception of the list a tribal group's federal existence depended on the existence of treaty relations or another formal political act acknowledging the tribal status of such group, e.g. a statute or a ratified agreement.[1874] The 1978 administrative process was established by the executive branch in terms of delegated authority derived from the Indian commerce clause.[1875] This is a cumbersome process that to date has not proved very effective from a tribal point of view. Both substantive and procedural concerns have been raised with regards to this administrative process followed. Substantive concerns include uneven standards of proof, unequal treatment of different groups,

---

[1870] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 132 n 2.

[1871] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 163 n 217.

[1872] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 140.

[1873] 25 USC § 479a.

[1874] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 140.

[1875] US Const art I, § 8, cl 3: see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 136.

bias against particular groups and the influence of "unwritten, improper policy considerations".[1876] Procedural concerns comprise issues such as high costs, long delays and inconsistent results.[1877]

The second mechanism requires direct intervention by Congress, and has been utilized by a number of tribes. This is a process that runs parallel to the administrative procedures just described. Past Congressional action includes treaty-making and direct congressional intervention.[1878] It presumably implies that the tribe possesses the requisite lobbying power.[1879]

While the third mechanism was plainly sanctioned by the *Tribe List Act* of 1994, the courts have thus far deferred to the first two routes. However, given the cumbersome nature of the administrative process,[1880] Cohen suggests that it is apposite for the courts to play a role.[1881]

5.5.2.2 Terminated Tribe

This refers to a group in excess of 100 tribes whose federal relationship was terminated by Congress during the 1950's, many of whom have since regained it.[1882] However, one of the most pernicious outcomes of the termination legislation was that most of these tribes lost their land base in the

---

[1876] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 159.

[1877] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 159.

[1878] For examples of recent direct congressional intervention, see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 141 n 59.

[1879] *Cf Cohen's Federal Indian Law*, which cites from a 2001 General Accounting Office Report as follows: Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 141: "[it] could be that the resolution of tribal recognition cases will have less to do with the attributes and qualities of a group as an independent political entity deserving of a government-to-government relationship with the United States and more to do with the resources that petitioners and third parties can marshal to develop a successful political and legal strategy."

[1880] *Cf* Anderson et al, *supra* note 386 at 3-4: "Through any route, the process is slow, costly, and requires extensive historical and anthropological documentation. In all, over 200 tribes have submitted letters of intent to pursue administrative recognition, only 17 tribes have received federal recognition through this process since 1978, while 16 have been recognized or restored by Congress."

[1881] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 142.

[1882] Anderson et al, *supra* note 386 at 2.

process.[1883] Importantly, the Supreme Court has held in *Menominee Tribe v United States*,[1884] that treaty rights are not abrogated by the *Termination Act* – the intention to abrogate is not lightly imputed to Congress.[1885]

Cohen's Federal Indian Law furthermore argues that while termination of the government-to-government relationship with a given tribe does not of itself entail that such tribe ceases to exist, it effectively strips the tribe of any protection afforded by "almost the entire body of federal law aimed at preserving Native American cultures and fostering tribal self-determination."[1886]

5.5.2.3 Non-Federally Recognized Tribe

Implicit in the concept of federally recognized tribes is the notion that there are non-federally recognized tribes, i.e. tribes that have not (yet) obtained federal recognition as a political entity and therefore do not have a relationship with the federal government, accordingly falling under state jurisdiction. They may or may not be recognized by the state in whose territory they reside.[1887]

They therefore have negligible possibilities of functioning as a federally sanctioned legal or political authority or to partake in federal benefits, whether as tribe or as members of a tribe.[1888] Because of its history of unratified treaties, the California Indians pose a limited exception in respect of health services delivery.[1889]

The consequences of non-recognition are dire for the tribes in question:

> lack of federal respect for their sovereignty and land bases, lack of protection from state jurisdiction, lack of access to repatriation rights and other forms of cultural protection under federal law, and

---

[1883] *Ibid.*

[1884] 391 US 404, 413 (1968).

[1885] On termination, see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 84-93.

[1886] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 163.

[1887] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 168–170.

[1888] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 134–135.

[1889] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 135.

> denial of most benefits available to tribes that enjoy a government-to-government relationship with the United States.[1890]

One of the most serious consequences in the context of this study is that such tribe is considered to lack standing for purposes of instituting proceedings against the government in a federal court.[1891]

5.5.2.4 Illustration: Desktop Study 3: The Winnemem Wintu and the Raising of Shasta Dam, Northern California

> You guys are an inconvenient tribe for the federal government, and that would be my framing on this, that you are in the wrong place when it comes to their plans for Shasta Dam, and so they've decided to ignore you out of existence.
>
> — California State Assembly Member, Jared Huffman[1892]

5.5.2.4.1 Introducing the Desktop Study

> We're a poor people here financially. But we're one of the richest tribes traditionally and culturally. … [The raising of Shasta dam] will devastate the Winnemem a second time. The United States goes all over the world to protect and give freedom to Indigenous peoples. But right here in their own backyard, nothing is sacred here.
>
> — Winnemem Wintu Spiritual Leader, Caleen Cisk Franco[1893]

[1890] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 135.

[1891] See e.g. *Bonnichsen v United States*, 217 FSupp 2d 116 (D Or 2002) [*Bonnichsen*] (holding that Wanapam Band did not have standing to bring a claim under the *Native American Grave Protection Act* (1990) 25 USC § 3001 [*NAGPRA*] for the return of the "Kennewick man".

[1892] Jared Huffman (California State Assembly Member 2007-2012) (talking to Winnemem representatives): "Pilgrims and Tourists" in *Standing on Sacred Ground*, produced and directed by Christopher McLeod (Bullfrogfilms, 2013).

[1893] Caleen Cisk Franco, "Pilgrims and Tourists", *supra* note 1892.

On the third anniversary of 9/11 the United States was engaged in spiritual war of a different kind. 11 September 2004 marked the second day of *Tuna Leliit Chonas – Hu'p Chona*,[1894] the first Winnemem Wintu war dance to be performed (in public) [1895] since the "last dance" of the Wintu in 1887 at the Baird Fish Hatchery.[1896] As in 1887, it took place against the backdrop of the Sacramento River watershed and the ongoing destruction of Wintu sacred sites.[1897] At stake this time was the proposed raising of Shasta Dam and the potential flooding of the last remaining Winnemem Wintu holy places.[1898]

American Indian law poses multiple structural difficulties: Indigenous sacred sites are treated completely differently depending on whether they are on- or off-reservation, depending on the type of sacred site under discussion, and depending whether the tribe claiming the site's protection is a federally recognized Indian tribe or not. Because only a federally recognized Indian tribe has *locus standi* to pursue sacred site protection, I deemed this aspect to be critical. I have accordingly selected a non-recognized tribe –who by definition thus does not have a reservation– with multiple types of sacred sites –topographical features; burial sites; massacre site; ceremonial sites; sites for the collection of ceremonial herbs) under threat by a proposed expansion of a resource development project that has already greatly impacted on them.

The Winnemem Wintu band, a community of some 225 members, have for the past 40 years lived on privately bought land in a village called *Kerikmet* near Redding, close to Shasta Dam.[1899] The band

---

[1894] Garrett, *supra* note 1729 at 348.

[1895] Mary Ngo, *Loss of Sacred Spaces: The Winnemem Wintu Struggle Against a Cultural Genocide by California Water Demands* (MA Thesis: Department of Geography, California State University, Long Beech, 2010) at 61–62; "Winnemem Wintu Tribal Timeline", *Sacred Land Film Project*, online: < www.sacredland.org/PDFs/Wintu_Timeline.pdf >.

[1896] See Alice R Hoveman, "The Wintu People of the McLeod River" in Alice R Hoveman, *Journey to Justice: The Wintu People and the Salmon* 18 at 52–54 [Hoveman, "Wintu People"]; Garrett, *supra* note 1729 at 349.

[1897] Thus Frank LaPena remarks, "With the loss and destruction of each sanctuary on the land, a little more of our heritage as Wintu and our cultural legacy was hidden away from each succeeding generation, so that in this millennium we Wintu are faced with a crucial issue of whether we have the right to claim our existence as 'Indians' with a valid history and culture.": Frank LaPena, "Introduction" in Hoveman, *Journey to Justice*, *supra* 1896 at 15.

[1898] See Garrett, *supra* note 1729 at 349; Ngo, *supra* note 1895 at 60–61.

[1899] Garrett, *supra* note 1729 at 348, 352.

lost over 90% of their traditional tribal lands and sacred sites with the construction of Shasta Dam as keystone element of the Central Valley Project in the mid-1940s.[1900] They received neither compensation nor the promised replacement lands.[1901] The Winnemem Wintu have since 2001 actively opposed proposals to raise Shasta Dam by a further 18 feet on the basis that doing so would flood their last remaining sacred sites — and that the ensuing loss of their ability to conduct their traditional ceremonies would entail cultural annihilation for their tribe.[1902]

5.5.2.4.2 Contemplating the Fact Set

A number of factors combined to put the Indigenous peoples of California in a uniquely unenviable position: federal Indian policy during the so-called "Removal Era"[1903] entailed the removal of tribes from densely populated areas in the east of the country and their systematic displacement to the west of the Mississippi;[1904] settlers came into increasing contact with the formerly remote eastern nations with the expansion of the railroad service;[1905] and "[t]he discovery of gold in California transformed the non-Indian migration westward into a stampede."[1906] While eighteen treaties were concluded with Californian tribes in order to obtain land for rapid settlement of migrants,[1907] the Senate ultimately declined to ratify any of these treaties.[1908] Since the "Indians" had already commenced their journeys towards the proposed reservations, they found themselves landless.[1909]

[1900] Ngo, *supra* note 1895 at 60; Suzanne Dallman et al, "Political Ecology of Emotion and Sacred Space: The Winnemem Wintu Struggles with California Water Policy", (2013) 6 *Emotion, Space and Society* 33 at 38. See Garrett, *supra* note 1729 at 350–351 on major dam construction in the American West during the Big Dam Era and its impacts on the Native American landscape.

[1901] Ngo, *supra* note 1895 at 33, 109–110; Dallman et al, *supra* note 1900 at 38.

[1902] See Garrett, *supra* note 1729 at 349; Ngo, *supra* note 1895 at 60; Dallman et al, *supra* note 1900 at 38.

[1903] 1817-1848: See *ibid* at 50–78, 41–51.

[1904] In terms of legislation such as the *Indian Removal Act,* 4 Stat 411 (1830).

[1905] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 55.

[1906] *Ibid* at 58.

[1907] An amount of $25,000 was allocated by Congress for these purposes and federal commissioners were dispatched to obtain lands from the "Indians" by treaty. The treaties were concluded in 1851: *ibid.*

[1908] Congress rejected the treaties on July 8, 1852: see *ibid* at 24 n 6 and at 59.

[1909] *Ibid* at 59.

Ultimately a number of small reservations were created by Executive Order for the use of the "California Indians".[1910]

The Winnemem Wintu band is named for the McLeod, or "middle river".[1911] The McLeod River is one of the Sacramento River watershed's main northern tributaries.[1912] The Winnemem, therefore, consider themselves to be the guardians of the river.[1913] They are a Wintu community. 'Wintu' or 'northern Wintun' refers to peoples native to the upper Sacramento Valley foothills.[1914] The Wintu occupied an area consisting of nine regions, all identified regionally by names marking their locations.[1915] In the case of the Winnemem, 'winemem' referred to the 'middle water' region.[1916] For the past 40 years the Winnemem Wintu have lived on privately bought land in a village called *Kerikmet* near Redding, close to Shasta Dam.[1917]

It is worthwhile pointing out in passing that the Winnemem Wintu's status as successors of the "Wintu from the McLeod River" is disputed by another group, the (equally federally unrecognized) "Wintu Tribe".[1918] The details of their dispute is beyond the scope of this thesis, though it should be noted that the Winnemem Wintu is no recently formed tribe: their current Chief and Spiritual Leader, Caleen Sisk-Franco, formally took over leadership from her predecessor, Florence Jones, in 1995.[1919] Florence had, in turn, led the Winnemem Wintu through 62 stormy years, including the

---

[1910] *Ibid.*

[1911] Ngo, *supra* note 1895 at 108. The "Winnemem Wintu" is also referred to in literature as the "Winemem Wintu" or the "'middle river' or McCloud River, band of Wintu": see "Editor's note" in Hoveman, *Journey to Justice*, *supra* 1896, 6.

[1912] Hoveman, "Wintu People", *supra* 1896 at 19.

[1913] *Ibid* at 21; Ngo, *supra* note 1895 at 108.

[1914] Hoveman, "Wintu People", *supra* note 1912 at 19.

[1915] *Ibid* at 18; Garrett, *supra* note 1729 at 352; Dallman et al, *supra* note 1900 at 36.

[1916] Hoveman, "Wintu People", *supra* note 1912 at 19.

[1917] Garrett, *supra* note 1729 at 348, 352.

[1918] See Alice R Hoveman, "Acknowledgements" in Hoveman, *Journey to Justice*, *supra* 1896, 11 at 12; Judith E Lalouche, "Preface" in Hoveman, *Journey to Justice*, *ibid*, 9.

[1919] "Winnemem Wintu Tribal Timeline", *supra* note 1895.

successful opposition of a ski lodge development on their holiest mountain, Mount Shasta,[1920] between 1987–1999.[1921] This type of inter-tribal dispute is symptomatic of American Indian law's insistence on categorizing Native American communities into federally recognized (and non-recognized) "Indian tribes" and then awarding benefits according to "Indian tribe" status: it creates a climate fertile for division and competition.

The Winnemem Wintu has since 2001 actively opposed proposals to raise Shasta Dam by a further 18 feet on the basis that doing so would flood their last remaining sacred sites — and that the ensuing loss of their ability to conduct their traditional ceremonies would entail cultural annihilation for their tribe.[1922] The band already lost over 90% of their traditional tribal lands and sacred sites with the construction of Shasta Dam as keystone element of the Central Valley Project in the mid-1940s.[1923] They received neither compensation nor the promised replacement lands.[1924]

The land surrounding (and under) Shasta Dam's reservoir, Shasta Lake,[1925] makes up the Winnemem Wintu tribal lands on the river and thus contains their traditional practice areas and sacred sites.[1926] It is now deemed to constitute mostly US Forest Service (USFS) land.[1927] The Winnemem presently continue to practice their cultural and religious ceremonies there on the basis of a use permit first obtained under the *American Indian Religious Freedom Act* [AIRFA][1928] in 1978,[1929] subsequently

---

[1920] Garrett, *supra* note 1729 at 360.

[1921] "Winnemem Wintu Tribal Timeline", *supra* note 1895.

[1922] See Garrett, *supra* note 1729 at 349; Ngo, *supra* note 1895 at 60; Dallman et al, *supra* note 1900 at 38.

[1923] Ngo, *supra* note 1895 at 60; Dallman et al, *supra* note 1900 at 38. See *supra* note 1894 at 350–351 on major dam construction in the American West during the Big Dam Era and its impacts on the Native American landscape.

[1924] Ngo, *supra* note 1895 at 33, 109–110; Dallman et al, *supra* note 1900 at 38.

[1925] Archaeologist Garrett, *supra* note 1729 at 354 takes issue with this euphemistically named reservoir on the basis that that "giv[es] it an illusion of permanence which clouds public understanding of this flooded landscape and makes the Winnemem appear to be asking to practice traditions in areas which have always have been underwater."

[1926] *Ibid* at 348; Ngo, *supra* note 1895 at t 60; Dallman et al, *supra* note 1900 at 38.

[1927] See "Winnemem Wintu Tribal Timeline", *supra* note 1895; Ngo, *supra* note 1895 at 110; Dallman et al, *supra* note 1900 at 36.

[1928] *American Indian Religious Freedom Act*, *supra* note 1934.

[1929] "Winnemem Wintu Tribal Timeline", *supra* note 1895.

developed through Memoranda of Understanding and Agreement signed with the USFS in the 1980s,[1930] as well as additional permits and private easements obtained in 1995 from private lumber companies –facilitated by USFS– for purposes of accessing sacred sites on private lands.[1931]

5.5.2.4.3 The Litigation

They are not a federally recognized tribe, a matter that the tribe members attribute to clerical oversight on the basis that they have had previous dealings with the federal government.[1932] This has meant that they were excluded from the environmental and cultural impact assessment studies performed by the Bureau of Reclamation on the raising of Shasta Dam[1933] since they do not qualify for the religious protections afforded by legislation such as AIRFA,[1934] the RFRA,[1935] RLIUPA[1936] or Executive Order 13007;[1937] for the cultural protections offered by NAGPRA,[1938] ARPA,[1939] and NHPA;[1940] or for the environmental protections of NEPA[1941]. They do not qualify because these Acts all extend their protections to "Indian tribes" — and "Indian tribe" is interpreted to mean a federally recognized Indian tribe.[1942]

1930 These were "developed for the protection of tribal gathering places, ceremonial sites and sacred places": *ibid.*

1931 *Ibid.*

1932 Dallman et al, *supra* note 1900 at 30.

1933 Garrett, *supra* note 1729 at 361.

1934 *American Indian Religious Freedom Act* of 1978, as amended ("AIRFA") [Public Law No. 95-341, 92 Stat. 469 (Aug 11, 1978) codified at 42 U.S.C. § 1996.

1935 *Religious Freedom Restoration Act*, *supra* note 37.

1936 *Religious Use of Public Institutionalized Lands* [RLIUPA] (2000), 41 USC § 2000cc, et seq.

1937 Executive Order 13007, 61 Fed Reg 26771 (24 May 1996) — Indian Sacred Sites.

1938 *Native American Graves Protection and Repatriation Act* (1990), *supra* note 1891. Thus, in *Bonnichsen*, *supra* note 1891, Wanapam Band was held to be an improper claimant because it lacked federal recognition as a tribe.

1939 *Archaeological Resources Protection Act* of 1979, as amended [Public Law 96-95; 16 U.S.C. § 470aa-mm].

1940 *National Historic Preservation Act* [*NHPA*], *supra* note 38.

1941 *National Environmental Policy Act,* Pub L No 91-190, 83 Stat 852, 42 USC 4321 (1970) [*NEPA*].

1942 "Indian tribe" has no standard, static, all-encompassing, all-purpose definition: Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 130–131. Nonetheless, the above can generally be said to have resulted from the combination of the prescribed administrative process for federal recognition and the list. See *ibid* at 131.

They furthermore cannot take the Bureau of Reclamation's resulting decision to proceed with the project on review under the *Administrative Procedures Act*,[1943] since they do not as a federally unrecognized tribe have standing for claims founded on the provisions of Acts that take the federally recognized tribe as their base unit.[1944] Neither can they rely on the freedom of religion guarantee in the US Constitution,[1945] due to the precedent in *Lyng*.[1946] Here the US Supreme Court treated a sacred site protection claim as a matter where property law prevails over sacred site protection offered to Native American claimants by measures such as AIRFA.[1947]

5.5.2.4.4 Analysis

The observant reader will have noticed that the Winnemem Wintu was granted a right of use permit under AIRFA in order to access the land in question and yet they are a federally non-recognized tribe. This apparent contradiction is clarified –if not satisfactorily explained– when having regard to the fact that, although the permit was first issued to them in 1978 and that the federal government awarded them federal benefits in the form of Indian Health Service as a recognized California tribe until 1985,[1948] their name did not appear on the Federally Recognized Tribes List that has been updated and published by the Secretary of the Interior (DOI) an annual basis since 1994.[1949] This public list builds on the formal federal recognition procedure for Indian tribes as established by the

---

1943 *APA*, *supra* note 1988.

1944 See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 181–182.

1945 First Amendment (1791) to the *United States Constitution* (1787): Free Exercise Clause.

1946 *Lyng*, *supra* note 787.

1947 The *Lyng* court held that *AIRFA* is a mere expression of policy preference that does not create judicially enforceable rights.

1948 But *cf* Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 135: California tribes were treated differently insofar as health care was concerned due to the historical inequity relating to the Senate's refusal to ratify the 18 treaties concluded in 1851.

1949 In terms of the *Federally Recognized Tribes List Act* of 1994, 25 USC §§ 479a, 479a-1.

Bureau of Indian Affairs of the DOI as an administrative process in 1978.[1950] Prior to the inception of the list a tribal group's federal existence had depended on the existence of treaty relations or another formal political act acknowledging the tribal status of such group, such as a statute or a ratified agreement.[1951] The Winnemem Wintu's name does not appear on this list and they are thus not considered to constitute a federally recognized tribe.[1952]

There are further contradictions. Although the Bureau of Indian Affairs of the Department of the Interior put a halt to their health services in 1985,[1953] 1986 saw the issue of a Fish and Wildlife permit to the Winnemem Wintu Chief and Spiritual Leader, Caleen Sisk-Franco, that has enabled her to hold and carry Eagle feathers.[1954] This is paradoxical, for the 1940 *Bald and Golden Eagle Protection Act* [BGEPA][1955] exemption regulations[1956] unequivocally restrict the granting of permits for the possession of eagle feathers to members of federally recognized Indian tribes.[1957] The Winnemem Wintu thus argue that the federal government has implicitly recognized them in that it has had dealings with them over the years.

At this point the notion of "Indian tribe" as utilized in federal American Indian law needs to be circumscribed further. It does not mean that a tribe exists,[1958] but rather that there is a government-

---

1950 25 CFR Part 83. Both substantive and procedural concerns have been raised with regards to this administrative process followed. Substantive concerns include uneven standards of proof, unequal treatment of different groups, bias against particular groups and the influence of "unwritten, improper policy considerations": Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 159. Procedural concerns comprise issues such as high costs, long delays and inconsistent results: *ibid.*

1951 *Ibid* at 140.

1952 Garrett, *supra* note 1729 at 352.

1953 "Winnemem Wintu Tribal Timeline", *supra* note 1895; Garrett, *supra* note 1729 at 352.

1954 *Ibid.*

1955 *Bald and Golden Eagle Protection Act*, 16 USC 688–688d, § 668a.

1956 50 CFR § 22.22.

1957 Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 971. Also see *United States v Wilgus*, 638 F3d 1274 (10th Cir 2011) [*Wilgus*]. In *United States v Hardman*, 297 F3d 1116, 1132 (10th Cir 2002) the Court questioned the federal government's authority to restrict permits in this way, but did not question the fact that they were so restricted.

1958 Anderson et al, *supra* note 386 at 135–136.

to-government relationship between the tribe and the US.[1959] It is also the source of the federal trust responsibility towards the tribe.[1960] Federal recognition of a tribe establishes tribal status for federal purposes such as health services, and recognition of tribal sovereignty in matters such as child welfare, gaming and the environment.[1961] Federal and tribal understandings of the concept "Indian tribe" do not necessarily mesh[1962] — an "Indian tribe" can for federal purposes be purely a legal entity, or a mere fragment of a previously unified larger group, or it can even be made up of different tribes occupying the same reservation.[1963]

5.5.3 Tribal, Federal or Private Land

> "You give us presents, and then take our land," complained the Cheyenne spokesman Buffalo Chief at the famous Treaty of Medicine Lodge in 1867. "That produces war."[1964]

As a second dimension, where it comes to the protection of Indigenous sacred sites in the pursuit of natural resource development projects in the United States, a critical distinction exists in whether such development takes place on tribal, federal or private land.

[1959] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 134; Anderson et al, *supra* note 386 at 251.

[1960] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 134 n 19.

[1961] *Ibid* at 131; Anderson et al, *supra* note 386 at 1.

[1962] *Ibid* at 251; Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 130.

[1963] *Ibid* at 133. Thus, for instance, the federally recognized Redding Rancheria "comprises the descendants of selected families of the Wintu, Pit River, and Yana tribes": Lalouche, *supra* note 1918, 9.

[1964] Peter Nabokov, "The Treaty Trail" in Nabokov, *Native American Testimony*, *supra* note 11, 117 at 117.

5.5.3.1 Tribal Land

Insofar as on-reservation[1965] development projects are concerned: judicial precedent has firmly established that "Indians" are entitled not only to their tribal lands,[1966] but also to mineral[1967] and forest reserves[1968] despite the absence of express treaty language to that effect, and that the government retains no beneficial interest therein unless such interest has been expressly reserved.[1969] Thus, the Supreme Court has also held that the proceeds of reservation timber sales are to be applied to "the benefit and protection of Indians".[1970] This is not an angle that will be followed in the present research for reasons related to the threefold perspective that is being pursued: from the positive law point of view, there is a specialized body of law that applies to on-reserve developments. A non-exhaustive list would include: in respect of (1) subsurface resources (a) generally— *The Indian Reorganization Act* [IRA][1971] in respect of tribal land leased under IRA corporate charter, the maximum term of which leases may not exceed 25 years; (b) non-agricultural leases—*Indian Long-Term Leasing Act*,[1972] widely known as "Section 415" after the operative consultative procedure provision, leases being authorized for a term of up to 25 years and renewable

---

1965 On reservations, see David E Wilkins (Lumbee), "From Time Immemorial: The Origin and Import of the Reserved Rights Doctrine" in Grounds, Tinker & Wilkens, *supra* note 1816, 81.

1966 Despite vast reductions in scale, land remains "the most important cultural and economic asset for most tribes": Anderson et al, *supra* note 386 at 4.

1967 Tribal lands account for 4% of US oil and gas reserves; 30% of western coal reserves and 40% of US uranium reserves: Anderson et al, *supra* note 386 at 5.

1968 *United States v Shoshone Tribe*, 304 US 111 (1938).

1969 *Ibid.* In respect of tribal lands postdating the ill-fated experiment with individual land-ownership that characterized the allotment era, see *Submarginal Lands of United States Held in Trust for Specific Indian Tribes*, 25 USC c 14 § 459. On the allotment era generally, see Anderson et al, *supra* note 386 at 79–111; Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 71–79; and Judith V Royster, "The Legacy of Allotment" (1995) 27 Arizona Students LJ 1. Allotment mechanisms were already present in the 19th century treaties. This was seen as "a means to both free land for white settlement and to instill in Indians the idea of individual property and, through it, civilization": Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 62.

1970 *United States v Algoma Lumber* Co, 305 US 415 (1939) [*Algoma Lumber*] at 420. See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 142.

1971 *The Indian Reorganization Act ("Wheeler-Howard Act"),* 48 Stat 934, 25 USC § 461 (1934) [IRA].

1972 *Indian Long-Term Leasing Act*, c 615, 69 Stat 539, 25 USC 415 (1955) [*Section 415*].

for one further 25 year term; (c) farmland and rangeland—*Taylor Grazing Act*;[1973] IRA; *American Indian Agricultural Resources Management Act*, [AIARMA];[1974] *Indian Long-Term Leasing Act*; (2) mineral resources—*Indian Mineral Leasing Act* [IMLA][1975] at §§ 396a–396g; *Indian Mineral and Development Act* [IMDA][1976] at §§ 2101–2108; *Federal Oil and Gas Royalty Management Act* [FOGRMA][1977] at § 1701(b)(4); *Indian Tribal Energy Development and Self-Determination Act* [ITEDSA][1978] at §§ 3501–3506; *National Environmental Policy Act,* [NEPA];[1979] and *Surface Mining Control and Reclamation Act* [SMCRA][1980] at §§ 1201–1328; and (3) forest resources— *Sale of Timber on Allotted and Unallotted Indian Land*;[1981] *Tender Implementation Regulations*;[1982] *National Indian Forest Resources Management Act* [NIFRMA];[1983] NEPA;[1984] and *Endangered Species Act of 1973* [ESA][1985] at §§ 1531–1544.[1986]

The position differs substantially in respect of water, in view of the fact that water allocation generally falls within the province of the states and not in the federal domain. However, in terms of the reserved rights doctrine, Indian tribes "have well-established rights to large, but often still unquantified amounts of water (…) based primarily on the fact that the establishment of an Indian

---

1973 *Taylor Grazing Act*, c 865, 48 Stat 1269, 43 USC 315 (1934).

1974 *American Indian Agricultural Resources Management Act*, Pub L No 103-77, 107 Stat 2011, 25 USC 3701 (1993) [AIARMA].

1975 *Indian Mineral Leasing Act of 1938*, 52 Stat 347, 25 USC § 396 (1938) [IMLA].

1976 *Indian Mineral and Development Act of 1982*, Pub L No 97-382, 96 Stat 1938, 25 USC § 2101 (1982) [IMDA].

1977 *Federal Oil and Gas Royalty Management Act of 1982*, Pub L No 97-451, 96 Stat 2447, 30 USC 1701 (1983) [FOGRMA].

1978 *Indian Tribal Energy Development and Self-Determination Act of 2005*, Pub L No 109-58, tit V, 119 Stat 763, 42 USC 3501 (2005) [ITEDSA].

1979 *National Environmental Policy Act,* Pub L No 91-190, 83 Stat 852, 42 USC 4321 (1970) [NEPA].

1980 *Surface Mining Control and Reclamation Act of 1977*, Pub L No 95-87, 91 Stat 445, 30 USC 1201 (1977) [SMCRA].

1981 25 USC §§ 406–407.

1982 Issued under the IRA.

1983 *National Indian Forest Resources Management Act*, Pub L No 101-630, tit III, 204 Stat 4532, 25 USC § 3101 (1990) [NIFRMA].

1984 *NEPA*, *supra* note 1941.

1985 *Endangered Species Act of 1973*, Pub L No 93-205, 87 Stat 884, 16 USC 1531 (1973) [ESA].

1986 For a detailed discussion of the aforegoing categories, see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1105–1152.

reservation recognized legal rights not only to the land, but also to sufficient water to fulfill the purposes of the reservation".[1987]

The application of this specialized body of law raises mostly questions of trust liability or problems to be dealt with as matters of administrative procedure.[1988] Thus the Supreme Court has held the federal government liable for damages sustained due to the way in which its agents managed on-reserve forest resources in *Mitchell II*[1989]–

> Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can be fairly interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.[1990]

However, in *United States v Navajo Nation*[1991] the same court declined to apply this reasoning to the leasing of coal on Indian land, concluding instead that the IMLA[1992] did not contain "trust language" at all, that it did not found fiduciary duties akin to those in *Mitchell II* and that imposing a trust

---

[1987] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1204. The authors deal with the topic in depth at 1204–1263. See in this context the interesting reflection by Harold Shepherd on off-reservation water rights for Indian tribes: "Implementing the Human Right to Water in the Colorado River Basin" (2010) 47 Willamette L Rev 425.

[1988] Under the *Administrative Procedure Act*, Pub L No 89-554 § 1, 80 Stat 378, 5 USC § 551 (1966) [APA]. Note that § 101 of the APA contains a broad waiver of sovereign immunity for purposes of injunctive relief and that § 102 "allows the claim to be based upon an act or a failure to act on the part of a government official without explicitly tying the action or failure to act to any specific written source of duty, such as a statute or administrative regulation", i.e. it is based on the trust relationship: Anderson et al, *supra* note 386 at 232. The authors point to the expansive interpretation of some lower courts in terms of which the Indian trust relationship consequently constitutes the base for a substantive cause of action (e.g. in *Pyramid Lake Paiute Tribe v Morton*, 354 F Supp 252 (DDC 1972) [*Pyramid Lake*] but observe that the Ninth Circuit has cast doubt on this (in *Gros Ventre Tribe v United States*, 469 F 3d 801 (9th Cir 2006) [*Gros Ventre*]: Anderson et al, *supra* note 386 at 232–233.) The issue of sovereign immunity renders it more complicated for a tribe to seek money damages: in the absence of a waiver akin to that in § 101 APA, " [the] tribes are stuck with claims under § 1505, the *Indian Tucker Act* [where claims are] largely tied to positive law: a claim arising under a statute or administrative regulation, for example": *ibid* at 233.

[1989] *United States v Mitchell*, 463 US 206, 103 S Ct 2961, 77 L Ed 2d 580 (1983) [*Mitchell II*].

[1990] *Mitchell II*, *supra* note 1989 at 224.

[1991] *United States v Navajo Nation*, 537 US 488 (2003).

[1992] IMLA, *supra* note 1975.

liability would be inconsistent with the self-determination objectives of the IMLA.[1993] Federal trust responsibility litigation implies navigating intricate rules of sovereign immunity.[1994]

In addition, there is no great problematic here in terms of international law, insofar as the positive law position corresponds roughly with the international law principles of state sovereignty over natural resources[1995] and Indigenous peoples' rights to self-determination.[1996] The real issue would have arisen within the context of my third perspective—that of Indigenous peoples themselves, namely whether, to what extent, and how traditionalist Indigenous peoples could oppose natural resource development projects that would affect sacred sites on their tribal lands in circumstances where more modern-minded members are in favour of development.[1997] While clearly a fascinating subject matter, this would constitute a thesis in itself.

5.5.3.2 Federal Land

As pointed out earlier, the "Indian country" concept is of pivotal importance in federal Indian law: it defines both the area of tribal jurisdiction and the tribal territory.[1998] It is striking that the definition of this key concept is codified not in Title 25 that deals with "Indians", but in Title 18

[1993] See in this regard Anderson et al, *supra* note 386 at 240–241 and 637.

[1994] Anderson et al, *supra* note 386 at 230. On the concepts of and the interplay between sovereign immunity and federal trust responsibility, see *ibid* at 208–233.

[1995] The principle of permanent state sovereignty holds that nation-states have absolute and exclusive control over their natural wealth and resources: Van der Vyver, *supra* note 40 at 386. Four UN resolutions are of particular importance here: *Right to Exploit Freely Natural Wealth and Resources,* GA Res 626 (VII), UNGAOR, (1952); GA Res 3201 (S-VI), UNGAOR, UN Doc A/Res/S-6/3201, (1974); GA Res 3202 (S-VI), UNGAOR, UN Doc A/Res/S-6/3202 (1974); and GA Res 3281 (XXIX), UNGAOR, UN Doc A/Res/29/3281 (1974). See above at 3.2.3.1 ("State Sovereignty as a Principle of International Law").

[1996] Under instruments such as UNDRIP, *supra* note 39, Art 3. See the discussion above at 3.2.3.2 ("State Sovereignty and the Right to Self-Determination").

[1997] It stands to reason that Indigenous communities are made up of individuals with differing points of view and do not constitute a single homogeinic mass. (See 2.2.1 "Romanticization, Reductionism and Essentialization" above.) There accordingly inevitably are inter-tribal differences when it comes to development. While I refer to this in broad sweeps as "the 'traditionalist' / 'non-traditionalist' debate", I do not wish to imply that there may not also be a more balanced view, or no common ground.) For an interesting take on tribal economic development, see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1319–1373.

[1998] See Anderson et al, *supra* note 386 at 251.

on "Crimes and Criminal Procedure". This is the heritage of the *Major Crimes Act*,[1999] which designated jurisdiction over crimes committed between Indians in Indian country as a federal competency. The *Major Crimes Act* was enacted in response to the Supreme Court's refusal in *Crow Dog*[2000] to extend US criminal law over Indian tribes in circumstances where a matter had already been resolved internally by the Sioux in accordance with their traditional law. Following a 1932 amendment to the *Major Crimes Act*, the definition was first codified in Title 18 by the *Indian Country Statute*.[2001] It is applied in civil and criminal matters alike and has been the subject matter of an extensive body of jurisprudence.[2002]

Since American Indian law is federal law it does not apply to state lands. Some states recognize tribes that are denied federal recognition and may go so far as to create reservations for them—but that neither turns the reservation into "Indian country", nor do such tribes enjoy a government-to-government relationship with the United States.[2003]

The present research, then, is limited to sacred sites that are not only off-reservation, but on federal public lands outside of "Indian country". These are important distinctions: "Indian country" comprises, in addition to federal reservations, also "dependent Indian communities" and "Indian allotments".

'Federal reservations' comprise "all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation".[2004] Reservations granted to Indians by

---

[1999] Act of 3 March, 1885, § 8, 23 Stat 385 (1885).

[2000] *Ex Parte Kan-Gi-Shun-Ca [Otherwise Known as Crow-Dog]*, 109 US 556, 3 S Ct 396, 27 L Ed 1030 (1893) [*Crow-Dog*]. The same court subsequently upheld the constitutionality of the *Major Crimes Act* in *United States v Kagama*, 118 US 375, 65 S Ct 1109, 30 L Ed 228 (1886).

[2001] 25 June 1942, c 645, 62 Stat 757 (1942).

[2002] See Anderson et al, *supra* note 386 at 93–100 and, for in in-depth discussion, Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 185–202.

[2003] Anderson et al, *supra* note 386 at 4.

[2004] *Indian Country Defined*, 18 USC § 1151(a).

States would therefore not fall within the ambit of "Indian country", whether the Indians in question qualify as "Indian tribes" or not.[2005] The insertion of "notwithstanding the issuance of any patent" was intended to avoid the "checkerboard jurisdiction" problem that was the twin legacy of the *Dawes Act*[2006] –authorizing the individual allotment of Indian lands and the opening of unallotted reservation lands to non-Indians– and the *Burke Act*[2007] –authorizing the Secretary of the Interior to issue patents prior to the expiry of the 25 year periods imposed by the *Dawes Act*.[2008] The Supreme Court has given a broad interpretation to the term "reservation" and has held that tribal trust land is its equivalent and thus forms part of Indian country.[2009]

The word "reservation" itself merely indicates land set apart under federal protection for use by tribal Indians and is neutral as to the origin of such tribe's right to the reservation (e.g., treaty, Executive Order, Act of Congress).[2010] However, that does not mean that all reservations are created equal —the extinguishment of rights to executive order reservations, contrary to the other two types, does not trigger compensation obligations under the takings clause of the Fifth Amendment[2011] (unless, of course, Congress has at some point either ratified or otherwise recognized the title).[2012] There are currently 326 federally recognized reservations – these vary greatly

---

[2005] E.g., New York State administers lands on behalf on certain non-federally recognized tribes as per *NY Indian Law* §§ 120–122: Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 170. While the California State has on occasion recognized Indian tribes such as the Winnemem Wintu, I am not aware of an instance where it has gone so far as to create a reservation for them. See c 4 below ("The Winnemem Wintu and the Raising of Shasta Dam—California, United States") in respect of the unique land issues faced by the so-called "California Indians."

[2006] *Indian General Allotment Act ("Dawes Act")*, c 119, 24 Stat 388 (1987) [*Dawes Act*].

[2007] *Burke Act*, c 2348, 34 Stat 182, 25 USC 349 (1906).

[2008] See in this regard Anderson et al, *supra* note 386 at 105–108; Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 71–79; and, with specific reference to the resultant pattern of land ownership, Royster, *supra* note 1969.

[2009] *Oklahoma Tax Commission v Citizen Band of Potawatomi Indian Tribe*, 498 US 505, 511 (1991) [*Potawatomi Indian Tribe*]: see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 192–193.

[2010] *Cohen's Federal Indian Law*, *ibid* at 191 furnishes the following explanation: "In the 1850s, the federal government began frequently to reserve public lands from entry for Indian use. This use of the term 'reservation' from public land soon merged with the treaty use of the word to form a single definition describing federally protected Indian tribal lands without depending on any particular source. This definition of the term 'reservation' has since been generally used and accepted."

[2011] See Anderson et al, *supra* note 386 at 230.

[2012] See Anderson et al, *supra* note 386 at 169–170.

in terms of both size and type of landholding.[2013] Furthermore, there is no necessary correlation between federal recognition of the tribe and their having a reservation, in the sense that not all tribes hold land.[2014]

'Dependent Indian communities' is defined in 18 USC § 1511 (b) as follows: "all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state".[2015]

Finally, in terms of 18 USC § 115 (c), the term 'Indian allotments' is defined as follows: "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." This is the only category of the definition to be expressly linked to land title. *Cohen's Federal Indian Law* argues that by implication it only applies to land outside of reservation boundaries.[2016] It necessarily refers to individual Indian title that is either held in trust by the US or that is subject to a statutory restriction on alienation—"extinguishment" referring to the termination of such individual ownership.[2017] This is explained by the fact that the act of allotment served to extinguish any tribal title over the land, substituting it with individual title.[2018]

2013 Anderson et al, *supra* note 386 at 5.

2014 Anderson et al, *supra* note 386 at 5.

2015 With reference to pertinent case law, *Cohen's Federal Indian Law* concludes that "[g]enerally, when the land at issue has been held in trust by the United States, or subject to a federal restriction on alienation, it has been found to be a dependent Indian community": *ibid* at 194 n 89. But cf the Supreme Court's restrictive approach in *Alaska v Native Village of Venetie*, 522 US 520 (1998), criticized in *Cohen's Federal Indian Law* for failing to consider the context of the pertinent land: Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 194–195.

2016 Otherwise it would fall within the ambit of para (a)): Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 197.

2017 Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 197.

2018 Author Thomas King has commented that the *Dawes Act*, supra note 2006 "sought to 're-imagine' tribes and tribal land": Thomas King, "What Is It About Us That You Don't Like?" in King, *Stories*, *supra* note 387, 124 at 130. Somewhat less subtly, Senator Teller, one of the allotment system's biggest opponents, categorized it as an attempt "to despoil the Indians of their lands and to make them vagabonds on the face of the earth": Anderson et al, *supra* note 386 at 106. History was to prove him right: allotment reduced Indian land from 138 million acres in 1887 to 48 million acres in 1934, 84% of which in unallocated reservations situated in Arizona, Montana, New Mexico, Utah and Wyoming—see *ibid* at 79 and 108, and Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 74.

5.5.3.3 Private Land

A different problematic arises where a sacred site is situated on private land, or where federal public land is transferred into private hands. The impact is that most of the US statutory framework as discussed at 5.5.4 below ("Type of Sacred Site") will not apply to the project. Sacred Indigenous sites on private lands in the United States therefore constitute yet another angle consigned to footnote status in this thesis. It does point to a structural weakness in the US statutory framework applicable to the protection of Indigenous sacred sites, though.

5.5.3.4 Illustration: Desktop Study 4 – The San Carlos Apache and Tonto National Forest (Oak Flat), Arizona

5.5.3.4.1 Introducing the Desktop Study

The sacred site in question –Oak Flat– forms part of the Tonto National Park in Arizona that was established in 1905 and was withdrawn from mining through a Public Lands Order in 1955 when President Eisenhower signed an executive order on the basis of the area's natural and cultural value.[2019] The mining ban was renewed by the Interior Department in 1971 under Richard Nixon.[2020]

Oak Flat is an area sacred to the San Carlos Apache Tribe and is known to them as *Chi'chil Bildagoteel*.[2021] It is a place for traditional prayer, for cleansing ceremonies, coming of age ceremonies, the gathering of medicines, and the commencement of life.[2022]

[2019] Chelsey Luger, "Inside the Apache Fight Against Development that Inspired Standing Rock" (25 October 2016) *Project Earth*, online: <https://projectearth.us/inside-the-apache-fight-against-development-that-inspir-1796423038 >.

[2020] Luger, *supra* note 2019.

[2021] Luger, *supra* note 2019.

[2022] See Luger, *supra* note 2019.

Having been removed from the forest area by the US Army between 1866–1888, the San Carlos Apache's reservation now borders the forest on the east.[2023] Going back some 150 years, the forest "has a rich history of producing copper, gold, silver, lead, zinc, uranium, molybdenum, manganese, asbestos, mercury and many other metals and minerals."[2024]

5.5.3.4.2 Contemplating the Fact Set

The polemic arises from its transfer to Resolution Copper Mining in a land swap agreement championed by Senator John McCain (R-AZ) in the form of US Bill HR 687[2025] that was included as a last-minute rider to the must-pass *National Defense Authorization Act* of 2015.[2026] Senator McCain argued that the mine would be the source of close to 4,000 jobs and that it would add $60 billion to Arizona's economy.[2027]

The Act was duly passed by Congress on December 19, 2014 despite protests by inter alia the Affiliated Tribes of Northwest Indians (ATNI) that the land was eligible for protection under the NHPA.[2028]

The Australian-British multinational corporation Resolution Copper is a joint venture owned by BHP Billiton and Rio Tinto.[2029]

[2023] See "Tonto National Forest: History and Development", *United States Department of Agriculture (USDA) Forest Service*, online: < https://www.fs.usda.gov/detail/tonto/home/?cid=fsbdev3_018924>.

[2024] *USDA Forest Service*, *supra* note 2023.

[2025] *Southeast Arizona Land Exchange and Conservation Act, supra* note 38.

[2026] *National Defense Authorization Act* of 2015, *supra* note 38.

[2027] Luger, *supra* note 2019.

[2028] *National Historic Preservation Act* [NHPA], *supra* note 38.

[2029] See Luger, *supra* note 2019; "Resolution Copper Mine" (2017) *Resolution Copper*: online < http://resolutioncopper.com/resolution-copper-mine/>.

5.5.3.4.3 The Legislation

Efforts are currently underfoot to repeal section 3003 of the *National Defense Authorization Act* of 2015, the section that enabled the land swap arrangement. House Bill HR 2811[2030] and its Senate Equivalent, S 2242,[2031] conjointly known as the "Save Oak Flat Bill" were introduced in June 2015 [by Representative Grijalva (D-AZ)][2032] and November 2015 [by Senator Bernie Sanders (I-VT)][2033] respectively. The former was referred to the Subcommittee on Indian, Insular and Alaska Native Affairs on 1 July 2015 and the latter to the Committee on Energy and Natural Resources on 5 November 2015. There has been no action on the Bills since,[2034] although the National Park Service (NPS) officially listed the site on the National Register of Historic Places as the *Chi'chil Bildagoteel* Historic District on 4 March 2016.[2035] However, while this is an acknowledgement of the area's historic significance, it does not necessarily prevent mining at the site: it merely implies a historic significance investigation as part of the Environmental Impact Assessment Study that the mine's owners must conduct under *NEPA*.[2036] But as critics have pointed out: the outcome of the EIS is pretty much a foregone conclusion, given that the land swap has already been legislatively mandated.[2037] The same applies to the so-called requirement that the Apache must consent to the development.

2030 US, Bill, HR 2811, *Save Oak Flat*, 114th Cong.

2031 US, Bill, S 2242, *Save Oak Flat*, 114th Cong.

2032 HR 2811, *supra* note 2030.

2033 S 2242, *supra* note 2031.

2034 See "S.2242 – Save Oak Flat", *supra* note 38.

2035 Luger, *supra* note 2019.

2036 See Jessica Swarner, "Did Obama Just Block the Sale of Sacred Apache Land to a Foreign Mining Company? Well…" (17 March 2016) *Cronkite News*, online: < https://indiancountrymedianetwork.com/news/environment/did-obama-just-block-the-sale-of-sacred-apache-land-to-a-foreign-mining-company-well/> and the discussion of the NHPA below at 5.5.4.3.1.

2037 See Jessica Swarner, "Oak Flat Peril: Feds Begin Environmental Review of Proposed Resolution Copper Mine" (23 March 2016), Cronkite News: online < https://indiancountrymedianetwork.com/news/environment/oak-flat-peril-feds-begin-environmental-review-of-proposed-resolution-copper-mine/>.

5.5.3.4.4 Analysis

This is serious because it shows how easy it is to circumvent the statutory protection process. The San Carlos Apache is a federally registered Indian tribe and the sacred site. Oak Flat, is located on federal public land. What is more, this land forms part of a national reserve –Tonto National Forest– that was withdrawn from the public (and thus commercial domain). The maneuver involved a land swap deal: Resolution Copper/Rio Tinto traded 5,300 acres of private land for 2,400 acres of Forest Service land[2038] – an area that included a significant copper deposit, and also Oak Flat. Once swapped, the land no longer qualifies as federal public land, but falls in the private domain – meaning that none of the protections envisaged in the statutory Native American sacred site protection framework would apply. It therefore indicates a further serious structural deficiency in the US sacred sites protection regime.

5.5.4 Type of Sacred Site

The last dimension relates to the type of sacred site that requires protection. This section seeks to analyse sacred site protection from a legal vantage point and thus necessarily has to follow the statutory logic relating to site typification. I do so quite conscious of the fact that Indigenous peoples tend to have a more holistic view when it comes to land, culture and religion and therefore do not define their sacred sites so narrowly. See above at 1.6.3 ("Sacred Sites"). Thus Fowler explains in the context of US heritage preservation laws and regulations that they are mostly founded on truisms which "assume that 'places of association' mean *primarily* places (*qua* properties in the real estate sense) associated with 'great' events important to the dominant society or with said-to-be-important dead white males".[2039]

[2038] See Luger, *supra* note 2019; "The Land Exchange" (2017) *Resolution Copper*: online < http://resolutioncopper.com/protecting-the-desert/land-exchange/>.

[2039] Don Fowler, "Foreword" in Thomas F King, *Places that Count: Traditional Cultural Properties in Cultural Resource Management* (Walnut Creek: Altmira, 2003) [TF King, *Places that Count*] at ix [emphasis in the original text].

When contemplating the statutory framework applicable to sacred site claims made in respect of non-Indian Country federal public lands, four categories of claims can accordingly be distinguished, with a small degree of overlap in terms of applicable legislation, *viz*: (1) sites that are imbued with sacredness by reason of spiritual beliefs or ceremonial practices; (2) sites where cultural keystone species or sacred plants or medicinal herbs that are key to spiritual and cultural ceremonies are to be found; (3) historically important sites; and (4) graves and graveyards. We accordingly proceed to consider the legislative framework applicable to each of these.

5.5.4.1 Spiritual Beliefs or Ceremonial Practices

> In cases in which courts balanced the religious interests of indigenous plaintiffs against the interest of the state to impose a burden on the indigenous free exercise of religion, the results have been influenced by what appears to be a general leitmotif in Euro-American legal culture, namely the suppression of indigenous cultures in the name of white development and progress. The westward expansion of the American "frontier", the conquest by Euro-Americans of Western lands that were defined as pristine wilderness, has widely been seen as a "natural" historical proof.[2040]

5.5.4.1.1 Freedom of Religion: First Amendment

> Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will "virtually destroy the . . . Indians' ability to practice their religion," 795 F.2d at 693 (opinion below), the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities –from social welfare programs to foreign aid to conservation projects– will always be considered essential to the spiritual wellbeing of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all

[2040] René Kuppe, "Religious Freedom Law and the Protection of Sacred Sites" in Thomas G Kirsch & Bertram Turner, *Permutations of Order: Religon and Law as Contested Sovereignties* (Surrey: Ashgate Publications, 2009) 49 [Kuppe, "Religious Freedom Law"] at 62.

> citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.
>
> — Supreme Court Justice O'Connor, *Lyng v Northwest Indian Cemetry Protective Association* [2041]

***

> The Free Exercise Clause of the First Amendment is the putative basis for the plaintiffs' claims that the Navajo-Hopi Relocation Act is unconstitutional and that they have the right to remain in perpetuity on property held in trust by the United States for the exclusive use of the Hopi Tribe. If ever there was a basis for asserting such contentions (…) they were put to rest by the United States Supreme Court in *Lyng v Northwest Indian Cemetry Protective Association* (…). *Lyng* provides direct and dispositive answers to the plaintiffs' First Amendment claims. The holdings of *Lyng* are the law of this country whether or not personally acceptable to plaintiffs or those who espouse their cause.
>
> — District Judge Carroll, *Manybeads v United States*[2042]

The concept of religious freedom is embodied in the First Amendment to the United States Constitution, which provides, "Congress shall make no law respecting an establishment of Religion or prohibiting the free exercise thereof."[2043] This sentence encapsulates two separate notions: (1) that the government may not establish a religion –the Establishment Clause– and (2) that government may not pass laws that prohibit the free exercise of religion –the Free Exercise clause.[2044] There are clear historical instances to be found where the US government acted contrary

---

[2041] *Lyng*, *supra* note 787 at 451–452. (O'Connor J).

[2042] *Manybeads v United States*, 730 F Supp 1515 (D Ariz 1989) Carroll J [*Manybeads*] at para 1.

[2043] US Const Amend I.

[2044] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 965. Also see Kuppe, "Religious Freedom Law", *supra* note 2040 at 49.

to both of these: it has both interfered with the free exercise of Native American religions by passing laws outlawing religious dances such as the Sun Dance in the 1880s,[2045] and it has sought to Christianize Native Americans through assimilationist measures such as the Indian Boarding Schools.[2046] Nonetheless, there were no resultant court decisions evaluating the legitimacy of such governmental actions.[2047]

Both the Free Exercise Clause and the Establishment Clause are pertinent when dealing with the protection of Native American sacred sites, though, as René Kuppe argues–

> the experience of the United States is a good example of how the application of the guarantees of the First Amendment to the United States Constitution to adherents of religions distinct from mainstream Judeo-Christian beliefs has been very discriminative.[2048]

Free exercise claims are likely to emanate from the tribe in question in favour of protecting a sacred site, while establishment challenges usually come from those who oppose their protection as Native American sacred sites.

[2045] Henrietta Mann (Cheyenne), "Earth Mother and Prayerful Children: Sacred Sites and Religious Freedom" in in Grounds, Tinker & Wilkens, *supra* note 1816, 194 at 195 refers in this context to the banning of the sweat lodge, the Sun Dance, the Snake Dance, the Ghost Dance , the Potlatch Ceremony, as well as the use of peyote for religious purposes. Also see George E Tinker (Osage/Cherokee), "American Indian Religious Traditions, Colonialism, Resistance, and Liberation" in Grounds, Tinker & Wilkens, *supra* note 1816, 223 at 223–224.

[2046] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 965.

[2047] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 965, n 154.

[2048] Kuppe, "Religious Freedom Law", *supra* note 2040 at 50.

Examples of the former are to be found in *Badoni v Higginson*;[2049] *Sequoyah Valley v TVA*;[2050] *Crow v Gullet*;[2051] *Wilson v Block*;[2052] *United States v Means*;[2053] *Lyng v Northwest Cemetery Protective Association*;[2054] *Manybeads v United States*;[2055] *Havasupai Tribe v United States*.[2056]

Badoni[2057] (1977) constituted an unsuccessful attempt by the Navajo –including three Navajo medicine men–[2058] to protect sacred areas around the Rainbow Bridge National Monument that became easily accessible to tourists pursuant to the flooding of the reservoir known as 'Lake Powell". Of their three claims, one is particularly pertinent for present purposes, namely that "the flooding of the Rainbow Bridge National Monument has resulted in the destruction and desecration of many Navajo gods and sacred areas in the vicinity and has thereby violated the plaintiffs" right to the free and uninhibited exercise of their beliefs and practices, as guaranteed by the First Amendment".[2059] Two elements of the District Court's reasoning stand out in particular: the Court's insistence to measure the Navajo's spiritual practices against the criteria of organized religions, and

---

[2049] *Badoni v Higginson*, 455 F Supp 641 (D Utah 1977) Anderson CJ [*Badoni*].

[2050] *Sequoyah Valley v Tennessee Valley Authority,* 620 F2d 1159 (6th Cir), cert denied, 449 US 953 (1980) [*Sequoyah Valley*].

[2051] *Crow v Gullet*, 541 F Supp 785 (DSD 1982) Bogue CJ[*Crow*].

[2052] *Wilson v Block*, 708 F2d 735 (DC Cir 1983) Lumbard J [*Wilson*].

[2053] *United States v Means*, 858 F2d 404 (8th Cir 1988) [*Means*].

[2054] *Lyng*, *supra* note 787.

[2055] *Manybeads v United States*, 730 F Supp 1515 (D Ariz 1989) Carroll J[*Manybeads*].

[2056] *Havasupai Tribe v United States*, 752 F Supp 1471 (D Ariz 1990) Strand J, aff'd sub nom, *Havasupai Tribe v Robertson*, 943 F2d 32 (9th Cir 1991) [*Havasupai*].

[2057] *Badoni*, *supra* note 2049. See Allison M Dussias, "Ghost Dance and Holy Ghost: The Echoes of 19th Century Christianization Policy in 20th Century Native American Free Exercise Cases", (1997) 49 Stanford L Rev 773 at 823–828 [Dussias, "Ghost Dance"]; Luralene D Tapahe, "After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshippers" (1994) 24 New Mexico LR 331.

[2058] *Badoni*, *supra* note 2049 at 641. The Court described them as being "religious leaders of considerable stature among the Navajo, learned in Navajo history, mythology and culture, and practitioners of traditional rites and ceremonies of ancient otigin": *ibid.*

[2059] *Badoni*, *supra* note 2049 at 643.

its emphasis on the fact that the Navajo lacked property interests in the flooded area.[2060] This is a theme that would be taken up later by the Supreme Court in *Lyng*.

In *Sequoyah Valley*[2061] (1979) there was a failed attempt by the Cherokee to prevent the flooding of their sacred sites, ancestral burial grounds and ceremonial medicine gathering cites for reservoir purposes. The Court considered that this did not constitute a burden on Native American religion, since –

> The overwhelming concern of the affiants appears to be related to the historical beginnings of the Cherokees and their cultural development. It is damage to tribal and family folklore and traditions, more than particular religious observances, which appears to be at stake (…) These are not interests protected by the Free Exercise Clause of the First Amendment.[2062]

In *Crow*[2063] (1982) the Court held that the government's management of Bear Butte State Park in North Dakota did not substantially impact the religious activities of the Lakota (Sioux) and Tsistsistas (Cheyenne) nations.[2064] The plaintiffs, traditional chiefs and spiritual leaders of the Lakota Nation and the Tsistsistas Nation, contended that Bear Butte, a geographical formation at the eastern edge of the Black Hills, is "the most powerful ceremonial site for the religious practices of the Lakota and Tsistsistas people."[2065]

In *Wilson*[2066] (1983) the Hopi Indian Tribe and Navajo Medicinemen's Association were unable to protect the San Francisco Peaks in the Coconino National Forest close to Flagstaff Arizona –which they both consider as sacred– against development of the government-owned Snow Bowl on the

---

[2060] See Kuppe, "Religious Freedom Law", *supra* note 2040 at 54.

[2061] *Sequoyah Valley*, *supra* note 2050. See Luralene D Tapahe, "After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshippers" (1994) 24 New Mexico LR 331.

[2062] *Sequoyah Valley*, *supra* note 2050 at 1164–1165.

[2063] *Crow*, *supra* note 2051. See Dussias, "Ghost Dance", *supra* note 2057.

[2064] See the discussion in Kuppe, "Religious Freedom Law", *supra* note 2040 at 54–55 and 57.

[2065] *Crow*, *supra* note 2051 at 787.

[2066] *Wilson*, *supra* note 2052. See Dussias, "Ghost Dance", *supra* note 2057.

Peaks.[2067] The Court held that it would not substantially burden their religious practices, despite the fact the Court's clear finding that the Peaks "have for centuries played a central role in the religions of the two tribes." It was clear on the facts that both tribes feared great spiritual harm should the development come to pass:

> The Navajos believe that the Peaks are one of the four sacred mountains which mark the boundaries of their homeland. They believe the Peaks to be the home of specific deities and consider the Peaks to be the body of a spiritual being or god, with various peaks forming the head, shoulders, and knees of a body reclining and facing to the east, while the trees, plants, rocks, and earth form the skin. The Navajos pray directly to the Peaks and regard them as a living deity. The Peaks are invoked in religious ceremonies to heal the Navajo people. The Navajos collect herbs from the Peaks for use in religious ceremonies, and perform ceremonies upon the Peaks. They believe that artificial development of the Peaks would impair the Peaks' healing power.
>
> The Hopis believe that the Creator uses emissaries to assist in communicating with mankind. The emissaries are spiritual beings and are generally referred to by the Hopis as "Kachinas." The Hopis believe that for about six months each year, commencing in late July or early August and extending through mid-winter, the Kachinas reside at the Peaks. During the remaining six months of the year the Kachinas travel to the Hopi villages and participate in various religious ceremonies and practices. The Hopis believe that the Kachinas' activities on the Peaks create the rain and snow storms that sustain the villages. The Hopis have many shrines on the Peaks and collect herbs, plants and animals from the Peaks for use in religious ceremonies. The Hopis believe that use of the Peaks for commercial purposes would constitute a direct affront to the Kachinas and to the Creator.[2068]

The Circuit Court affirmed the Court *a quo*'s ruling that, although the plaintiffs' sincerity was not in doubt, a First Amendment claim had not been made out. This is because "the government had not denied the Indians access to the Peaks or impaired their ability to gather sacred objects and conduct ceremonies, and thus had not burdened their beliefs or religious practices."[2069]

[2067] *Wilson*, *supra* note 2052 at 738.

[2068] *Wilson*, *supra* note 2052 at 738.

[2069] *Wilson*, *supra* note 2052 at 740. Cf Kuppe, "Religious Freedom Law", *supra* note 2040 at 56: "It was therefore logically consistent for the Court *not* to recognize a compelling government interest in the ski expansion project. (…) the balancing test derived from *Sherbert* vs. *Verner* and *Wisconsin* vs. *Yoder*, which had been developed as a sharp sword for

Lyng[2070] (1988) constituted an unsuccessful attempt to stop the construction of a logging road through a National Park area sacred to three Native American tribes and created an unfortunate precedent in United States sacred sites protection insofar as freedom of religion assertions are concerned.[2071] Here the Yurok, Karok, and Tolowa Indians ("the Native American tribes") who live in the surrounding region sought to prevent the US Forest Service from implementing two Multiple-Use Forest Management Plans that involved respectively the logging of 733 million board feet of Douglas firs over an 80-year period, and the construction of a paved road ("the G-O Road") through an area known to them as "the High Country".[2072] The entire High Country is sacred to the Native American tribes in question, although their physical use for prayer and religious purposes is restricted to particular sites therein.[2073] Because the road logging-issue fell away due to Congressional intervention,[2074] I focus here on the construction of G-O Road. In the District Court and the Appeals Court the Native American tribes succeeded in obtaining an injunction against G-O Road on the basis that *inter alia* their First Amendment freedom of religion rights were being infringed.[2075] The District Court held, and the Appeals Court affirmed, that the Native American tribes had succeeded in proving that the intended construction of the Road would interfere with their free exercise rights for three reasons: (1) there was abundant evidence to the effect that their religious leaders and spiritual healers received their powers from the High Country and that the High Country was indispensable for these purposes; (2) it was clear that the "unitary pristine nature"

---

defending Christian sects, was converted into a dull knife when the Court was requested to analyse the (alleged) violation of the Navajo and Hopi peoples" [Author's emphasis].

2070 *Lyng*, *supra* note 787.

2071 See Camala Collins, "No More Religious Protection: The Impact of Lyng v Northwest Indian Cemetery Protection Association" (1990) 38 Washington University J Urban & Contemporary L 369; Tapahe, *supra* note 2061 at 340ff; Samuel D Brooks, "Note: Native Americans' Fruitless Search for First Amendment Protection of Their Sacred Religious Sites", (1990) 24 Val U L Rev 521.

2072 See *Northwest Indian Cemetery Protective Association v Peterson*, 795 F2d 688 (1986) Canby J [*Peterson*] at 689–690. This is the decision of the Appeals Court that was subsequently overturned by the Supreme Court in *Lyng*. "G-O Road" refers to the fact that the road was planned from Gasquet, California to Orleans, California: *Peterson* at 690.

2073 *Peterson*, *supra* note 2072 at 690.

2074 Congress enacted the *California Wilderness Act of 1984*, Pub L No 98-425, 98 Stat 1619 (1984) that placed most of the high country beyond the reach of logging but left open a corridor for the potential construction of G-O Road: see *Peterson*, *supra* note 2072 at 691.

2075 See *Peterson*, *supra* note 2072 at 689.

of the High Country was an indispensable prerequisite to this use; and (3) there was ample evidence that many other Native Americans drew on the spiritual services of these religious leaders and spiritual leaders and thus that their religious lives depended on them.[2076] Secondly, the Government had failed to advance a compelling interest in the construction of G-O Road, preferring instead to rely on its statutory prerogative of forest management.[2077] However, the Supreme Court, in a widely anticipated first pronouncement on Indigenous sacred sites, elected to treat the issue as a matter of property rights prevailing over the Native American tribes' religious freedom rights.[2078]

In *Means*[2079] (1988) the Court held that the denial of a special permit to the Sioux for the use of a portion of the Black Hills that they consider as sacred did not burden their exercise of religion. With reference to *inter alia Lyng*, the Court's *ratio* in holding that they did not meet the first leg of the First Amendment claim was that "[t]he Government [had] not coerced [the Sioux] into violating their religious beliefs, nor [had] it compelled them, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons."[2080]

A motion to dismiss was granted in *Manybeads*[2081] (1989) where Navajo were objecting to being relocated from land recently reassigned to a Hopi tribe. The plaintiffs had advanced seven grounds on which they were so objecting: (1) violation of religious freedom rights; (2) violation of AIRFA; (3) violation of Equal Protection; (4) violation of federal trust responsibility; (5) violation of religious freedom under customary international law and the United Nations Charter; (6) violation of the international prohibition on genocide; and (7) violation of their rights under article 73 of the UN Charter as a non-self-governing people.[2082] The Federal District Court for Arizona rejected the first

---

[2076] See *Peterson*, *supra* note 2072 at 692.

[2077] See *Peterson*, *supra* note 2072 at 695.

[2078] For a detailed analysis of *Lyng,* see Kuppe, "Religious Freedom Law", *supra* note 2040 at 58–61. Also see the take of Vine Deloria Jr, "Sacred Lands", *supra* note 141 at 204–205.

[2079] *Means*, *supra* note 2053.

[2080] *Means*, *supra* note 2053 at 407.

[2081] *Manybeads*, *supra* note 2055.

[2082] *Manybeads*, *supra* note 2055 at 1516–1517.

two claims out of hand on the basis of *Lyng*;[2083] described their Equal Protection claim as "disingenuous" because of the fact that they were being dispossessed of the land in favour of another Native American tribe;[2084] held that there was no violation of federal trust responsibility as "the Government has a trust obligation to both tribes" and based on its failure "to fairly act to protect the Hopi rights for many, many years";[2085] and pronounced the last three claims based on international law and the *UN Charter* to be "legally frivolous"[2086] and "far fetched".[2087]

In *Havasupai*[2088] (1990) the Arizona District Court held that the proposed location of the Grand Canyon Uranium Mine in the Kaibab National Forest near the Grand Canyon National Park on land sacred to the Havasupai Tribe did not violate their free exercise rights.[2089] The Tribe had advanced four grounds why the mining development should not go ahead: (1) violation of their religious freedom rights; (2) violation of their aboriginal access right to the Canyon Mine site; (3) breach of fiduciary duties; (4) deficient EIS that did not comply with the *National Environmental Policy Act*.[2090] The Court dismissed their religious freedom claim on the basis of *Lyng*;[2091] held that their aboriginal title had been extinguished by the twin combination of the establishment of a forest reserve[2092] and the payment of compensation to the Tribe by the Indian Claims Commission;[2093] considered that there were no specific fiduciary duties on the Government in this regard,[2094] and

---

[2083] See *Manybeads*, *supra* note 2055 at 1517–1519.

[2084] *Manybeads*, *supra* note 2055 at 1519.

[2085] *Manybeads*, *supra* note 2055 at 1519.

[2086] *Manybeads*, *supra* note 2055 at 1520.

[2087] *Manybeads*, *supra* note 2055 at 1520–1521.

[2088] *Havasupai*, *supra* note 2056.

[2089] See *Havasupai*, *supra* note 2056 at 1475.

[2090] *Havasupai*, *supra* note 2056 at 1475–1476.

[2091] See *Havasupai*, *supra* note 2056 at para 15.

[2092] *Havasupai*, *supra* note 2056 at para 7.

[2093] *Havasupai*, *supra* note 2056 at para 8. But consider the position in Canadian law, where a definite distinction is drawn between aboriginal *title* and aboriginal *rights*: see *Delgamuukw*, *supra* note 550 at 1027 and the discussion at 4.5.3.3 above ("Aboriginal and Treaty Rights as Potential Avenue of Sacred Site Protection").

[2094] *Havasupai*, *supra* note 2056 at paras 16–27.

the Government was in compliance with its general fiduciary duty;[2095] and considered insofar as NEPA is concerned that whereas the "duties imposed upon an agency are 'essentially procedural'"[2096], "a reviewing court cannot impose its judgment on an agency."[2097] *In casu* the Forest Service had fulfilled its procedural obligations.

Establishment challenges have frequently arisen in the context of National Park Management Plans that seek to accommodate Native American spiritual beliefs in multi-use policies. Examples of these include: *Bear Lodge Multiple Use Association v Babbitt*;[2098] *Cholla Ready Mix, Inc v Civish*;[2099] *Access Fund v US Department of Agriculture*.[2100]

In *Bear Lodge*[2101] (1998) the district court upheld a voluntary climbing ban of Devil's Tower during the month of June when many Native American religious practices took place in the area, emphasizing the voluntary nature of the ban and holding that it did not deprive others of regular use of the area.[2102] The Tenth Circuit dismissed the application on standing grounds. The plaintiffs, an organization of non-Native American commercial guides and rock climbers, had alleged that "the Program proselytizes school children who visit the Monument under the guise of educating children about the heritage surrounding the Memorial".[2103]

2095 *Havasupai*, *supra* note 2056 at para 28.

2096 *Havasupai*, *supra* note 2056 at paras 31–32.

2097 *Havasupai*, *supra* note 2056 at paras 33–35.

2098 *Bear Lodge Multiple Use Association v Babbitt*, 2 F Supp 2d 1448 (D Wyo 1998), aff'd, 175 F3d 814 (10th Cir 1999) [*Bear Lodge*].

2099 *Cholla Ready Mix, Inc v Civish*, 382 F3d 969 (9th Cir 2004) Fletcher J [*Cholla*].

2100 *Access Fund v US Department of Agriculture*, 499 F3d 1036 (9th Cir 2007) McKeown J [*Access Fund*].

2101 *Bear Lodge*, *supra* note 2098.

2102 Two years earlier the same court had invalidated a Climbing Management Plan that included a ban on sports climbing during June on Establishment Grounds in *Bear Lodge Multiple Use Association v Babbit*, 2 FSupp2d 1448. See Kuppe, "Religious Freedom Law", *supra* note 2040 at 57–58 in this regard.

2103 2 F Supp 2d 1448 (D Wyo 1998) at 1452. Also see the discussion in Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 977.

Shortly after the Plaintiff in *Cholla*[2104] (2004) began mining Woodruff Butte, a site sacred to three tribes –the Hopi Tribe, Zuni Pueblo, and Navajo Nation– for road construction materials, the three tribes passed resolutions against the mining because of the site's religious, cultural and historical significance to them.[2105] Woodruff Butte was subsequently declared eligible for listing on the National Register of Historic Places (NRHP), meaning that adverse effects on the historic property had to be considered in the Environmental Assessment (EA) that was required from Cholla under newly issued commercial regulations.[2106] Cholla's challenge to the regulations on establishment grounds was rejected on the basis that they had a secular purpose,[2107] and that their primary effect was to accommodate religion rather than to advance it:

> Moreover, defendants' policy does not *advance* religion, but rather implements ADOT's decision that state construction projects should be carried out in a way that does not *interfere* with the Tribes' religious practices or destroy religious sites that have historical significance. Accommodating religious practices that does not amount to an endorsement is not a violation of the Establishment Clause.[2108]

An important factor in the Ninth Circuit's reasoning was the Court's finding that the Defendants' policy did not amount to an endorsement of the tribes' religion, nor was there anything to suggest that their religion was being given preferential treatment:

> Because of the unique status of Native American societies in North American history, protecting Native American shrines and other culturally-important sites has historical value for the nation as a whole, much like Greece's preservation of the Parthenon, an ancient Greek temple of worship. The Establishment Clause does not require governments to ignore the historical value of religious sites. Native American sacred sites of historical value are entitled to the same protection as the many Judeo-Christian religious sites that are protected on the NRHP, including the National Cathedral in Washington, DC; the Touro Synagogue, America's oldest standing synagogue, dedicated in 1763; and numerous

---

[2104] *Cholla*, *supra* note 2099.

[2105] See *Cholla*, *supra* note 2099 at 972.

[2106] See *Cholla*, *supra* note 2099 at 972.

[2107] See *Cholla*, *supra* note 2099 at 975.

[2108] *Cholla*, *supra* note 2099 at 976.

> churches that played a pivotal role in the Civil Rights Movement, including the Sixteenth Street Baptist Church in Birmingham, Alabama.[2109]

Finally, there was nothing to indicate that the Defendants' actions promoted "excessive government entanglement with religion".[2110]

In *Access Fund*[2111] (2007) the Ninth Circuit upheld a rock climbing ban on Cave Rock –a large rock formation on the eastern shore of Lake Tahoe that is sacred to the Washoe Tribe[2112]– on the basis that the ban had a secular purpose, namely cultural, historical and archaeological preservation;[2113] it did not have the primary effect of endorsing religion; and it could not be fairly perceived as constituting one. In discussing the lack of an endorsement effect, the Court made a useful distinction between accommodation and actual endorsement:

> The Forest Service's chosen alternative not only provides for general public use and access well beyond members of the Washoe Tribe, but also permits activities that are incompatible with Washoe beliefs. When a government action challenged under the Establishment Clause explicitly violates some of the core tenets of the religion it allegedly favors, such action will typically be considered permissible accommodation rather than impermissible endorsement.[2114]

It is apparent that the Courts have been more willing to extend protections in the Establishment category; nonetheless, I should emphasize that in none of these cases have the tribes themselves been able to invoke these protections as a spear rather than a shield – in fact, the tribes were not even party to any of them. Two comments bear making in this regard: first, it does not for an active enforcement mechanism make, and second, in all of them the sacred site protections were extremely

---

[2109] *Cholla*, *supra* note 2099 at 976.

[2110] *Cholla*, *supra* note 2099 at 977. For more on the case, see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 971 and Marcia Yablon, "Note: Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land" (2004) 113 Yale LJ 1623.

[2111] *Access Fund*, *supra* note 2100.

[2112] *Access Fund*, *supra* note 2100 at 1038.

[2113] *Access Fund*, *supra* note 2100 at 1043–1045.

[2114] *Access Fund*, *supra* note 2100 at 1045.

tightly defined and quite limited in nature unless they could clearly be tied to a secular purpose such as historical preservation.

The Free Exercise case law, on the other hand, has been dominated by a discussion as to whether incidental burdens on religious freedom resulting from the application of a generally applicable law invite strict scrutiny.[2115] Prior to the 1990 Supreme Court judgment in the *Employment Division v Smith*[2116] matter, the test was one of strict scrutiny under *Sherbert v Verner*[2117] (1963). This entailed the application of the 2-step *Sherbert* test: (1) the plaintiffs needed to establish that the infringement constituted a burden on the exercise of their religion, whereafter (2) it fell to the state to justify its limitation on the basis of a compelling government interest. What constituted grounds for such limitation was further elaborated on in *Wisconsin v Yoder*[2118] (1972): the first leg of the inquiry considered whether the infringement of religious liberty served a compelling governmental interest; the second leg contemplated whether the government had at its disposal a less restrictive means of achieving its goal. In *Smith*, the Supreme Court essentially overruled *Sherbert* in that it limited *Sherbert* to its facts.[2119] The Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes"',[2120] *in casu* the smoking of peyote in Native American religious ceremonies.[2121]

2115 For a detailed discussion, see Tapahe, *supra* note 2061.

2116 *Employment Division v Smith*, 494 US 872 (1990) [*Smith*].

2117 *Sherbert v Verner*, 374 US 398 (1963) [*Sherbert*].

2118 *Wisconsin v Yoder*, 406 US 205 (1972) [*Yoder*].

2119 Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 967. On *Smith*, see Vine Deloria Jr, "Worshipping the Golden Calf: Freedom of Religion in Scalia's America" in Deloria, *For This Land*, *supra* note 335, 214.

2120 *Smith*, *supra* note 2116 at 879.

2121 On the use of peyote in Native American religious ceremonies, see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 966–968. It is one of four defined areas of legal conflict involving Native American religions in the United States, the others relating to sacred site protection, eagle feather possession, and the rights of Native American inmates: *ibid* at 966. Also see Joseph D Calabrese, *A Different Medicine: Postcolonial Healing in the Native American Church* (Oxford Scholarship Online: 2013).

Kuppe has argued that the US courts' treatment of First Amendment claims is indicative of a strong cultural bias in that there is a strong underlying Judeo-Christian undercurrent.[2122] In particular, he identifies the following: (1) the strict division between religion and culture that is in conformance with the church/state divide in Western thought, but fails to capture the holistic nature of Indigenous spirituality;[2123] (2) the commemorative nature of Western religious traditions, as opposed to the Indigenous belief that nature and all its parts fulfil a harmonizing, balancing role;[2124] (3) the worst that happens with the breach of a Western religion –at least on the earthly plane– is that it constitutes a transgression,[2125] whereas non-compliance with the prescriptions of Indigenous spiritual tenets may encompass physical danger to human and other beings due to the disturbance of balance and harmony;[2126] (4) Western religions embrace the notion of proselytism of a revelatory event, which is the *raison d'être* of the Establishment Clause[2127] – Indigenous spirituality does not proselytise but focuses on communal involvement and the renewal of relationships with sacred sites,[2128] which is why it is inappropriate to raise Establishment challenges to religious accommodations that are afforded to Indigenous Nations;[2129] (5) similarly, Western religions are not location-bound and can be practiced anywhere,[2130] while Indigenous religions are "dependent on specific spatial and socio-cultural contexts".[2131] He therefore justly submits that for religious freedom rights to offer an effective sacred sites protection mechanism in the United States, their scope would have to be widened.[2132]

[2122] Kuppe, "Religious Freedom Law", *supra* note 2040 at 63.

[2123] See Kuppe, "Religious Freedom Law", *supra* note 2040 at 61.

[2124] See Kuppe, "Religious Freedom Law", *supra* note 2040 at 61–62.

[2125] See Kuppe, "Religious Freedom Law", *supra* note 2040 at 63.

[2126] See Kuppe, "Religious Freedom Law", *supra* note 2040 at 62.

[2127] See Kuppe, "Religious Freedom Law", *supra* note 2040 at 63.

[2128] See Kuppe, "Religious Freedom Law", *supra* note 2040 at 63.

[2129] See Kuppe, "Religious Freedom Law", *supra* note 2040 at 62–63.

[2130] See Kuppe, "Religious Freedom Law", *supra* note 2040 at 62.

[2131] Kuppe, "Religious Freedom Law", *supra* note 2040 at 63.

[2132] See Kuppe, "Religious Freedom Law", *supra* note 2040 at 64.

To the above indicators of cultural bias as identified by Kuppe, I would add the conflict inherent in the Judeo-Christian notion of religion as revelatory event of which the word is to be spread versus the intensely personal and sacred aspects of Indigenous spirituality that oftentimes prevent detailed disclosures in respect of scared sites.

5.5.4.1.2 American Indian Religious Freedom Act [AIRFA]

In 1978 Congress enacted the *American Indian Religious Freedom Act* [AIRFA].[2133] Despite its promising title, it was in its initial format a mere policy declaration[2134] to the effect that the United States as a policy would –

> protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian (…) including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[2135]

Lyng was the final nail in AIRFA's coffin. In this context, the Supreme Court said, "Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights."[2136]

In reaction to the Supreme Court ruling in *Smith*, AIRFA was amended in 1994[2137] to protect the sacramental use of peyote.[2138] However, the *Lyng* precedent stands insofar as sacred site protection is concerned.

[2133] (1978), 42 USC § 1996.

[2134] See e.g. *Peterson*, *supra* note 2072 at 694. The Court here uses Congress' policy declaration as embodied in AIRFA as part of its argumentation that accommodation of the Indians' religious freedom in the form of an injunction against the construction of G-O Road does not amount to the establishment of a religion in conflict with the Establishment Clause. But this is of mere academic interest, the matter having been overturned by the Supreme Court in *Lyng*.

[2135] 42 USC § 1996.

[2136] *Lyng*, *supra* note 787 at 1327.

[2137] 42 USC § 1996a.

[2138] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 968.

5.5.4.1.3 Religious Freedom Restoration Act [RFRA]

In another reaction to *Smith*, Congress enacted the *Religious Freedom Restoration Act* [RFRA][2139] with the objective of restoring the compelling state interest test as per *Sherbert*.[2140]

The RFRA has had a chequered history: originally enacted in1993, its scope has since been restricted to federal actions. Its salient provision reads as follows:

> Government shall not substantially burden a person's exercise of religion [unless] it demonstrates that application of the burden (…) (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[2141]

However, an RFRA plaintiff bears an initial burden of proof, *viz* that–

1. the Government's policy or action implicates her religious exercise,
2. the relevant religious exercise is grounded in a sincerely held religious belief, and
3. the policy or action substantially burdens that exercise.[2142]

However, in *City of Boernes v Flores*[2143] the Supreme Court declared RFRA unconstitutional insofar as its application to the States was concerned, holding that Congress had overextended its powers under section 5 of the Fourteenth Amendment, i.e. its powers were limited to the protection of existing constitutional rights.[2144] While a number of lower courts proceeded to hold that RFRA is

---

[2139] RFRA, *supra* note 37.

[2140] *Sherbert*, *supra* note 2117: see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 968.

[2141] 42 USC § 2000bb–1.

[2142] *Standing Rock Sioux Tribe v US Army Corps of Engineers*, F Supp 3d (2017) (DDC, 7 March 2017), 2017 WL 908538, Boasberg J [*Standing Rock II*], para 8, with reference to *Holt v Hobbs, –US–*, 135 S Ct 853, 862, 190 L Ed 2d 747 (2015).

[2143] *City of Boernes v Flores*, 521 US 507 (1997).

[2144] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 968.

constitutional insofar as it applies to the federal government,[2145] the position only crystalized in 2014 with the Supreme Court's judgment in *Hobby Lobby*[2146] that confirmed the RFRA to be constitutional in federal government matters, on the basis that it "draws from the power to create and regulate the federal entity to which it is applied".[2147]

All of this does not make a big difference insofar as sacred site protection on the basis of religious freedom rights is concerned: *Lyng* was decided pre-*Smith*, and as such applied the *Sherbert* balancing test that the RFRA has reintroduced. This means that any sacred site protection claims based on the RFRA are bound to run into problems with the precedent created in *Lyng*, as the discussion of *Standing Rock II* below illustrates (see at 5.5.4.5.3.2).

5.5.4.1.4 Executive Order 13007– Indian Sacred Sites

Executive Order 13007 provides that federal agencies

> shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, and (2) avoid adversely affecting the physical integrity of such sacred sites.[2148]

It has no force and effect on its own, but is sometimes incorporated into other legislation such as the *Federal Land Policy and Management Act* [FLPMA][2149] through the operation of the FLPMA's prohibition on unnecessary or undue land degradation.[2150]

[2145] See e.g. *Holy Land Found for Relief & Development v Ashcroft*, 333 F3d 156 (DC Cir 2003); *Guam v Guerrero*, 290 F3d 1210 (9th Cir 2002); *In re Young*, 141 F3d 854 (8th Cir 1998). See generally Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 968.

[2146] *Burwell v Hobby Lobby Stores, Inc*, 134 S Ct 25751, 2671 (2014) [*Hobby Lobby*]. See Newton, *Cohen's Federal Indian Law* (2015 Cumulative Supplement) at 46.

[2147] Newton, *Cohen's Federal Indian Law* (2015 Cumulative Supplement) at 46.

[2148] 61 Fed Red 26771 (24 May 1996).

[2149] *Federal Land Policy and Management Act of 1976* [*FLPMA*], Pub L 94-579, 90 Stat 2743 (1976).

[2150] See 43 USC §1732(b); 43 CFR § 3809.5.

Well-meaning as this Executive Order may have been, it is not problem-free. Thus it defines a sacred site as a "specific, discrete, narrowly delineated location" with an "established religious significance" or "ceremonial use".[2151] An unreported case, *Te-Moak Tribe of Western Shoshone Indians of Nevada v US Department of the Interior*,[2152] provides a good illustration of the problems created by this definition. In casu the plaintiff Native American tribe lost its endeavour to protect its sacred site, Mount Tenabo, against a mining development on federal land. The Court held that the entire Mount Tenabo did not constitute a sacred site[2153] and that the Bureau of Land Management was justified to conclude that "further accommodation was not practicable given the lack of specificity as to location and as to number of Tribal members who use any particular site on the pediment for religious activities."[2154]

5.5.4.1.5 National Historic Preservation Act [NHPA][2155]

See discussion below at 5.5.4.3 ('Historically Important Sites")

2151 61 Fed Red 26771.

2152 *Te-Moak Tribe of Western Shoshone Indians of Nevada v US Department of the Interior*, 565 Fed Appx 665 (9th Cir, 2014) [*Te-Moak Tribe*].

2153 See *Te-Moak Tribe*, *supra* note 2152 at 667.

2154 *Te-Moak Tribe*, *supra* note 2152 at 668.

2155 54 USC § 300101 *et seq*.

5.5.4.2 Cultural Keystone Species, Sacred Plants, Medicinal Herbs

5.5.4.2.1 National Environment Protection Act [NEPA][2156]

The same issues relating to specificy and revelation of secret details has characterized efforts to protect Native American sacred sites by means of the NEPA scoping process that aims to identify cultural, religious and environmental concerns. A typical example can be found in *Havasupai*:

> The Hopi and Havasupai Tribes have suggested that sacred religious sites, including ruins, graves and hunting areas exist at or near the mine site and haul routes. However, consultation with the Tribes and experts on Indian religious sites and practices as well as archaeological inventories have failed to identify any specific Hopi or Havasupai sites of sacred or religious significance near the proposed mine site.[2157]

We learn somewhat later that the work of the "experts on Indian religious sites" relate to "American Indians in general". The Forest Service had undertaken this generic study despite the fact that the Havasupai "claim to be the only experts on the Havasupai religion"[2158] as they "would not speak of their religion directly or reveal details concerning the manner in which the proposed mining activity would interfere with their religious beliefs and or practices."[2159] The Court blamed the Havasupai for their reserve and qualified their disclosures in letters as "cryptic references".[2160] Consequently –

> The court recognizes that the nature of the Havasupai religion is inherently a personal and secret issue. *However, the law requires revelation in exchange for further recognition, consideration, and mitigation*. (…) The Forest Service agency repeatedly sought clarification of plaintiff's comments. However, the Administrative Record reflects that the Havasupai declined to participate in a meaningful manner during the administrative action. Accordingly, the

---

[2156] 42 USC 4332(c).

[2157] *Havasupai*, *supra* note 2056 at 1498.

[2158] *Havasupai*, *supra* note 2056 at 1499.

[2159] *Havasupai*, *supra* note 2056 at 1499–1500.

[2160] *Havasupai*, *supra* note 2056 at 1500.

> plaintiffs cannot complain that the agency's consideration of their religious concerns was inadequate.[2161]

5.5.4.3 Historically Important Sites

5.5.4.3.1 National Historic Preservation Act [NHPA]

There are two possibilities here: that the property in question already is registered in the National Register of Historic Places, or that it has not yet been done. Listing will often only become topical once the site is endangered.[2162] Either way, if a determination is made that the site qualifies for inclusion in the National Register, it invokes the section 106 federal consultation process.[2163] It is known as the 'section 106 process' because it originally appeared in s 106 of the *National Historic Preservation Act* [NHPA][*2164*], the (revised and amended) provisions of which are now reflected in chapter 54 of the United States Code.

There are two ways of qualifying: in terms of the National Parks Service (NPS) eligibility regulations as contained in 36 CFR part 63[2165] or as a "traditional cultural property" (TCP) under Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*. [2166] Section 106 consultation is required in both instances, but the obligation to consult specifically with affected Indian tribes is stipulated specifically with regards to the latter category.

The eligibility criteria in 36 CFR part 63 include three types of sites that are of importance for present purposes: "districts, sites, buildings, structures, and objects" that (a) "are associated with

---

[2161] *Havasupai*, *supra* note 2056 at 1500 [emphasis added].

[2162] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1294.

[2163] 54 USC § 306108.

[2164] 54 USC § 300101 *et seq*.

[2165] 16 USC § 470, was repealed and restated in Title 54 §§ 300101 *et seq*: *National Park Service & Related Programs* in December 2014 by Pub L 113-287, 128 Stat 3272 (19 December 2014).

[2166] National Park Service, National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (1990).

events that have made a significant contribution to the broad patterns of our history"; (b) "are associated with the lives of persons significant in our past"; and (d) "have yielded, or may be likely to yield, information important in prehistory or history." TCP's may overlap with these: it is a term that refers to property that is "eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." Importantly, while physical evidence of human activity is not a requirement for qualification under the latter category, there must be a distinguishable place.[2167]

However, there is a significant nuance: the section 106 process is primarily procedural but where the property in question is historic property owned or controlled by the federal government, a substantive requirement comes into place: "The head of each Federal agency shall assume responsibility for the preservation of historical property that is owned or controlled by the Agency."[2168] Where a federally-owned or controlled sacred site thus is sacred because of a historical event –a massacre site, for instance– it would be to the tribe's advantage to emphasize the historical nature of the site more than its religious dimension. A federally recognized tribe may apply for funding to restore a sacred site that is listed on the National Register, provided that "the purpose of the grant —(1) is secular; (2) does not promote religion; and (3) seeks to protect qualities that are historically significant."[2169] This likely serves as safeguard against claims that the Establishment clause of the First Amendment is being breached.

Cohen's Federal Indian Law points out that the eligibility criteria in 36 CFR part 63 were last revised in 1990, i.e. prior to the 1992 NHPA amendments.[2170] It consequently does not specifically refer to

---

[2167] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1291, with reference to *Hoonah Indian Association v Morrison*, 170 F3d 1223, 1239-1232 (9th Cir 1999) ("although historic significance of trail referred to as 'survival march' was not in dispute, no violation of NHPA occurred because location of trail could not be established despite Forest efforts to do so.")

[2168] 54 USC § 306101(a)(1). See in this regard 54 USC § 306101–306114 and Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1293.

[2169] 54 USC § 302905.

[2170] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1290.

"Indian tribes" but simply to "tribes". But even if this were to mean that a federally unrecognized tribe could get their sacred site listed on the National Register –a somewhat doubtful proposition, since only States may nominate sites to the Secretary for listing in the National Register –[2171] it is clear from the Section 106 regulations in 36 CFR Part 800 they would not qualify for section 106 consultation purposes *qua* tribe. For purposes of this division, "Indian tribe" is defined as follows: "'Indian tribe' means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation,[2172] that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians".[2173] It is furthermore clear from 54 USC §§ 302906–302908 that a non-recognized tribe will not qualify for any grant funding from the Historic Preservation Fund. Individual tribe members might have standing as interested members of the public with a historic preservation concern,[2174] but that hardly addresses the root concern of a community that is trying to protect its culture, religion and identity.

Thomas F King, co-author of Bulletin 38,[2175] points out that the section 106 consultation process is not a shield against the development of a listed property but usually gives rise to a negotiated agreement on the avoidance or mitigation of damages.[2176] Here it is critical for the tribe whether the resource is on tribal lands or not: although they must be consulted, they can only insist on having a controlling outcome in the negotiating process where their tribal lands are at issue.[2177] Whichever argument is used to demonstrate eligibility for listing, it is an agency-driven consultation process with stakeholders including, but not limited to, state and tribal historic preservation officers

---

2171 54 USC § 302104.

2172 As those terms are defined in section 3 of the *Alaska Native Claims Settlement Act*: 43 U.S.C. 1602.

2173 54 USC § 300309.

2174 Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1293, with reference to *Winnemem Wintu Tribe v US Department of Interior*, 725 FSupp 2d 1119, 1134 (ED Cal 2010) [*Winnemem Wintu Tribe*]. We addressed this judgment at 5.2.2.4.3 above ("The Litigation").

2175 Fowler, *supra* note 2039, ix.

2176 TF King, *Places that Count*, *supra* note 2039 at 13.

2177 See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1298.

(SHPOs and THPOs) and concerned Indian tribes. In the case that no agreement can be reached, a formal and final decision is made by the keeper of the National Register.[2178]

5.5.4.3.2 Archaeological Resources Protection Act [ARPA]

Cultural property as conceived of by tribes may go beyond what is protected by either federal statutory or international law.[2179] While in international law terms 'cultural property' is defined broadly, so as to encompass all property that is "of great importance to the cultural heritage of a people"[2180] federal statutory law's reach is more selectively defined. There are principally two ways in which federal statutory law does protect tribal cultural property: the *Archaeological Resources Protection Act* [ARPA][2181] partially protects "archaeological resources" and NAGPRA protects certain "cultural items" such as "funerary objects", "sacred objects" and items of "cultural patrimony".[2182] "Archaeological resources" protected by ARPA include remains of past human life or activities that are of archaeological interest and are at least 100 years of age.[2183] ARPA has particular permitting requirements when it comes to the excavation or removal of archaeological resources (as defined) on federal lands and "Indian lands".[2184] If such excavations take place on "Indian lands", the consent of the "Indian tribe" in question is required;[2185] where they take place on federal lands and it appears that there may possibly harm to any tribal religious or cultural site, there is a requirement that the tribe must be informed (though not necessarily consulted).[2186] Where

---

2178 TF King, *Places that Count*, *supra* note 2039 at 13.

2179 See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1266.

2180 Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1267.

2181 (1979), 16 USC § 470aa, *et seq*.

2182 Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1267–1268.

2183 16 USC § 470bb(1); 43 CFR § 7.3(a).

2184 16 USC § 470aa et seq. For a detailed explanation, see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1285–1288.

2185 16 USC § 470cc(g)(2) read with 43 CFR § 7.8(a)(5). See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1285.

2186 See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1286–1288.

such excavations involve human remains, the notice and consultation requirements of NAGPRA will apply.[2187]

5.5.4.3.3 American Indian Freedom of Religion Act [AIRFA][2188]

See above at 5.5.4.1 ("Spiritual Beliefs or Ceremonial Practices").

5.5.4.3.4 National Environment Protection Act [NEPA][2189]

See above at 5.5.4.2 ("Cultural Keystone Species, Sacred Plants, Medicinal Herbs").

5.5.4.4 Graves and Graveyards

5.5.4.4.1 Native American Graves Protection and Repatriation Act [NAGPRA]

The *Native American Graves Protection and Repatriation Act* [NAGPRA]*[2190]* governs human remains located on federal or tribal lands and in the custody of federally funded museums.[2191] Different processes apply depending on whether such remains are located in the course of intentional excavations on federal or tribal lands, or due to inadvertent discoveries on federal or tribal lands. Intentional excavations on federal lands require a permit, prior consultations with the "appropriate"[2192] Indian tribes, and are subject to the section 106 NHPA process.[2193] Human remains discovered inadvertently involve a temporary halting of activities, notification of federal activities, and possible consultation by the federal authorities with appropriate tribes before the

---

[2187] 43 CFR § 7.7(b)(4). See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1288 and the discussion at 5.5.4.4.1 below ("*Native American Graves Protection and Repatriation Act* [NAGPRA]").

[2188] (1978), 42 USC § 1996.

[2189] 42 USC 4332(c).

[2190] (1990), 18 USC § 1170, 25 USC §§ 3001–3013.

[2191] See generally Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1271–1285; Vine Deloria Jr, "A Simple Question of Humanity: The Moral Dimensions of the Reburial Issue" in *Deloria, For This Land*, *supra* note 335, 187.

[2192] 43 CFR § 10.3(c) more closely defines 'appropriate".

[2193] For further details, see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1280–1281.

work may be recommenced.[2194] Intentional excavations from tribal lands require the tribe's consent,[2195] while inadvertent discoveries on tribal lands requires notification of the tribe.[2196] Other tribes that may have a cultural affiliation with the remains need not be consulted with, as the property interests vests in the tribe whose land it is.[2197]

5.5.4.4.2 Archaeological Resources Protection Act [ARPA] (1979)[2198]

See above at 5.5.4.3 ("Historically Important Sites").

5.5.4.5 Illustration: Desktop Study 5 – The Standing Rock Protest and the Dakota Access Pipeline, North Dakota

> The Court readily recognizes the sordid chronicle of the United States' dispossessing the Lakota people of swaths of land (…) and takes seriously that the Tribe feels such deep oppression as to warrant analogy to the prisoner cases. Yet *Lyng* expressly cautions that "measuring the effects of a governmental action on a religious objector's spiritual government" is not the proper inquiry when the challenged action is the federal government's management of its own land.[2199]
>
> — District Court Judge Boasberg, in *Standing Rock II*

5.5.4.5.1 Introducing the Desktop Study

The uniquely exclusionary nature of the United States statutory framework pertaining to federal Indian Law was well illustrated by the Winnemem Wintu case study above: if the tribe in question is not a federally registered tribe, it in essence can lay claim to no protection under the framework

---

[2194] For further details, see Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1281–1282.

[2195] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1282–1283.

[2196] See Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1283–1284.

[2197] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at 1283, with reference to 25 USC § 3002(a)(2)(A).

[2198] 16 USC § 470aa, *et seq*.

[2199] *Standing Rock II, supra* note 2142.

in place. While this case study well demonstrated the point, however, it did not measure the effectiveness of the framework when it comes to the protection of a federally recognized tribe. I therefore undertook the unusual step of including in my United States chapter a second case study, this one focussing on a problem that involved two federally recognized tribes: the Standing Rock Sioux and the Cheyenne River Sioux. Note that these have not been the only Sioux challenges to the Dakota Access Pipeline Project: I limit the study to these two as they engaged in joint litigation, so as to limit the scope of the discussion.

5.5.4.5.2 Contemplating the Fact Set

The Standing Rock issue concerns the construction of the Dakota Access Pipeline under Lake Oahe that provides drinking water to the Standing Rock Sioux reservation. A $3.7 billion project, this pipeline stretches from the Bakken oil fields near Stanley in North Dakota via South Dakota and Iowa to Patoka, Southern Illinois for a distance of some 1,200 miles.[2200] While it does not traverse the Standing Rock Reservation, it passes within less than half a mile of it.[2201] It is to convey more than half a billion gallons of crude oil across four states per day.[2202] One of its several hundred river crossings has become the face of an international Indigenous protest movement, drawing a crowd of protesters[2203] who represented more than 300 US tribes[2204] –the cause having united Indigenous and environmental activists.[2205]

[2200] *Standing Rock Sioux Tribe v US Army Corps of Engineers*, F Supp 3d (2016), 2016 WL 4734356 (DDC, 9 Sept 2016), Boasberg J [*Standing Rock I*] at 4, para I and I.D.

[2201] *Standing Rock I*., *supra* note 2200 at 4, para I and I.D.

[2202] *Standing Rock I*, *supra* note 2200 at 4, para I and I.D.

[2203] Even the use of the word "protesters" here is polemical: see the opinion piece by Peter d'Errico, "Be Clear: Distinguish Between Civil Rights and Treaty Rights" (19 December 2016), *Indian Country Media Network*, online: < https://indiancountrymedianetwork.com/news/opinions/clear-distinguish-civil-rights-treaty-rights/>.

[2204] See David Treuer, "An Indian Protest for Everyone" (26 November 2016) *New York Times*, online: <https://www.nytimes.com/2016/11/26/opinion/sunday/an-indian-protest-for-everyone.html?_r=0>.

[2205] See e.g. David Archembault II, "Taking a Stand at Standing Rock" (24 August 2016), *New York Times*, online: < https://www.nytimes.com/2016/08/25/opinion/taking-a-stand-at-standing-rock.html?_r=0>; Treuer, *supra* note 2205. Contra the identitary argument proferred by e.g. D'Errico, *supra* note 2203.

At stake here are two issues for the Standing Rock Sioux: potential contamination of their drinking water and the destruction of their sacred burial sites.

This struggle takes place against the background of a 1980 Supreme Court judgment, *United States v Sioux Nation*[2206], which represented the culmination of a 60-year legal battle between three Sioux groups[2207] and the Federal United States Government. The Supreme Court ruled that the 1877 Act constituted a "taking" contrary to the Fifth Amendment of the US Constitution[2208] and awarded compensation and interest amounting to $123 million.[2209] In the 1960s the Standing Rock and Cheyenne River Sioux Tribes faced a further disturbance in their use and occupation of the land: forced relocation, as more than 200,000 acres of their Reservation lands were flooded in the process of creating America's fourth largest reservoir, Lake Oahe, in the implementation of the Pick-Sloan Plan for development of the Missouri River. This was a joint initiative of the US Army Corps of Engineers (Lewis Pick, director of the Corps Missouri River office) and the US Bureau of Reclamation (William Sloan, director of the Montana office of the Bureau of Reclamation) with three economic objectives: irrigation, barge navigation and hydroelectricity. None of this benefited the displaced Sioux: the two Reservations in question are located in two of the top ten poorest American counties (Sioux County in North Dakota and Carson County in South Dakota) and unemployment in the Standing Rock reservation is at 43.2% – roughly three times the national average of 14.5%:[2210]

[2206] 448 US 337, 413 (1980) Blackmun J [*Sioux Nation*].

[2207] The Teton, Yanktonai and Santee co-signers of the *Fort Laramie treaty* of 1868 – hereafter jointly referred to as "the Sioux Nation". The treaty was also signed by the Northern Araphoe and the Northern Cheyenne Bands, but the latter two are not relevant for purposes of the present discussion as they did not hold in common Black Hills, which is the sacred site in question. See Richmond L Clow, "A New Look at Indian Land Suits: The Sioux Nation's Black Hills Claim as a Case for Tribal Symbolism", (1983) 28:102 Part 1 Plains Anthropologist 315.

[2208] See Anderson et al, *supra* note 386 at 168.

[2209] The Court awarded a principal compensatory amount of $17.1 million, as well as interest fixed at 5% per annum dating from 1877, a total of around $106 million at the time: *ibid* at 222; Clow, *supra* note 516 at 321. By 2009, accumulated interest had increased the amount to $900 million: Anderson et al, *supra* note 386 at 229.

[2210] See Trymaine Lee, "No Man's Land: The Last Tribes of the Plains", Geography of Poverty Series, *MSNBC*, online: < http://www.msnbc.com/interactives/geography-of-poverty/nw.html>.

In addition, *Cohen's Federal Indian Law* points out that "[t]he great Sioux Nation (…) was divided by federal law into geographically separated and independently recognized tribes in order to weaken the Sioux militarily."[2211]

5.5.4.5.3 The Litigation

5.5.4.5.3.1 Introduction

The Standing Rock Sioux Tribe originally filed suit under the *Administrative Procedure Act* (APA)[2212] against the US Army Corps of Engineers alleging violations of the *National Environmental Policy Act* (NEPA), *National Historic Preservation Act* (NHPA), *Clean Waters Act* (CWA),[2213] the *Rivers and Harbors Act* (RHA),[2214] and the *Flood Control Act*,[2215] as well as for breach of trust responsibility.[2216] Although not cited in the suit,[2217] Dakota Access made a successful motion to intervene in support of the US Army Corps of Engineers, while the Standing Rock Sioux was joined by the Cheyenne River Sioux Tribe.[2218] The main application is brought by both Tribes, but the two motions for preliminary injunctions were brought by them individually. The first injunction's objective was to block the permits that the Corps had issued to Dakota Access, LLC, on the basis that the "DAPL permitting

---

[2211] Newton, *Cohen's Federal Indian Law*, *supra* note 421 at § 3.02[3], 133. The present issue specifically concerns two of these independently recognized Sioux tribes: the Standing Rock Sioux Tribe, whose reservation is located half a mile from a crossing site known as Lake Oahe, and the Cheyenne River Sioux Tribe, whose reservation is some 73 miles away(*Standing Rock II, supra* note 2142, para 1). The Standing Rock Sioux Tribe is the original applicant in the ongoing Dakota Access litigation and the Cheyenne River Sioux subsequently became an intervening applicant (*Standing Rock I*, *supra* note 2200 at I.E). Judgment 1, rendered on 9 September 2016, was in response to a motion for a preliminary injunction brought by the Standing Rock Sioux (*Standing Rock I*, *supra* note 2200); Judgment 2, rendered on March 7 2017, answered to an application for an urgent preliminary injunction brought by the Cheyenne River Sioux (*Standing Rock II*, *supra* note 2142). The latter case has gone on appeal. There are further Sioux challenges to DAPL: see *Yankton Sioux Tribe v US Army Corps of Engineers*, No 16–1796, 2016 WL 4706774 (DDC, filed 8 September 2016); *Oglala Sioux Tribe v US Army Corps of Engineers*, No 17–267 (DDC, filed 11 February, 2017).

[2212] *Administrative Procedure Act of 1946* (*APA*), Pub L 79-404, 60 Stats 237 (1946).

[2213] 33 USC § 1251 et seq (1972).

[2214] 33 USC § 408.

[2215] 35 USC § 701 et seq.

[2216] See *Standing Rock II*, *supra* note 2142, para 2.

[2217] *Standing Rock I*, *supra* note 2200 at III.B.

[2218] *Standing Rock I*, *supra* note 2200 at t I.E.

threatens [the Tribe's] environmental and economic well-being, as well as its cultural resources."[2219] The second injunction's aim was to prevent oil from flowing in the pipeline.

Justice Boasberg was keenly aware of the fact that the Sioux had suffered at the hands of the American government in the past[2220] and scrupulously explained his reasoning every step of the way. However, he had no option but to apply the law as he found it.[2221] In neither of the two applications was the Tribe able to meet the high standard of proof,[2222] leading him to the conclusion that "the Tribe has not shown it will suffer injury that would be prevented *by any injunction the Court could issue*."[2223]

5.5.4.5.3.2 *Standing Rock I*: The First Preliminary Injunction

In *Standing Rock I* –the first preliminary injunction hearing– the Standing Rock Sioux Tribe argued that the Corps had not complied with the section 106 consultation procedure of the *National Historic Preservation Act* (NHPA) and that irreparable harm would occur if Dakota Access were to proceed on the basis of the issued permit, namely the destruction of sites of cultural and historical significance consequent to construction of the pipeline i.e. the direct subject matter of the injunction was Sioux sacred sites.[2224] That was in September 2016, when the pipeline was 48% complete.[2225] The

---

[2219] *Standing Rock I*, *supra* note 2200 at I.

[2220] See e.g., *ibid* at III.B: "The tragic history of the Great Sioux's repeated dispossessions at the hands of a hungry and expanding early America is well known. (…) The threat that new injury will compound old necessarily compels great caution and respect from this Court in considering the Tribe's plea for intervention." Also see at IV.

[2221] See e.g., *ibid* at III.B: "Although the potential injury may be significant, the Tribe must show that it is probable to occur in the absence of the preliminary injunction it now seeks. (…) This is the burden the law imposes for this form of relief. The Court must faithfully and fairly apply that standard in all cases, *regardless of how high the stakes or how worthy the cause*" [My emphasis].

[2222] For purposes of both preliminary injunctions the burden of proof was enunciated by the Court as follows: "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3], that the balance of equities tip in his favor, and [4] that an injunction is in the public interest.": *Standing Rock I*, *supra* note 2200 at II and *Standing Rock II*, *supra* note 2142, para 4, both with reference to *Winter v Nat Res Def Advisory Council, Inc*, 555 US 7, 22, 129 S Ct 365, 172 L Ed 2d 249 (2008) at 20.

[2223] *Standing Rock I*, *supra* note 2200, intr para [my emphasis].

[2224] *Standing Rock I*, *supra* note 2200 at, intr para.

[2225] *Standing Rock I*, *supra* note 2200 at I.E.

Court painstakingly set out the pertinent statutory framework and summarized the facts in considerable detail. Though he was sympathetic to the deprivations to which the Sioux Nation had been subjected in the past,[2226] Justice Boasberg found no way of accommodating their fears pertaining to the destruction of sites of cultural and historical significance within the existing statutory framework.[2227] He thus found that their application failed both on the criteria of irreparable injury and a likelihood of success on the merits, when a negative finding on either ground would have caused the claim to fail.[2228] In his reasoning two things loomed large: the Tribe's negligent,[2229] even obstructive attitude,[2230] that kept them from engaging in the consultation process when they were invited to do so. In addition, they had alleged mere generalities and did not point the Court to any specifics of likely damage that would ensue.[2231]

Honourable Justice Boasberg concluded that he was not capable of offering the Standing Rock Sioux Tribe any meaningful assistance:

> Powerless to prevent these harms given the current posture of the case, the Court cannot consider them likely to occur in the absence of the relief sought here. Put simply, any such harms are destined to ensue whether or not the Court grants the injunction the Tribe desires. As Standing Rock acknowledges, Dakota Access has demonstrated that it is determined to build its pipeline right up to the water's edge regardless of whether it has

---

[2226] See e.g. *Standing Rock I*, *supra* note 2200 at intr para.

[2227] Note that the preliminary injunction was limited only to this aspect: *ibid* at I.

[2228] *Ibid*, para II.

[2229] See e.g. *Standing Rock I*, *supra* note 2200 at I.D.7: "In summary, the Corps has documented dozens of attempts it made to consult with the Standing Rock Sioux from the fall of 2014 through the spring of 2016 on the permitted DAPL activities."

[2230] See e.g. *Standing Rock I*, *supra* note 2200 at I.D.7: "Standing Rock took a different tack. The Tribe declined to participate in the surveys because of their limited scope. (…) Instead it urged the Corps to redefine the area of potential effect to include the entire pipeline and asserted that it would send no experts to help identify cultural resources until this occurred."

[2231] See e.g. *Standing Rock I*, *supra* note 2200 at III: "At no point has the Tribe clearly pointed this Court to a specific non-PCN activity – *i.e.*, crossings the Corps permitted – where there is evidence that might indicate that cultural resources would be damaged. The Tribe instead focuses on the potential impact to cultural resources elsewhere along the pipeline. But to show the Corps' determination was unreasonable, Standing Rock needs to offer more than vague assertions that some places in the Midwest around some bodies of water may contain some sacred sites that could be affected."

> secured a permit to then build across. […] Like the Corps, this Court is unable to stop it from doing so.

In other words: the Tribe had tried to stop the federal agency as it had no grounds for engaging with Dakota Access directly. It was unsuccessful for two main reasons: (1) only 3% of the pipeline falls under the federal agency's jurisdiction and (2) essentially the federal agency had complied with the bare minimum required of them. That being the case, the Court had no authority to interfere with the way in which it exercised its discretion.

In *Standing Rock I* we see that at the base of the Tribe's failure to engage with the Us Army Corps consultation process lay, quite simply, their belief that the process was inherently flawed due to its segmented and highly selective nature.[2232] Even if they were to "succeed" in proving their cultural and historically significant sites that were directly within the DAPL corridor, it would at most have resulted in a slight adjustment to a segment of the DAPL route[2233] –just like the 140 such other adjustments had already been made in North Dakota alone–.[2234] It would not have stopped the line.[2235] Their argument, and one that the Court was not empowered to consider, was that their

---

[2232] This conclusion is supported by an op-ed penned by the Standing Rock Sioux Tribe's Chairman, David Archembault II, while awaiting the ruling in *Standing Rock I*: "The Environmental Protection Agency, the Department of the Interior and the National Advisory Council on Historic Preservation supported more protection of the tribe's cultural heritage, but the Corps of Engineers and Energy Transfer Partners [DAPL's owners] turned a blind eye to our rights. (…) The Dakota Access pipeline was fast-tracked from Day 1 using the Nationwide Permit No 12 process, which grants exemption from environmental reviews required by the Clean Water Act and the National Environmental Policy Act by treating the pipeline as a series of small construction sites.": Archembault II, *supra* note 2205. Cf the copmlaint of the Mississaugas of the New Credit First Nation who intervened in the *Chippewas of the Thames* matter: they argued in the court of first instance "that, because s. 58 is frequently applied to discrete pipeline expansion and redevelopment projects, there are no high-level strategic discussions or consultations about the broader impact of pipelines on the First Nations in southern Ontario": *Chippewas of the Thames*, *supra* note 1589 at para 40.

[2233] *Cf Standing Rock I*, *supra* note 2200 at I.B: "The Corps considers each permitted water crossing of a linear pipeline, however, to be its own individual undertaking because the rest of the project – *i.e.*, the entire line 'almost always[s] can be undertaken without Corps authorization' of such individual crossing by a feasible reroute."

[2234] See *Standing Rock I*, *supra* note 2200 at I.D.1.

[2235] See *ibid* at III.B: "There is, moreover, no sign that Dakota Access will pull back from this construction on private land if this Court enjoins the NWP 12 permitting necessary for the 3% of DAPL's route subject to federal jurisdiction. Quite the contrary, the company has indicated that it has little choice but to push ahead in the hopes of meeting contract obligations to deliver oil by January 2017."

culture and heritage is threatened by DAPL *as such*.[2236] For this reason, they insisted on a section 106 *National Historic Preservation Act* [NHPA] review of *the entire pipeline*[2237]– an endeavour that was supported by the National Advisory Council on Historic Preservation, a federal agency.[2238] This, they argued, was because of the word *indirect* in the section 106 regulations[2239] – as a Tribe they were being indirectly affected by the whole of the pipeline, not just the odd segment.[2240]

On the face of it, their reasoning appears to be eminently sensible: DAPL will convey oil hailing from a fracking operation at the Bakken oil fields in North Dakota to Southern Illinois; the Bakken oil fields are upstream from the Standing Rock Reservation; and the Reservation is directly affected by this upstream water. There are regular spills of brine –a fracking by-product– and oil into the Missouri River's water and the long-term health and economic impacts that that will have on the Reservation are as yet unknown.[2241] But the Tribe did not have any say in the Bakken Development. DAPL criss-crosses the Missouri, meaning that any leaks will mean further spills. Moreover, to the Sioux, water is sacred and they are tasked with protecting it.[2242] On this logic, does it not stand to reason that they should at least be consulted in the context of the pipeline development?

But the Court was unable to consider this argument because of an intricate statutory manoeuvre that Justice Boasberg explains well. Although the US Army Corps of Engineers is the federal agency tasked with supervision of pipelines, domestic oil pipelines on private lands are not subject to such supervision.[2243] This is true for 99% of DAPL.[2244] The remaining 1% falls under the Corps'

[2236] *Cf* Archembault II, *supra* note 2205: "Our elders of the Seven Council Fires, as the Oceti Sakowin, or Great Sioux Nation, is known, sit in deliberation and prayer, awaiting a federal court decision on whether construction of a $3.7 billon oil pipeline from the Bakken region to Southern Illinois will be halted."

[2237] See *Standing Rock I*, *supra* note 2200 at I.D.7.

[2238] See *ibid* at I.D.7.

[2239] See *infra* at note 2257.

[2240] See *Standing Rock I*, *supra* note 2200 at II.3.

[2241] See Lee, *supra* note 2210.

[2242] See Archembault II, *supra* note 2205.

[2243] Contrary to natural gas pipelines: *Standing Rock I*, *supra* note 2200 at I.

[2244] *Ibid.*

jurisdiction because of construction activities in federally regulated waters at hundreds of individual places along the pipeline route.[2245] These are governed by one or both of the *Clean Water Act* [*CWA*] and the *River and Harbors Act* [*RHA*]. One should bear in mind here that the lawsuit was brought against the Corps of Engineers, and not against DAPL, as well as Judge Boasberg's introduction: "the Tribe has not shown it will suffer injury that would be prevented *by any injunction the Court could issue*."[2246]

This fatal flaw, legally speaking, tainted the Standing Rock Tribe's entire case. Technically, it boils down to the following: Under the *Clean Waters Act* [*CWA*] the US Army Corps of Engineers has at its disposition two types of permits when dealing with oil pipeline applications that involve construction activities in federally regulated waters:[2247] general permits[2248] and individual ones.[2249] Here it issued a general permit: Nationwide Permit 12 (NWP 12).[2250] NWP 12 authorizes "'the construction, maintenance, repair, and removal' of pipelines throughout the nation, where the activity will affect no more than a half-acre of regulated water at any single water crossing."[2251] Importantly, "[e]ach stand-alone crossing of a waterway is considered to be a 'single and complete project' for these purposes."[2252]

Where a federal agency has issued a permit, the *National Historic Preservation Act* [NHPA] obliges said agency to assess adverse effects on properties of historical significance –which include property of

---

[2245] *Ibid.* In total, a mere 3% of DAPL required federal approval of any kind: see *ibid* at I.D.1.

[2246] *Supra* note 2223.

[2247] The *CWA* requires a Corps-issued permit for the discharge of dredged or fill material into navigable waters: 33 USC §§ 1311(a), 1342(a).

[2248] General permits "preauthorize a certain type of activity within a defined area": *Standing Rock I*, *supra* note 2200 at at I.B, with reference to 33 USC § 1344(e)(1) and *Sierra Club v US Army Corps of Eng'rs*, 803 F3d 31, 38-40 (DC Cir 2015). General permits are issued through public notice and comment for 5-year terms at a time and the permit-holder typically need not even notify the Corps of its covered activities: 33 USC § 1344(e)(2) read with 33 CFR § 330.1(e)(1).

[2249] These are stand-alone permits issued for specific actions under 33 USC § 1344(a).

[2250] *Standing Rock I*, *supra* note 2200 at I.B.

[2251] *Ibid*, with reference to *Reissuance of Nationwide Permits* (NWP 12), 77 Fed Reg 10, 184, 10, 271 (12 February 2012) and *Sierra Club, Inc v Bostick*, 787 F3d 1043, 1056 (10th Cir 2015). NWP 12 also satisfies the requirements of the *RHA*, which is pertinent in respect of Lake Oahe: see *Standing Rock I*, *supra* note 2200 at I.C.

[2252] *Standing Rock I*, *supra* note 2200 at I.B, with reference to 33 CFR § 330.2(i).

cultural or religious significance to Indian tribes–, to afford the Advisory Council on Historic Protection a reasonable opportunity to comment and to consult with the affected tribe.[2253] This is known as the "section 106 procedure", one that the Court aptly classified as a "'stop, look and listen' provision".[2254] However, the agency is under no obligation to undertake any preservation measures for the protection of such resources.[2255]

In addition, the Advisory Council on Historic Protection promulgated the regulations needed for section 106's implementation in 36 CFR § 800 and these regulations "command substantial judicial deference."[2256] The regulations define an effect as being adverse when the undertaking in question "'may alter, directly or indirectly, any of the characteristics of a property that qualify it for inclusion in the National Register,' including via the 'introduction of visual, atmospheric or audible elements that diminish the integrity of the property's historic features.'"[2257] However, while the agency makes such determination of adverse effects in consultation with the other parties, it retains the decisional power and may even "terminate this final consultation if it becomes unproductive and then proceed to permit the undertaking despite the effects."[2258]

Having so clearly expounded the law, the Honourable Justice Boasberg concluded that he was not capable of offering the Standing Rock Sioux Tribe any meaningful assistance:

> Powerless to prevent these harms given the current posture of the case, the Court cannot consider them likely to occur in the absence of the relief sought here. Put simply, any such harms are destined to ensue whether or not the Court grants the injunction the Tribe desires. As Standing Rock acknowledges, Dakota Access has demonstrated that it is determined to build its pipeline right up to the water's edge regardless of whether it has

---

[2253] 54 USC § 306108, 302706(b) read with § 300320.

[2254] *Standing Rock I*, *supra* note 2200 at I.A.

[2255] *Ibid*, with reference to *CTIA-Wireless Ass'n v FCC*, 466 F3d 105, 106-07 (DC Cir 2006) (citing *Davis v Latschar*, 202 F3d 359, 370 (DC Cir 2000).

[2256] *Standing Rock I*, *supra* note 2200 at I.A, with reference to *McMillan Park Comm v Nat'l Capital Planning Comm'n*, F2d 1283, 1288 (DC Cir 1992).

[2257] *Standing Rock I*, *supra* note 2200 at I.A, with reference to 36 CFR § 800.5(b).

[2258] *Standing Rock I*, *supra* note 2200 at I.A, with reference to 36 CFR § 800.7(a).

> secured a permit to then build across. (…) Like the Corps, this Court is unable to stop it from doing so.[2259]

5.5.4.5.3.3 *Standing Rock II*: The Second Preliminary Injunction

In *Standing Rock II*, the Cheyenne River Tribe followed a different tack. At this stage, early March 2017, the pipeline was all but complete. The Tribe filed for an urgent injunction to prevent the oil from flowing through the pipeline. They founded their application on the *Religious Freedom Restoration Act* [RFRA], but made a complicated argument that the appropriate case law to consider belonged not to the RFRA, but rather to RLIUPA.

The Cheyenne River Sioux Tribe pleaded that DAPL constituted the Black Snake against which their ancestors had warned and that had been prophesied to enter their homeland and wreak destruction.[2260] Given that the waters of Lake Oahe are sacred to the Tribe, letting oil flow under the Lake would constitute an irremediable desecration of that sacred site for them, thus causing irreparable harm to the Tribe members' religious exercise.[2261] This is because they believed that the presence of the Black Snake under the Lake's sacred waters would unbalance the water, meaning that they would no longer be able to utilize it in their religious ceremonies.[2262]

Accordingly, the Tribe brought a Motion for Preliminary Injunction on the basis that the grant of an easement to Dakota Access that enabled it to drill under the Lake[2263] violated the *Religious Freedom*

[2259] *Standing Rock I*, *supra* note 2200 at III.B.

[2260] See *Standing Rock II*, *supra* note 2142, para 3.

[2261] *Ibid.*

[2262] *Ibid.*

[2263] One of President Trump's first acts as President of the United States was to issue a Presidential Memorandum on December 4 that directed an expedited approval process in respect of DAPL. Pursuant to this Order, the Corps of Engineers rescinded its decision of 4 December 2016 to prepare an EIS and issued the easement in question to Dakota Access. See *Standing Rock II*, *supra* note 2142 at 5, para 1; 6, para 3.

Restoration Act (RFRA),[2264] requesting the Court to enjoin the effect of the easement and thereby the imminent flow of oil.[2265]

5.5.4.5.4 Analysis

In the matter at hand the Court made short work of the Tribe's arguments. Judge Boasberg's ruling can be stripped down to four main points: (1) the Tribes did not rely on RFRA before – they are precluded from doing so now by the doctrine of latches;[2266] (2) even if they could, Lake Oahe's water has already been desecrated;[2267] (3) the precedent in *Lyng*[2268] clearly goes against them;[2269] and (4) their attempt to rely on the *RLIUPA* case law instead may have worked if the harm they suffered was of an economic or physical nature, but they cannot invoke it in respect of 'mere' spiritual harm.[2270] The Motion was accordingly denied on the basis that such extraordinary relief was

---

[2264] 42 USC § 2000bb *et seq*.

[2265] See *Standing Rock II*, *supra* note 2142, para 1.

[2266] The doctrine of latches is an equitable remedy. The Court formulated its operation *in casu* succinctly: "Although it [requests the injunction] within RFRA's four-year statute of limitations, the request comes long after Cheyenne River learned of the pipeline's proposed route, was invited to offer feedback, articulated other specific environmental and cultural issues, and filed suit on other claims. Only once Dakota Access had built up to the water's edge and the Corps had granted the easement to proceed did Cheyenne River inform Defendants that the pipeline was the realization of a long-held prophecy about a Black Snake and that the mere presence of oil in the pipeline under the lakebed would interfere with the Tribe's members' ability to engage in important religious practices. Because of the Plaintiff's delay in raising this religious-exercise objection and the negative impact of that delay on the Corps and Dakota Access, the Court concludes that the requested preliminary-injunctive relief is barred by latches": *ibid,* para 7.

[2267] Although the Court did hold that the Tribe could likely prove a sincerely held belief on the basis of "instructions to tread gently with [the] sincerity inquiry" (at para 10), it nonetheless enumerated various ways in which Lake Oahe's water was less than pure. These included the presence of a natural-gas pipeline running next to the oil pipeline (in place since 1982); the fact that the Missouri River is crossed upstream from Lake Oahe by a number of other oil pipelines; the fact that there are three vehicle bridges and one railroad bridge across Lake Oahe; and that a wastewater-treatment plant discharges effluent into a river that flows through the Reservation into Lake Oahe: *ibid*, para 9.

[2268] *Lyng*, *supra* note 787 [The incidental effect of a government action on religious exercise alone is not enough to give rise to a Free Exercise claim, even if it is extreme.]

[2269] See the exhaustive discussion in *Standing Rock II*, *supra* note 2142, para 11–12.

[2270] I take issue with this portion of the judgment. If the Court is willing to accept the *RLIUPA* argument for purposes of both economic and physical harm (and it appears to be: see *ibid*, para 14), then it eludes me why spiritual or cultural harm should be different.

inappropriate, given "both the equitable doctrine of laches and the Tribe's unlikelihood of success on the merits".[2271]

There is an important nuance to be made here: The Court refused injunctive relief on the basis of the *RFRA* because of *inter alia* the operation of the doctrine of laches – it must still rule on the main claim and in *Standing Rock II* Boasberg J suggested that he would allow the Tribes to amend their pleadings so as to include an *RFRA* claim.[2272] However, that does not remove the significant obstacle posed by *Lyng* to an RFRA claim.

This is, indeed, a serious obstacle. The Court found strong parallels between the present case and *Lyng*:

> It involves a government action –granting an easement to Dakota Access to build and operate a pipeline– regarding the use of federal land –the land under Lake Oahe (…)– that has an incidental, if serious impact on a tribe's ability to practice its religion because of spiritual desecration of a sacred site. Just as the government's tree cutting and road building in *Lyng* did not give rise to an actionable Free Exercise claim, neither does its easement granting here likely violate RFRA.[2273]

Justice Boasberg went on to cite two Ninth Circuit cases (*Navajo Nation*[2274] and *Snoqualmie Indian Tribe*[2275]) that both relied heavily on *Lyng* and concluded: "Just as the Ninth Circuit and other courts must follow *Lyng* until the Supreme Court instructs otherwise, this Court must do the same."[2276]

[2271] *Standing Rock II*, *supra* note 2142, para 1.

[2272] See *supra* note 2199, paras 3–5.

[2273] *Ibid*, para 12.

[2274] *Navajo Nation*, *supra* note 37 [The government's decision to allow artificial snow made from wastewater effluent on a sacred mountain did not impose a substantial burden under *RFRA* because it did not force the tribe to choose between exercising their religion and receiving a government benefit, and it did not coerce them to act contrary to their religion under threat of criminal or civil sanction.]

[2275] *Snoqualmie Indian Tribe v Fed Energy Regulatory Comm'n*, 545, F 3d 1207, 1214–15 (9th Cir 2008) ["The Tribe's arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant to whether the hydroelectric project either forces them to choose between practicing their religion and receiving a government benefit or coerces them into [foregoing] exercise of their religion under fear of civil or criminal sanction."]

[2276] *Standing Rock II*, *supra* note 2142, para 13.

And it is here that the ineffective protections of the US statutory framework become readily apparent. RFRA was conceived of as a vehicle for the protection of Native American religion, including Native American sacred sites. However, its effectiveness has been largely paralyzed by *Lyng*. There is no doubt that the Tribes here have the benefit of a sympathetic and sensitive audience, but *Lyng* has the effect of giving precedence to property rights over religious rights*:*

> The Court readily recognizes the sordid chronicle of the United States' dispossessing the Lakota people of swaths of land (…) and takes seriously that the Tribe feels such deep oppression as to warrant analogy to the prisoner cases. Yet *Lyng* expressly cautions that "measuring the effects of a governmental action on a religious objector's spiritual government" is not the proper inquiry when the challenged action is the federal government's management of its own land.[2277]

Or, as Justice Sandra Day O'Connor had so succinctly put it on behalf of the Court in *Lyng*: "Whatever rights the Indians may have to the use of this area, however, those rights do not divest the government of its right to use what is, after all, *its* land."[2278]

5.6 Drawing Conclusions

> The theme of *victory through settlement over savages and wolves* (…) is deeply rooted in Euro-American culture. In North America, moreover, indigenous peoples have not been deprived of their lands and intellectual resources by the application of force, but by an expropriation process based on *legal* principles that were developed and applied by the "courts of the conqueror". This also implies that competitive interests involving lands considered to be sacred by indigenous American groups fall into a legal explanatory framework in which land (and natural resources more generally) should be subject to rational and efficient development. Therefore, developmental interests do not need any further justification for outbalancing the interests of indigenous groups. Through the lens of this principle, the courts of the American mainstream society have trivialized indigenous religious interests in lands against economic interests

---

[2277] *Standing Rock II, supra* note 2142, at 28–29.

[2278] *Lyng*, *supra* note 787 at 453.

> such as the exploitation of oil, minerals, or even the expansion of recreation lakes or ski areas.[2279]

Fourteen conclusions flow from the investigation undertaken in this Chapter:

First, only federally recognized tribes enjoy federal protection of their sovereignty, religion and culture. As the *Winnemem Wintu* case study has illustrated, Native American tribes who do not enjoy such federal recognition find themselves in a legislative no-man's-land where they are not considered to be an interested party for federal consultation purposes; they cannot avail themselves of the protections of religious federal legislation such as AIRFA, the RFRA , RLIUPA and Executive Order 13007; of the cultural protections offered by NAGPRA, ARPA and NHPA, or of the environmental protections of NEPA; and they do not have standing to take administrative decisions that affect their sacred sites on review under APA. They are entirely dependent on the goodwill of the National Parks Authority to grant them use permits to undertake their ceremonies where their sacred sites fall in national parks. Strictly speaking, their chiefs and spiritual leaders are not entitled to possess golden eagle feathers – since they are not a federally recognized Indian tribe, they cannot really apply for the requisite permit. The fact that Caleen Sisk, spiritual leader to the Winnemem Wintu was granted such an eagle feather permit, points to the unequal application of the BGEPA.

Second, neither can Native American tribes –whether recognized or not– rely on the freedom of religion guarantee in the first Amendment to the US Constitution as the law now stands, due to the damaging precedent in *Lyng* that effectively ranks the federal government's property rights higher than the religious rights of Native Americans to the protection of their sacred sites.

Third, building on Kuppe's argumentation[2280], the US Courts' treatment of First Amendment claims is indicative of a strong cultural bias in that there is a strong underlying Judeo-Christian undercurrent: (1) there is a strict division between religion and culture that is in conformance with

---

[2279] Kuppe, "Religious Freedom Law", *supra* note 2040 at 61.

[2280] See above at 5.5.4.1.1 ("Freedom of Religion: First Amendment").

the church/state divide in Western thought, but that fails to capture the holistic nature of Indigenous spirituality; (2)Western religious traditions have a commemorative nature, versus the Indigenous belief that nature and all of its parts fulfil a harmonizing, balancing role; (3) the worst earthly consequence of the breach of a Western religion is that it constitutes a transgression, whereas non-conformance with the prescriptions of Indigenous spiritual tenets may encompass physical danger to human and other beings due to the disturbance of balance and harmony; (4) Western religions embrace the notion of proselytism of a revelatory event, which is the *raison d'être* of the Establishment Clause – Indigenous spirituality does not proselytise but focusses on communal involvement and the renewal of relationships with sacred sites, meaning that it is inappropriate to raise Establishment challenges to religious accommodations that are afforded to Native Americans; (5) Western religions are not location-bound and can be practised anywhere, while Indigenous religions depend on particular spatial and socio-cultural contexts; (6)There is an inherent conflict between the Judeo-Christian notion of religion as a revelatory event of which word is to be spread versus the intensely personal and sacred aspects of Indigenous spirituality that frequently prevent detailed disclosures in respect of sacred sites.

Fourth, an overview of the Native American sacred site jurisprudence has demonstrated a marked reluctance on the part of the US courts to deviate from the dictates of the legislature – or even to take a proactive role in defining Native American rights. For instance, although the *Tribe List Act* clearly foresees the possibility that a court may declare a given tribe to constitute a federally recognized tribe, the courts have consistently deferred to the authority of legislature and Congress in this regard.

Fifth, American Indian law dictates the lives of Native American people in great detail. A Native American person can only be "Indian" for purposes of the various pertinent laws if he/she belongs to a "federally recognized tribe", and "Indian country" determines both a federally recognized tribe's area of tribal jurisdiction and its tribal territory. All of this is very much at odds with the notion of land and spirituality being interrelated – the impact of which is worrisome when one considers the identitary effect of sacred sites for Native American people.

Sixth, the *Oak Flat* case study has demonstrated two structural issues with Indigenous sacred site protection under US law: (1) there is no protection forthcoming when the sacred site is located on

third party private land; and (2) it is possible to manipulate the US legislation in such a way as to turn a previously protected federal site into private property with the authority to exploit even in the face of vociferous opposition, provided that the political will to do so is there.

Seventh, the US legislative framework is extremely detailed and it is structured such that a sacred site protection effort would have to be framed in one of four categories: (1) sites that are imbued with sacredness by reason of spiritual beliefs or ceremonial practices; (2) sites where cultural keystone species or sacred plants or medicinal herbs that are key to spiritual or cultural ceremonies are found; (3) historically important sites; or (4) graves and graveyards. Which category it falls into, will determine the legislative provisions that govern it.

Eighth, a survey of the US jurisprudence indicates that Native American sacred sites have been impacted a great deal by tourism activities, natural resource development projects, or a combination of the two. Tourism cases often concern the management of state parks –*Crow* dealt with Bear Butte State Park; *Bear Lodge* dealt with a voluntary climbing ban of Devil's Tower; *Wilson* was concerned with the manufacture of snow from waste water on the San Francisco Peaks in Arizona; *Access Fund* comprised a rock climbing ban on Cave Rock–; natural resource developments can take the form of infrastructure projects –*Lyng* in respect of the G-O Road in the "High Country"– or mining activities –*Havasupai*, regarding the proposed location of the Grand Canyon Uranium Mine in the Kaibab National Forest; *Cholla* regarding the mining of Woodruff Butte–; the joint versions often involve reservoir building and flooding activities in the context of big dam construction –the Winnemem Wintu case study involves Shasta "Lake"; *Badoni* dealt with "Lake" Powell and the Rainbow Bridge National Monument; *Sequoya Valley* comprised the Tellico Dam. As was demonstrated in the discussion of these cases above, the majority of them by far tend to go against the Native American tribes concerned.

Ninth, jurisprudence demonstrates that where Native American tribes are not willing to make detailed and specific disclosures relating to sacred sites concerns –and we have seen that secrecy is an issue with the sacred– they are blamed for being 'uncooperative' and they are denied the protections of the legislation that they seek to rely on, be it in the domain of Executive Order 13007 employed in conjunction with the FLPMA, or NEPA.

Tenth, sometimes all Native American spirituality is conflated into one, for instance in *Havasupai*,[2281] where the Court consulted experts on "American Indians in general" to learn more about specific Hopi and Havasupai sacred sites in circumstances where the tribes themselves were tight-lipped due to secrecy requirements.

Eleventh, sacred site protections in the context of the US heritage legislation assume that these are places ("properties") associated with dead white males who are historically deemed to be important.

Twelfth, sacred sites that have a demonstrable historical dimension –such as massacre sites– are better protected under the Section 106 process of the NHPA than under legislation aimed at offering religious protections. In fact, it would be important to downplay religious dimensions of the site, so as to avoid Establishment challenges. However, a listing on the Register of Historical Places does not safeguard the site against development – it merely invokes a section 106 consultation process, meaning that the tribe will have an input, but that a formal and final decision will be made by the Keeper of the National Register in the event that the parties cannot come to agreement.

Thirteenth, the *Standing Rock* case study has demonstrated the sophisticated machinery at work in the US legislative context, together with the power of a negative precedent – in this case *Lyng*.

Fourteenth, in sum, the US federal statutory framework reveals a sophisticated legal regime that makes very little provision for cultural paradigms which diverge from its dominant underlying Judeo-Christian ethos. As the analysis of US jurisprudence has demonstrated, it is a system that has proven particularly unpliable insofar as Native American paradigmatic differences are concerned. Although the potential protective provisions are legion, their cumulative effect is not one of comprehensive sacred site protection, but rather the creation of legislative *lacunae* that simply fail to provide Native Americans with any other real option than to go along with the developmental interests of mainstream society.

[2281] *Havasupai*, *supra* note 2056: see the discussion above at 5.5.4.2.1 ("*National Environmental Act* [NEPA]").

Not much has changed since Alexis de Tocqueville wrote the opening citation to this chapter in 1835: Native Americans still find themselves on the wrong end of the Americans' love of legal formalism, still remain entangled in the Americans' endless legal machinery, still have no real recourse to the law that is being wielded with utmost dexterity to their disadvantage. In sum, as Kuppe has so elegantly observed, the American *leitmotiv* remains one of "victory through settlement over savages and wolves."

Chapter 6: Australia

> It is important to make clear that the case for the plaintiffs was not simply that they were aboriginals who had been dispossessed of their ancestral lands by the advent of the white man, culminating in the mining activities of the defendant (…). There are great and difficult moral issues involved in the colonization by a more advanced people of a country inhabited by a less advanced people. These issues, though they were rightly dealt with as relevant to the matters before me, were not treated as the foundation of the plaintiffs' case. Had they been so treated, the case would have involved an examination, not merely of some aspects of the dealings of some European people with some aboriginal races over the last four hundred years (as it did), but of much of the history of mankind.[2282]

6.1 Introduction

In Chapter 2 we learnt that Indigenous Australians comprise a vast variety of clans and linguistic groups. It also brought to light the fact that there is no discrete 'Aboriginal belief system' but that these clans have rich and sophisticated belief structures that share certain transversal themes, such as the Dreaming and the Rainbow Serpent. Chapter 3 has hinted at Australia's less-than-perfect human rights record when it comes to the treatment of its Indigenous peoples, and noted its use of the doctrine of state sovereignty to ward off interference by the UN in this context. The objective of this Chapter is to consider, at the hand of insights gained in Chapter 2 on the spiritualties of Indigenous Australians, to what extent their positive law manages to cater for the protection of Indigenous sacred sites.

As in the previous two Chapters, I commence with a non-exhaustive timeline for contextualization purposes (6.2). This is followed by some background on Australia's legal *mentalité* (6.3) and a summary of pertinent sources that are likely to come up in the ensuing discussion (6.4). Next, I get to the heart of the matter, and contemplate two Australian legal mechanisms that may be engaged

---

[2282] *Milirrpum*, *supra* note 1205 at 7.

in the endeavour to protect Indigenous sacred sites in that jurisdiction (6.5). For practical illustrative purposes a desktop study follows (6.6) and I end by summarizing the conclusions drawn from my investigation into Australian law (6.7).

6.2 Timeline

Table V: Brief Historical Survey – Australia

DATE	ITEM
1770	**Lieutenant James Cook** purported to take possession of "the whole Eastern coast" on 22 August 1770 at Possession Island.[2283]
1788	**Full colonization** of the Australian continent commenced with the arrival of Britain's First Fleet for purposes of the establishment of a penal colony.[2284]
1835	**John Batman purported to enter into a 'treaty'** with Indigenous people in the Port Phillip area.[2285]
1835	Governor Bourke formally responded to the Batman 'treaty' effort by issuing the **Proclamation of 26th August, 1835**, in terms of which, "every such treaty, bargain, or contract with the Aboriginal Natives … is void and of no effect against the rights of the Crown"[2286] and which threatened people who were in possession of land anywhere within the colony without obtaining the Crown's authority that they would be treated as trespassers.[2287]
1836	The **Royal Letters Patent of 19th February 1836** established the Province of South Australia.[2288]
1863	The whole of the **Northern Territory was annexed to the Colony of South Australia** by Letters Patent under the *Australian Colonies Act, 1861* on 6 July 1863.[2289]

[2283] *Milirrpum*, *supra* note 1205 at 5.

[2284] See J Clarke, *supra* note 2318 at 84. She observes that other explorers had landed in Australia prior to the British, including the Dutch, the Portuguese, and possibly also Macassan (Indonesian) trepangers: *ibid.*

[2285] *Milirrpum*, *supra* note 1205 at 82.

[2286] Quoted in *Milirrpum*, *supra* note 1205 at 82.

[2287] *Milirrpum*, *supra* note 1205 at 82.

[2288] See *supra* note 1205 at 83.

[2289] *Milirrpum*, *supra* note 1205 at 6.

1879	**Queensland annexed** the Torres Strait.
1900	The ***Commonwealth of Australia Constitution Act*, 1900**: It contains various express and implied human rights safeguards but no Bill of Rights.
1910–1970	Between 10–30% of Indigenous children were forcibly removed from their families and either placed in foster care with white families or institutionalized (known as the **"Stolen Generations"**).[2290]
1911	The **Northern Territory became a Territory of the Commonwealth of Australia** on 1 January 1911.[2291]
1925	The **Aborigines' Progressive Association (APA)** was founded by Indigenous activists and 'white' supporters, and the all-Indigenous **Australian Aborigines' League (AAL)** was founded by Yorta Yorta man William Cooper.[2292]
1931	The **Arnhem Land Reserve** was created as a reserve "for the use and benefit of the aboriginal native inhabitants of the Northern Territory".[2293]
1937	**Assimilation policy** was introduced targeting "halfcasts".[2294]
1938	AAL & APA staged a **'Day of Mourning'** when the remainder of Australia celebrated the country's sesquicentenary of the arrival of the first convict ships.[2295]
1930s–1960s	**Indigenous protests** relating to labour conditions took place.[2296]

[2290] See ATSIC, *supra* note 11 at 11.

[2291] *Milirrpum*, *supra* note 1205 at 6. Also see Australian Heritage Database, "Aboriginal Embassy Site, King George Tce, Parkes, ACT, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DAboriginal%2520Embassy%2520Site%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=18843>.

[2292] J Clarke, *supra* note 2318 at 100.

[2293] *Milirrpum*, *supra* note 1205 at 6.

[2294] See ATSIC, *supra* note 11 at 11.

[2295] J Clarke, *supra* note 2318 at 100.

[2296] See J Clarke, *supra* note 2318 at 100. For a more detailed account, see Australian Heritage Database, "Aboriginal Embassy Site", *supra* note 2291.

1950s	Queensland Indigenous **reserves were opened to bauxite miners** from the 1950s onwards.[2297]
1960	Tacit **abandonment of the assimilation policy**.[2298]
1963	**Yolngu people from Yirrkala** on the Gove Peninsula sent a petition to the Commonwealth Parliament to protest mining, attached to bark paintings that depict their traditional landscape designs.[2299] This was the prelude to the *Milirrpum* case.[2300]
1967	A **landslide constitutional referendum vote** followed pursuant to a prolonged campaign by the multi-racial Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI).[2301] It brought Indigenous Australians under the jurisdiction of the Commonwealth Parliament, but did not remove the States' concurrent jurisdiction.[2302] Two significant pieces of Commonwealth legislation that have been promulgated under this power are the *Native Title Act 1993* (Cth) and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).
1971	***Milirrpum v Nabalco Pty Ltd*, 17 FLR 141 (NT Sup Ct 1971):** "In 1971, the Supreme Court of the Northern Territory rejected claims to aboriginal title in *Milirrpum* (…). The case involved the government's issuance of mining leases in the Gove Peninsula without consulting the Yirrkala people, the aboriginal inhabitants of the area. The case ignited the aboriginal protest movement, which culminated in occupation of the grounds of Parliament."[2303]
1972	**Establishment of the 'Tent Embassy'** outside the (then) Parliament House in Canberra on Australia Day, 1972, as an Indigenous protest symbol against the Government's continued failure to address the land rights question.[2304]

[2297] J Clarke, *supra* note 2318 at 101.

[2298] See ATSIC, *supra* note 11 at 11.

[2299] See J Clarke, *supra* note 2318 at 101. While the petition did not manage to stop the mining, the paintings now decorate Parliament House in Canberra: *ibid* at 101 n 178. Also see Australian Heritage Database, "Aboriginal Embassy Site", *supra* note 2291; Howard Morphy, Art and Politics: The Bark Petition and the Barunga Statement", in Sylvia Kleinert, & Margo Neale, eds,*The Oxford Companion to Aboriginal Art and Culture* (Oxford: Oxford University Press, 2000) 100 at 100–101.

[2300] *Milirrpum*, *supra* note 1205; Australian Heritage Database, "Aboriginal Embassy Site", *supra* note 2291.

[2301] J Clarke, *supra* note 2318 at 101. Also see Australian Heritage Database, "Aboriginal Embassy Site", *supra* note 2291.

[2302] See J Clarke, *supra* note 2318 at 101–102.

[2303] Anderson et al, *supra* note 386 at 918. Also see *Milirrpum*, *supra* note 1205 at 5.

[2304] See J Clarke, *supra* note 2318 at 102. For a detailed account of events leading up to the establishment of the Aboriginal Embassy, see Australian Heritage Database, "Aboriginal Embassy Site", *supra* note 2291.

1972	**Formal replacement of the assimilation policy** with the so-called 'self-determination' policy.[2305]
1973	41-member **National Aboriginal Consultative Committee (NACC)** was introduced by the Whitlam government as advisory body to Parliament, elected by Indigenous Australians countrywide.
1976	***Aboriginal Land Rights Act 1976***: Legislation enacted in the Northern Territory following on the Woodward Aboriginal Land Rights Commission Report that had been commissioned in the wake of *Milirrpum*.[2306] The Act sets in place land trusts as mechanism for Indigenous people to acquire title and acknowledged land claims on the basis of spiritual ties. However, the mineral estate under any such lands remains vested in the Crown. Aboriginal Land Councils –who are akin to tribal governments– submit name lists to the Minister of Aboriginal Affairs, and he appoints the land trust members on the basis of such lists. Lands claims cases are heard by an Aboriginal Land Commissioner who makes recommendations to the Minister of Aboriginal Affairs. The Minister, in turn, issues final decisions.[2307]
1977	The NACC was replaced by a "smaller 'forum for the expression of Aboriginal views"', the **National Aboriginal Conference (NAC)**.[2308]
1979	***Coe v Commonwealth,* 53 ALJR 403 (Austl 1979):** The High Court rejected a claim of Indigenous sovereignty, holding that Captain Cook's annexation of Australia's east coast and the subsequent acts by which the entire Australian subcontinent became part of the Dominions of the Crown were acts of state whose validity were beyond challenge. The Court explicitly rejected the notion that Australian Indigenous peoples may be "domestic dependent nations" as they are in the United States in terms of *Cherokee Nation*, holding that the position differs in Australia.[2309]
1981	***Land Acquisition Act 1981* (Cth):** this Act "provided the authority for the Commonwealth to compel the sale of land to meet obligations pursuant to aboriginal claims. The 1981 Act was necessary to provide some redress to the vast majority of aboriginal peoples whose traditional lands were in private ownership."[2310]
1984	The ***Aboriginal and Torres Strait Islander Heritage Protection Act 1984*** (Cth) is last-resort legislation at the disposal of Indigenous Australians when they have exhausted all State recourse.[2311]

[2305] See ATSIC, *supra* note 11 at 11.

[2306] *Milirrpum*, *supra* note 1205.

[2307] Anderson et al, *supra* note 386 at 918.

[2308] J Clarke, *supra* note 2318 at 104.

[2309] On lack of sovereignty, also see Anderson et al, *supra* note 386 at 919.

[2310] Anderson et al, *supra* note 386 at 918.

[2311] See the discussion below at 6.3.4 ("Heritage and Environmental Legislation").

1985	The Hawke Labor Government **abolished the NAC**.[2312]
1986	***Australian Human Rights Commission Act 1986*:** ordinary legislation that created the Australian Human Rights Commission, which endeavours to resolve complaints of discrimination or breaches of human rights under federal laws by means of a conciliatory mechanism.[2313]
1989	NAC's successor was introduced: the **Aboriginal and Torres Strait Islander Commission (ATSIC)**, a statutory authority overseen by an elected Indigenous board.[2314]
1992	***Mabo v Queensland*, 107 ALR 1 (1992) (High Court of Australia):** the *locus classicus* in Australian law on the doctrine of Native title.
1993	***Native Title Act* of 1993:** New lands legislation passed by the Australian government pursuant to the *Mabo* judgment.
2004–2005	The **Howard Government disbanded ATSIC** based on "leadership flaws and government claims that it had taken a wrong policy direction."[2315]
2008	***Apology to Australia's Indigenous Peoples*, Government Business, Motion No. 1, Feb. 13, 2008 (Australian Parliament):** Australia's Prime Minister formally apologized for the policies that resulted in the "Stolen Generations" –the forcible removal of Indigenous children from their families to integrate them into White society– but made no offer of monetary compensation or any other concrete form of reparations.[2316]
2009	**Australia reverses its position on UNDRIP:** In adopting the Declaration in April 2009, the Australian Government clarified that it is a "positive, aspirational document" with "no legal force".[2317]

[2312] See J Clarke, *supra* note 2318 at 104.

[2313] See Australian Human Rights Commission, "About the Commission", (2014), online < http://www.humanrights.gov.au/about-commission-0>.

[2314] See J Clarke, *supra* note 2318 at 104.

[2315] J Clarke, *supra* note 2318 at 104.

[2316] See Barbara Ann Hocking & Margaret Stephenson, "Why the Presistent Absence of a Foundational Principle? Indigenous Australian, Proprietary and Family Reparations" in Federico Lenzerini, ed, *Reparations for Indigenous Peoples: International & Comparative Perspectives* 481 (2008); J Clarke, *supra* note 2318 at 81-82.

[2317] See Australian Human Rights Commission, "Questions and Answers on the UN Declaration on the Rights of Indigenous Peoples", (2 April 2009), online: < https://www.humanrights.gov.au/publications/questions-and-answers-un-declaration-rights-indigenous-peoples-2009>.

6.3 Background: Uncovering Australia's Legal *Mentalité*

6.3.1 Legal Family/Legal Tradition

Australia has a common law system, meaning that it also follows the doctrine of precedent. It is set apart fundamentally from the other jurisdictions studied in two respects: there is no treaty-making tradition[2318] and the concept of Indigenous sovereignty has never been recognized by Australian courts.[2319] There furthermore was no Australian equivalent to the *Royal Proclamation* of 1763 that had safeguarded Indigenous lands in North America against encroachments[2320] by settlers, and no trust relationship akin to the Canadian or United States one has ever been deemed to exist in respect of Australia and the Indigenous peoples who inhabit its territorial bounds.[2321] Like the other British colonies at the time, it pursued assimilationist policies insofar as its Indigenous peoples were concerned.

6.3.2 Constitutional Culture

Australia is a federation with a bi-cameral parliamentary system, and a member of the Commonwealth of Nations. Its Constitution displays a closer resemblance to that of the United States than to Canada's — so much so that some Australian scholars consider it in republican terms.[2322] Having been subject to British sovereignty, it subsequently became independent or self-governing.

[2318] Jennifer Clarke, "Australia: The White House with Lovely Dot Paintings Whose Inhabitants Have 'Moved On' From History?" in Richardson, Imai & McNeil, *supra* note 1246 at 103.

[2319] J Clarke, *supra* note 2318 at 95. Also see *Coe v Commonwealth* (1979) 24 ALR 118.

[2320] J Clarke, *supra* note 2318 at 95.

[2321] See J Clarke, *supra* note 2318 at 95. She identifies five factors that have prevented fiduciary duties from developing in the Australian context: the national government's traditionally limited role in Indigenous matters; the absence of foundational treaty relationships; the "narrow scope of fiduciary principles in Australian law, the strength of the doctrine of parliamentary supremacy, and the existence of comprehensive land alienation statutes": *ibid.*

[2322] See Smith, *supra* note 2219 at at 75.

It has a foundational *Constitution* (1900)[2323] that contains various express and implied human rights safeguards, but no bill of rights.[2324] Its constitution is uncodified, comprising both other texts of constitutional significance and unwritten constitutional conventions. Goldsworthy characterizes the Australian constitutional legal culture as being essentially legalist but notes that it experienced "a limited and tentative form of judicial activism in the 1990s".[2325]

The Australian Human Rights Commission[2326] resolves complaints of discrimination or breaches of human rights under federal laws, but only has a conciliatory mechanism at its disposal for doing so. Its other functions include the holding of public inquiries into "human rights issues of public importance" and the provision of "independent legal advice to assist courts in cases involving human rights principles."[2327] Insofar as the Constitutional protection of Indigenous rights is concerned, the picture is bleak: Clarke concludes that –

> Australia lacks the constitutional infrastructure for judicial enforcement of minority rights: few constitutions refer to human rights or Aborigines; rights protections in the Commonwealth Constitution tend to be ineffective and inapplicable to states; and the rare state provisions are unentrenched. Only two jurisdictions with small indigenous populations (the Australian Capital Territory and Victoria) have recently prohibited racial discrimination and guaranteed respect for minority cultures in statutory charters.[2328]

[2323] *Commonwealth of Australia Constitution Act 1900* (Cth). Grimm cites it as an example of a constitution that limits itself to establishing the organizational structure of the state: *supra* note 908 at 108.

[2324] Australia deliberately renounced a bill of rights, on the basis that "it deemed individuals best served by ensuring each an equal share in political power": *ibid* at 123.

[2325] Goldsworthy, *supra* note 1287 at 710.

[2326] Created under the *Australian Human Rights Commission Act 1986* (Cth).

[2327] "About the Commission", (2014), *Australian Human Rights Commission*, online: <www.humanrights.gov.au/about-commission-0>.

[2328] J Clarke, *supra* note 2318 at 88.

6.3.3 Approach to and Relationship with Indigenous Peoples

> No doubt, in Australia, there were some oases of benevolence, where Aborigines were treated humanely by the white settlers, but the prevailing situation was one where Aborigines were evicted from their lands without any real compensation (save for the famous 'flour, sugar and tea' and the annual gift of a blanket). Generally, Aborigines were treated by pastoralists as chattels and kept in a position of virtual slavery where their wives and daughters were often sexually exploited; again, they were subjected to spasmodic massacres and arbitrary detention, while their children were often removed 'for their own good'. 'Genocide' is not a word which should be used lightly but this pattern of cruel repression resulted in the near extinction of many Aboriginal groups and the disappearance of their languages, kinship systems, and above all their rich and complex religions. (…) At all events, if we balk at the use of the term 'genocide', the effect was undeniably genocidal.[2329]

6.3.3.1 Self-Identification and State Identification

Broadly speaking, Australia is home to two Indigenous peoples: Aboriginal people and Torres Strait Islanders.[2330] These are distinct peoples, although there is a small group of people who identify as being both Aboriginal and Torres Strait Islander.[2331] The *2011 Census of Population and Housing* indicated an Indigenous population of 669,991 people, constituting 3% of the total Australian population.[2332] This is interesting, for the 1996 census number reflected an Indigenous population of only 352,970, or some 2%.[2333] It would thus appear that more people are embracing their Indigenous heritage in Australia as well.

According to Clarke, "Australian legislation counts as 'Indigenous' anyone with an Aboriginal or Torres Strait Islander ancestor who identifies as Indigenous, and is accepted as such, by an

---

[2329] Max Charlesworth, "Religious Business", *supra* note 433 at xxiv.

[2330] ATSIC, *supra* note 11 at 4.

[2331] *Ibid.*

[2332] Australian Bureau of Statistics, "Estimates of Aboriginal and Torres Strait Australians, June 2011", (30 August 2013), online: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>.

[2333] ATSIC, *supra* note 11 at 4. Of the 352,970 a total of 28,744 identified as Torres Strait Islander, and a further 10,106 claimed to be both Aboriginal and Torres Strait Islander: *ibid.*

Indigenous 'community'".[2334] She finds the statutory definition troubling, in the sense that it places the determination of indigeneity in the hands of the courts rather than the tribes.[2335] Interestingly, though, the Aboriginal and Torres Strait Islander Commission (ATSIC)[2336] observed in 1999 that "a more flexible approach to establishing Aboriginal identity" by the Federal Court "was generally not well accepted in the Aboriginal community."[2337] ATSIC emphasized, however, the impossibility of defining aboriginality with reference to either skin colour or blood *quantum*[2338] and (at the time) pointed out that the *Aboriginal and Torres Strait Islander Commission Act*[2339] and other Commonwealth legislation simply defined "Aboriginal" as "a person who is a member of the Aboriginal race of Australia."[2340]

6.3.3.2 Evolving Approach

The Indigenous peoples of Australia represent some of the oldest cultures in the world, dating back between 50,000 to 150,000 years ago.[2341] There are two main groups: Aboriginal people and Torres Strait Islanders,[2342] though the former group[2343] was composed of communities speaking some 200–

[2334] J Clarke, *supra* note 2318 at 86. This three-part administrative definition was accepted by the High Court in *Commonwealth v Tasmania* ("Tasmanian Dam case") [1983] HCA 21; (1983) 158 CLR 1 and confirmed in *Gibbs v Capewell* [1995] FCA 25. According to ATSIC it is used by both the courts and the Indigenous community: *supra* note 11 at 60.

[2335] J Clarke, *supra* note 2318 at 86.

[2336] The Aboriginal and Torres Straight Islander Commission (ATSIC) was created in 1990 as the principal Commonwealth agency in Indigenous affairs. It administered certain Commonwealth programs and also acted as main policy maker in Aboriginal and Torres Strait Islander affairs, adviser to government, and national and international advocate of Indigenous interests: ATSIC, *supra* note 11 at 23–24.

[2337] *Ibid* at 60–61.

[2338] *Ibid* at 60. They affirm that blood *quantum* was utilized as government criterion for several decades, with outcomes described as "both brutal and inconsistent". These included targeting lighter-skinned children for removal due to their improved assimilation prospects.

[2339] *Aboriginal and Torres Strait Islander Commission Act 1989*.

[2340] ATSIC, *supra* note 11 at 60.

[2341] *Ibid* at 8. Also see J Clarke, *supra* note 2318 at 83, who observes that it makes "indigenous Australians' probably the oldest continuous human cultures in the world."

[2342] ATSIC, *supra* note 11 at 4.

[2343] I use the word "group" very loosely, as a measure of distinction, not in the collectivistic sense. Aboriginal communities have never made up a homogenous group, as is evidenced by the fact that there is no communal

250 different languages and many more dialects during the pre-contact era.[2344] While the Aboriginal people lived in kinship systems on the mainland,[2345] the Torres Strait Islanders historically lived on islands off the southernmost tip of Queensland.[2346] It is not known how many people lived in Australia pre-contact (1788), but estimates range from 300,000–1,000,000+, with a figure of at least 750,000 finding common acceptance.[2347] Like Indigenous groups in the other jurisdictions studied, they suffered population decline due to the introduction of foreign diseases against which they had no immunity,[2348] but they also suffered the brunt of a colonial style described by Feinberg and Macpherson in terms of "systematic removal, exclusion, and, in some cases, extermination".[2349]

Unlike the other jurisdictions there never were any treaty negotiations or possession of land by conquest:[2350] Australia was treated *ab initio* as a colony of settlement on the basis of the *terra nullius* doctrine.[2351] While the famous *Mabo* case[2352] did away with this doctrine in 1992 after a 10-year court battle driven by the late Eddie Mabo,[2353] a Torres Strait Island man, the impact of the High Court's recognition of native title is diluted somewhat by the fact (1) that it is open to the Crown to extinguish aboriginal ownership;[2354] (2) that native title is also extinguished if the community failed

---

Aboriginal language: see John Hilary Martin, "Australian Aboriginal Societies" in Juergensmeyer, *supra* note 317, 576 at 580.

2344 ATSIC, *supra* note 11 at 8; J Clarke, *supra* note 2318 at 84. She notes that linguistic groups did not equate to political units: *ibid.*

2345 ATSIC, *supra* note 11 at 8; J Clarke, *supra* note 2318 at 85.

2346 *Ibid.* These islands, now known as the Torres Strait, were annexed by Queensland in 1879: 4. The Torres Strait Island people "are more closely related, culturally and ethnically, to their New Guinean neighbours": *ibid.*

2347 *Ibid.* Also see J Clarke, *supra* note 2318 at 85.

2348 ATSIC, *supra* note 11 at 9.

2349 Feinberg & Macpherson, *supra* note 82 at 123.

2350 ATSIC, *supra* note 11 at 9.

2351 *Ibid.* But see below at 6.5.1.2 ("Native Title") for a more sophisticated discussion.

2352 *Mabo*, *supra* note 434.

2353 Eddie Mabo was from Mer (Murray) island in the Torres Strait and died on the eve of the verdict: ATSIC, *supra* note 11 at 9, 41. There were a further four parties from the Torres Strait Islands. Notwithstanding their Torres Strait heritage, the judgment applies to all Indigenous Australians: *ibid* at 50.

2354 *Ibid.*

to maintain a continuous connection with the land in question according with its traditional laws and customs;[2355] and (3) that no compensation is payable in respect of any such extinguishment that took place prior to 1975.[2356]

Indigenous Australians have been excluded from the legislative,[2357] judiciary[2358] and executive spheres of power and subjected to a colonial regime that has ranged from displacement to conversion, isolation and assimilation.[2359] Pursuant to the 1967 Constitutional amendments[2360] the assimilation policy was replaced by one of "self-determination", defined as "Aboriginal communities deciding the pace and nature of their future development as significant components within a diverse Australia."[2361]

[2355] See *ibid*.

[2356] *Ibid* at 51. This is pursuant to the *Native Title Act 1993* (Cth) read with the *Racial Discrimination Act 1975* (Cth), in terms of *Mabo*. For a comprehensive discussion, see below at 6.5.1.2 ("Native Title").

[2357] See J Clarke, *supra* note 2318 at 95–96: this includes propertied franchise systems and formal exclusion from the vote at federal and provincial level until as late as 1965.

[2358] See J Clarke, *supra* note 2318 at 97–99: their only 'meaningful participation' in the justice system has been as defendants, a capacity in which they remain over-represented; appropriate interpretation services have been lacking; they have effectively been excluded from jury pools; and there is a historic antagonism between them and the police force.

[2359] ATSIC, *supra* note 11 at 10. The assimilation policy was applied from 1937 "for those Aboriginal people not of 'full blood'" and extended to all Aboriginal people from 1951 with the objective of absorbing them into the wider community so that they would "lose their identity": *ibid*.

[2360] In a 1967 public referendum the Australian population voted overwhelmingly to remove two discriminatory provisions from the Australian Constitution, which meant that the Commonwealth's legislative authority was effectively extended to include Aboriginal people and Torres Strait Islanders (a capacity previously restricted to the Northern Territory), concurrently with the States: ATSIC, *supra* note 11 at 11. In 1972 the assimilation policy, tacitly abandoned in the 1960s, was formally replaced with the "self-determination" policy: *ibid*.

[2361] *Ibid*. But see Martin, *supra* note 2343 at 577ff on the unintended cultural costs that this policy has brought to Aboriginal communities. He points to the fact that communitarian societies were expected to assimilate into a society that prizes individualistic efforts as constituting one of the central problems.

Today more than 80% of the Torres Strait Island people live on the mainland,[2362] while many Aboriginal people have been displaced,[2363] whether through removal to reserves or missions,[2364] or because they were taken into care and form part of the so-called "stolen generation".[2365] The associated displacement has had disastrous impacts on social cohesiveness,[2366] as is reflected by their poor socio-economic indicators.[2367]

Although Australia –like the two North American jurisdictions studied– comprises a considerable size, it is a "fragile continent populated by small, flat societies" in that it cannot sustain sizeable human populations due to the aridity and water poverty experienced by two thirds of the country.[2368]

6.3.4 Relationship with International Law

In Chapter 3,[2369] we uncovered seven characteristics of Australia's relationship with International law that are salient for present purposes: (1) it follows an essentially dualist approach to international law, meaning that formal incorporation of International instruments is required to render them

---

[2362] ATSIC, *supra* note 11 at 43.

[2363] *Ibid.*

[2364] *Ibid* at 10. One characteristic of such reserves and missions was that they "might be forbidden to speak their language or practise their culture": *ibid.* In addition, reserves were sometimes revoked, leading to what has been termed a "second dispossession": *ibid.*

[2365] In the period 1910–1970, between 10-30% of Indigenous children were forcibly removed from their families and either institutionalized or placed in foster care with white families, leaving no family unaffected: *Ibid* at 11. See Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney: Commonwealth of Australia, 1997).

[2366] ATSIC, *supra* note 11 at 11. They list: "health, education, employment, family cohesion" as examples and explain that "[f]or Aboriginal people today a sense of our collective past is basic to our cultural and political identity", which identity is frequently "inscribed in personal experience."

[2367] For a detailed list, see *ibid* at 16. These include a decreased average life expectancy by up to 20 years, disproportionately high incarceration and unemployment rates and an increased likelihood of living "in poor and overcrowded housing, without essential services." Also see *ibid* at 34 on health statistics, ranking them at the bottom when compared to the United States, Canada and Aotearoa New Zealand; at 34–35 on life expectancy; at 36–37 on educational disadvantage; at 38–39 and 64–66 on incarceration rates and Aboriginal deaths in custody; at 62 on the unemployment rate; and at 67 on alcohol abuse and stereotypes of public drinking. Further see J Clarke, *supra* note 2318 at 82.

[2368] See J Clarke, *supra* note 2318 at 83.

[2369] See above at 3.4.4 ("The Domestic Implementation of International Law: Australia").

enforceable in Australia, possibly even insofar as customary International law is concerned; (2) unincorporated treaties are not without effect and may inspire some judicial activism although this is contentious; (3) although active on the International front, it has a questionable human rights record, notably insofar as its Indigenous peoples are concerned; (4) it appears to be generous in adopting and ratifying treaties but is strategically selective in their actual incorporation; (5) thus the federal government has skilfully employed the *World Heritage Convention* in a manner that enables it to legislate in the environmental and heritage spheres — traditionally state domain; (6) it wields the doctrine of state sovereignty as a shield against UN interference in its human rights approach; (7) but the fact that it has adopted the First Optional Protocol to the ICCPR means that individuals can complain to the International Human Rights Committee in respect of alleged violations of their rights under the ICCPR.

6.4 Summary of Pertinent Sources

Table 6 below is ambitious in scope, but not exhaustive. By that I mean that I list more legislation than I could possibly hope to discuss within the space of 50-odd pages, but I by no means pretend that these are the only legal avenues that could be pursued in the quest to protect Indigenous sacred sites in Australia. They simply strike me as constituting the most appropriate methods.

Table VI: Overview of the Australian Legal Framework

AUSTRALIA	
Express Constitutional Protection	
Implicit Constitutional Protection: Fundamental Rights Protection	
Implicit Constitutional Protection Minority Rights Protection	

Statutory Provisions: Sui Generis Legislation	**Commonwealth:** None **State:** Northern Territory: *Aboriginal Sacred Sites Act 1989* (NT)
Statutory Provisions: Indigenous Peoples (Non-Exhaustive)	
Statutory Provisions: General Legislation (Non-Exhaustive)	**Heritage Legislation**: **Commonwealth** *Aboriginal & Torres Strait Heritage Protection Act 1984* (Cth) *Protection of Movable Cultural Heritage Act 1986* (Cth) *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) [*EPBC*] *Australian Heritage Council Act 2003* (Cth) **Heritage Legislation: State** Australian Capital Territory: *Heritage Act 2004* (ACT) *Heritage Objects Act 1991* (ACT) Northern Territory: *Aboriginal Sacred Sites Act 1989* (NT) *Heritage Conservation Act 1991* (NT) *Northern Territory Heritage Act 2002* (Cth) New South Wales: *Heritage Act 1977* (NSW) *National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996* (NSW) Queensland: *Aboriginal Cultural Heritage Act 2003* (Qld) *Torres Strait Islander Cultural Heritage Act 2003* (Qld) South Australia: *Aboriginal Heritage Act 1988* (SA) Tasmania: *Aboriginal Relics Act 1975* (Tas) Victoria: *Aboriginal Heritage Act 2006* (Vic) *Heritage Act 1994* (Vic) Western Australia: *Aboriginal Heritage Act 1972* (WA) **Environmental Legislation: Commonwealth** *Environmental Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC)

Environmental Legislation: States

Australian Capital Territory:	*Environmental Protection Act 1997* (ACT)
Northern Territory:	*Environmental Assessment Act 1982* (NT)
New South Wales:	*Protection of the Environment Operations Act 1997* (NSW)
Queensland:	*Environmental Protection Act 1994* (Qld)
South Australia:	*Environment Protection Act 1993* (SA)
Tasmania:	*Environmental Management and Pollution Control Act 1994* (Tas)
Victoria:	*Environment Protection Act 1970* (Vic)
Western Australia:	*Environment Protection Act 1986* (WA)

Land Legislation: Commonwealth

Native Title Act (1993) (Cth)

1998 Amendments to Native Title Act (Cth)

Land Legislation: States

Australian Capital Territory:	*Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth)
Northern Territory:	*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
	Aboriginal Land Rights (Northern Territory) Amendment Act 2006 (Cth)
	Aboriginal Land Rights (Northern Territory) Regulations 2007 (Cth)
	Minimum Connection Material Requirements for Consent Determinations
New South Wales:	*Aboriginal Land Rights Act 1983* (NSW) (ALRA)
Queensland:	*Aboriginal Land Act 1991* (Qld)
	Torres Strait Islander Land Act 1991 (Qld)

	South Australia:	*Aboriginal Lands Trust Act 1966* (SA) *Pitjantjatjara Lands Act 1981* (SA) *Maralinga Tjarutja Land Rights Act 1984* (SA)
	Tasmania:	*Aboriginal Lands Act 1995* (Tas)
	Victoria:	*Traditional Owner Settlement Act 2010* (Vic) (TOSA)
	Western Australia:	*Aborigines Act 1889* (WA)
Common Law Provisions: Aboriginal Title	**Doctrine of Native Title** *Milirrpum v Nabalco (Pty) Ltd* (1971) *Mabo v Queensland No 2* (1992) *Native Title Act* (1993) (Cth) *Wik v Queensland* (1996) *1998 Amendments to Native Title Act* (Cth)	
Common Law Provisions: Treaty Rights		

6.5 The Australian Legal Response to Developments that (Potentially) Impact on Indigenous Sacred Sites

> The sense of legitimate regional or inherited differences and interests found in the United States is much less pronounced in Australia, where it is usually necessary to present self-interest in utilitarian terms in order to press it politically. Decisions by 'the ethnic minority' to privilege their own interests are typically cast as neutral, and minority grievances with them presented as unhelpfully sectional. Continued sacrifice of Aboriginal interests to 'majority' ones in case of conflict is perceived as essential and inevitable, even if it is necessary politically to mask this unpalatable truth, sometimes with law. Thus Australia's trademark egalitarianism is not customarily extended to Aboriginal people — because their humanity or

> political citizenship has been denied or, in recent years, their cultural difference over-emphasised.[2370]

Two potential mechanisms will be discussed in this section: land rights, and heritage legislation. We look at them in turn.

6.5.1 Land Rights

6.5.1.1 Background: Indigenous Spirituality in Australia — The Dreaming, and the Land

In Chapter 2, the following three points were made relating to the spirituality of Indigenous Australians: (1) it was initially deemed to be too primitive to constitute a religion and was relegated to the sphere of magic prior to the 1950s; (2) they do not share the Western Manichaean propensity for distinguishing between dichotomies such as sacred & profane, nature & culture, man & animal, etc., meaning that their approach is more holistic and less prone to watertight compartmentalization than Western belief systems; and (3) they have a flexible conception of time that is responsive to changing social conditions and that conceives of the Dreaming –their 'creation story'– as taking place as much in the past as in the present.

Core to understanding Aboriginal spirituality is the notion of the Dreaming:

> The Dreaming is a powerful factor in the culture of all Australian aboriginals and has religious roots. According to traditional aboriginal understanding, in the beginning before all time, the eternally existing land was flat and empty, without the features that we know today or have known at any time. There were multiple sources of power in the earth, however. Ancestral beings broke through the surface of the earth and moved over the landscape. In the course of their ancestral journeys they shaped and formed the land, generating all the particularities we are aware of today. These ancestral Dreaming figures created communities of human beings to maintain and care for the particular places which they had shaped and formed and gave them charge over it. Their action generated an eternal relation between a particular people and a particular place on the landscape. *There is an old phrase sometimes used to help explain this relationship to outsiders: "the land does not belong to us, we*

[2370] J Clarke, *supra* note 2318 at 87.

> *simply belong on this land*." For aboriginal communities other people's lands (such as white people's lands) may be a commodity to be bought and sold, but not their land. The local land given to each community in the Dreaming is definitely not a commodity. That land which is the root of their Dreaming must be preserved in all its critical aspects, although the land can be shared.[2371]

Seven points made in Chapter 2 are of interest insofar as Indigenous Australian spiritual conceptions of the land are concerned: (1) theirs is a non-theistic, land-based spirituality[2372] that postulates the existence of an unbreakable bond between the triad ancestors-land-rightful heir; (2) specific Indigenous groups are irrevocably bonded with particular tracts of land; (3) Indigenous land is accordingly not alienable,[2373] and can even withstand attempted spoliation by acts of war; (4) there is an intergenerational chain of transmission wherein a man is first an heir and subsequently a donor; (5) individual consciousness and identity is anchored in land, but it also serves the collective identity in that it links the heirs to the community; (6) the notion of ancestral transformation means that the alienation of land from its rightful heirs amounts to desecration, and not mere theft; and (7) this makes the doctrine of discovery entirely inconceivable to them. Finally, they have traditionally conceived of the landscape itself as a "religious text"[2374] and their "[s]ystems of land tenure were intimately bound up with spiritual attachment and notions of custodianship."[2375]

In Indigenous Australian cultures, the clan is the basic land-owning entity.[2376] ATSIC defines the clan as: "a local descent group, larger than a family but based on family links through a common (usually male) ancestry"[2377] and explains that "[t]he connection between a clan and its land involves

---

[2371] Martin, *supra* note 2343 at 576–577 [emphasis added].

[2372] Also see ATSIC, *supra* note 11 at 8. Land, in consequence, is "the locus of identity, both personal and communal" for these communities: Martin, *supra* note 2343 at 584.

[2373] Cf J Clarke, *supra* note 2318 at 85: "Some Torres Strait traditions recognized individual property rights and clear boundaries, but no indigenous Australian culture contemplated permanent alienation of land."

[2374] ATSIC, *supra* note 11 at 8.

[2375] ATSIC, *supra* note 11 at 8; Martin, *supra* note 2343 at 577.

[2376] For a sophisticated analysis of the meaning and make-up of the clan, see *Milirrpum*, *supra* note 1205 at 19–21, and especially 23–25.

[2377] ATSIC, *supra* note 11 at 42.

both rights and duties — rights to use the land and its products, and duties to tend the land through the performance of ceremonies." The latter duty to tend to the land is of importance in the context of the use of Western heritage laws to protect their sacred sites.[2378] Further noteworthy features of their land tenure system include the following: individual persons may have links (and thus rights and duties) to particular places;[2379] there are inter-group land transfer mechanisms for use when a group is decimated;[2380] and –importantly for present circumstances– the gravity and consequences that interference with spiritual places has both for the land and for the people responsible for maintaining it.[2381]

When these core beliefs relating to land become the angle through which native title jurisprudence and legislation is apprehended in Australia, a somewhat different picture emerges. This is the endeavour that we now undertake.

6.5.1.2 Native Title

> I am not here concerned to give a balanced historical account of the relations between the aboriginal and white races in Australia. Everyone knows that the white race has a great deal to be ashamed of. What cannot be denied is that there was always an official concern for the welfare of aboriginals –even where punitive measures were applied– and with this went the growth of an understanding, slow at first but much later more vital, that the occupation of land by white men was ipso facto a deprivation of the aboriginals. For purposes of this case, what is significant is that notwithstanding this growth of understanding, the historical material shows that no attempt was made to solve this problem by way of the creation or application of law relating to title to land, which the aboriginals could invoke.[2382]

[2378] See above at 2.4.3.1 ("Issues of Cultural Cross-Translation").

[2379] ATSIC, *supra* note 11 at 42; Martin, *supra* note 2343 at 577.

[2380] ATSIC, *supra* note 11 at 42.

[2381] *Ibid* at 43.

[2382] *Milirrpum*, *supra* note 1205 at 81–82.

In the same way that the spirituality of Indigenous Australians was denigrated as constituting mere myth and magic, the law has frequently treated them as being uncivilized and 'backward', justifying the occupation of their lands on the *terra nullius* doctrine,[2383] and the poor treatment of Indigenous witnesses by colonial courts.[2384] Thus the judgment of Justice Blackburn in *Milirrpum v Nabalco (Pty) Ltd*[2385] is frequently reviled on one or both of the following two bases: first, that it underwrote the *terra nullius* doctrine,[2386] and second, with a hint of suggestion that it denied the existence of the doctrine of native title at common law in an ungenerous manner. A careful reading of the case lends authority to neither of these points of view. Instead, it paints the picture of a judge who painstakingly sought to get to the heart of the matter argued before him, who did so with great respect for the Indigenous claimants and their belief systems,[2387] and who canvassed the common law at length and with reference to all the applicable authority that he could find in other common law systems. It also raises certain other angles that are of importance for purposes of this research: the nature of the relationship between Indigenous Australians and their land, specifically whether this relationship amounts to a proprietary interest;[2388] whether their customs and traditions comprise

---

[2383] See J Clarke, *supra* note 2318 at 85.

[2384] This ranged from the courts' initial refusal to hear such witnesses, to their subsequent treatment akin to prisoners — to the extent of bringing them to town in neck chains and keeping them in custody until the hearing: see J Clarke, *supra* note 2318 at 85, 97.

[2385] *Milirrpum*, *supra* note 1205.

[2386] Robert van Krieken rightly argued that nothing turned on the acceptance or rejection of *terra nullius* in *Milirrpum*: the important aspects of this judgment were Justice Blackburn's factual finding that the plaintiffs had not managed to prove that the links between them and the territory remained the same as those of their ancestors in 1788, and the fact that plaintiffs had failed to prove an interest in the land that could be classified as being 'proprietary' in nature. See Robert van Krieken, From *Milirrpum* to *Mabo*: The High Court, *Terra Nullius* and Moral Entrepreneurship" (2000) 23:1 University of New South Wales LJ 63 at 66.

[2387] *Milirrpum* was not appealed, in view of Woodward's considered counsel against it: "I took the view that the finding of close identification between particular groups of people and particular land was sufficient to mount a claim for recognition of Aboriginal title at a political level. I had no confidence that the High Court, as it was then constituted, would produce any better result for the Aboriginal people than had already been achieved. Indeed, I was afraid that doubts might be cast on Justice Blackburn's findings about Aboriginal law. I therefore advised against an appeal": quoted by Van Krieken, *supra* note 2386 at 71.

[2388] See *Milirrpum*, *supra* note 1205 at 18.

'law' as understood in Western legal systems;[2389] the manner in which Indigenous peoples may prove their customs and traditions in a court of law, given the orality thereof;[2390] and the difficulties inherent in translation, issues of cross-cultural translation and the perils of universalization.[2391] Limitations of space and time do not permit the analysis that this 107-page judgment warrants, but I wish to touch on some of them by way of introduction.

First, while it is true that Justice Blackburn followed established precedent that considered the entire colony of Australia to have vested in the British Crown on the basis of settlement as opposed to conquest, he was careful to distinguish between *terra nullius*[2392] and the doctrine of discovery,[2393] and to explain that 'settlement' here proceeded from a legal fiction, not factual reality.[2394]

Second, he canvassed the English common law at great length,[2395] starting with the works of Kent[2396] and Blackstone,[2397] discussing the *Marshall trilogy* that shaped the doctrine of Aboriginal title in the United States;[2398] considering Canadian law, notably *Calder*, which had not yet reached the Supreme

---

[2389] He answered this in the positive: see *Milirrpum*, *supra* note 1205 at 88–89.

[2390] Notably in the context of difficulties raised by the hearsay rule in this regard: see *Milirrpum*, *supra* note 1205 at 9–14.

[2391] See eg *Milirrpum*, *supra* note 1205 at 18: "A problem for the Court in this case is to decide, with the experts' assistance, as a matter of fact, what the aboriginals' 'rights' are, in the eyes of the aboriginals. To reach, and to express, any conclusions on the matter it is convenient to use words like 'right', 'claim' and 'law'. The Solicitor-General himself went to the heart of the matter, when, in reference to the use of the word 'ownership' by Professor Berndt, he commented: 'I think he is trying to use an English word to describe it but it is the only one he can find.'"

[2392] See *Milirrpum*, *supra* note 1205 at 43: "The first is a principle which was a philosophical justification for the colonization of the territory of the less civilized peoples; that the whole earth was open to the industry and enterprise of the human race, which had the duty and the right to develop the earth's resources; the more advanced peoples were therefore justified in dispossessing, if necessary, the less advanced. (…) The Puritans of Massachusetts looked upon it as the application of a command given by God at the Creation".

[2393] See *Milirrpum*, *supra* note 1205 at 43: "Related to this was the doctrine that discovery was a root of title in international law: that the sovereign whose subjects discovered new territory acquired title by the fact of such discovery."

[2394] See *Milirrpum*, *supra* note 1205 at 45.

[2395] See *Milirrpum*, *supra* note 1205 at 42–49.

[2396] See *Milirrpum*, *supra* note 1205 at 43, 45, 46.

[2397] See e.g. *Milirrpum*, *supra* note 1205 at 44, 48.

[2398] See *Milirrpum*, *supra* note 1205 at 49–55.

Court in its trajectory through the Canadian court system;[2399] contemplating Indian law,[2400] African law,[2401] and New Zealand law;[2402] and tracing the development of Australian law in this regard[2403] – even looking at the application of Australian law in its Papua New Guinean Colony.[2404] Having done all of this, it was his considered opinion that the doctrine of Native title did not exist at common law.[2405] In all fairness, this was in 1971, the first time that a Native title claim had been argued in an Australian court – 21 years prior to *Mabo*; 32 years before the New Zealand Court of Appeal's award of Customary title in *Ngati Apa*, and 43 years ahead of the first successful Canadian Aboriginal title claim in *Tsilhqot'in* …

Third, an analysis of his reasoning demonstrates his insight into the aspects regarding the relationship between Indigenous Australians, their spirituality and their land that were highlighted in 6.2.3.1 above ("Background: Indigenous Spirituality in Australia – the Dreaming") and discussed in more detail in Chapter 2: (1) the fact that they do not distinguish between the physical and spiritual realities;[2406] (2) their flexible conception of time;[2407] (3) the religious nature of their relationship with land;[2408] (4) the fact that they consider the bond with their land to constitute an inalienable link;[2409] (5) the notion that they are not the owners of the land, but rather are owned by

---

[2399] See *Milirrpum*, *supra* note 1205 at 56–59.

[2400] See *Milirrpum*, *supra* note 1205 at 59–62.

[2401] See *Milirrpum*, *supra* note 1205 at 59, 62–66.

[2402] See *Milirrpum*, *supra* note 1205 at 66–72.

[2403] See *Milirrpum*, *supra* note 1205 at at 72–77.

[2404] See *Milirrpum*, *supra* note 1205 at 77–78.

[2405] See *Milirrpum*, *supra* note 1205 at 85–86.

[2406] See *Milirrpum*, *supra* note 1205 at 20.

[2407] Thus one of the two anthropological expert witnesses, Professor Berndt, explained to the Court that a particular event in the past could be explained "on two planes, the mythological and the historical" and 'was at pains to emphasize that the second, the historical, interpretation 'does not invalidate the original interpretation. One has to think in two ways.'": *Milirrpum*, *supra* note 1205 at 37–38. Justice Blackburn did not reject the mythological explanation but appeared to take umbrage at the witness's effort to dictate to the Court: "The issues in the case are a matter for the Court and counsel, not for the witness.": *ibid*, at 38.

[2408] See e.g. *Milirrpum*, *supra* note 1205 at 19, 20, 23, 31

[2409] See e.g. *Milirrpum*, *supra* note 1205 at 31.

it;[2410] and (6) the fact that they have maintenance duties towards the land in the form of rituals to perform.[2411]

The plaintiffs in this case were the Rirratjingu and the Gumatj clans, who were claiming that their interests in certain land in the Northern Territory had been unlawfully infringed on by the defendant, a miner of bauxite.[2412] They based their claim on the contention that radical title to the land became vested in the Crown upon colonization in 1788, and that from then on the common law applied to all subjects of the Crown in that area, including their predecessors:

> The plaintiffs' central contention was that at common law the rights, under native law or custom, of native communities to land within territory acquired by the Crown, provided that these rights were intelligible and capable of recognition by the common law, were rights which persisted, and must be respected by the Crown itself, and by its colonizing subjects, unless and until they were validly terminated. Such rights could be terminated only by the Crown and only by the consent of the native people, or perhaps by explicit legislation. Until terminated, the right of the native people to use and enjoy the land, in the manner in which their own law and custom entitled them to do, was a right of property.[2413]

Justice Blackburn identified five disparate questions that needed to be dealt with: (1) What is the plaintiffs' subjective relationship with the land in question? (2) How are matters such as these proved in evidentiary terms? (3) Does the common law recognize a doctrine of Native title? (4) If so, does the subjective relationship of the plaintiffs with the land (as proved) require the application of this doctrine *in casu*? (5) Questions of law pertaining to the effect of a range of events and legislative provisions since 1788.[2414] For our purposes, only the Court's treatment of the first question is immediately pertinent.

[2410] See *Milirrpum*, *supra* note 1205 at 91.

[2411] See *Milirrpum*, *supra* note 1205 at 20.

[2412] *Milirrpum*, *supra* note 1205 at 5.

[2413] *Milirrpum*, *supra* note 1205 at 6.

[2414] *Milirrpum*, *supra* note 1205 at 8.

With regards to the first question, the plaintiffs submitted that their interest in the lands was one of communal property held by the clan jointly with the individual clan members, whose inalienable interest in the land arises at birth and continues until death.[2415] According to Justice Blackburn, "the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship."[2416] However, it was not recognizable as a proprietary interest for purposes of Australian law.[2417] He bases this conclusion on two main aspects: first, the lack of evidence that they consider themselves 'owners' of the land –

> In my view, the clan is not shown to have a significant economic relationship with the land. The spiritual relationship is well proved. One of the manifestations of this is the fact that sacred sites associated with a particular clan are to be found there (though sometimes other clans have spiritual links with these sites). Another manifestation is that the rites performed by the clans have as part of their object the fructification and renewal of the fertility of the land. The evidence seems to me to show that the aboriginals have a more cogent feeling of obligation to the land than ownership of it. It is dangerous to attempt to express a matter so subtle and difficult by a mere aphorism, but it seems easier, on the evidence, to say that the clan belongs to the land than that the land belongs to the clan.[2418]

and second, the inalienable nature of the bond between them and the land, property "generally imply[ing] the right to use or enjoy, the right to exclude others, and the right to alienate."[2419]

As a consequence of *Milirrpum*, the Woodward Royal Commission was called, and the *Aboriginal Land Rights (NT) Act* 1976 (Cth) promulgated.[2420] The objective of the latter was to provide a statutory form of Indigenous land ownership, and it has been argued that it did so in a "firmer" manner than the famous *Mabo v Queensland (No 2)*[2421] case that followed in 1992, some 16 years

---

[2415] *Milirrpum*, *supra* note 1205 at 9.

[2416] *Milirrpum*, *supra* note 1205 at 19.

[2417] See *Milirrpum*, *supra* note 1205 at 86–93.

[2418] *Milirrpum*, *supra* note 1205 at 91.

[2419] *Milirrpum*, *supra* note 1205 at 92.

[2420] See Van Krieken, *supra* note 2386 at 72.

[2421] *Mabo v Queensland (No 2)* [1992] HCA 23, 175 CLR 1 [*Mabo*].

later.[2422] For one, it recognized the existence of spiritual ties with the land, even if it still deprived the Indigenous owners of the associated mineral estate.[2423]

Mabo introduced the doctrine of Native law in 1992 "as a form of customary title arising from traditional laws and customs that pre-existed and, under certain conditions, survived British sovereignty."[2424] A point of criticism levied against *Mabo* has been that it is "Aboriginal title to land (…) in an ersatz form" [2425] in that the Australian version "takes its contours from what can be proven of traditional laws and customs."[2426] I also refer back here to the discussion on Identity Politics at 2.2.2 above and James Clifford's concept of *'Indigènitude*": the problem with requirements such as we find in *Mabo* is that they underlie fixed notions of cultural authenticity and that they hold the potential for cultural fossilization and the minority oppression of majorities – and *vice versa*.

[2422] See Van Krieken, *supra* note 2386 at 72.

[2423] See Anderson et al, *supra* note 386 at 361.

[2424] "Treaty of Waitangi Fisheries Settlement", *ATNS Project*, online: <http://www.atns.net.au/agreement.asp?EntityID=1730> [*ATNS Project*, "Fisheries Settlement"]. The connection between the claimant Indigenous group and the land in question must have been substantially maintained and as ultimate owner the government could extinguish native title by plain and clear intention: Barrie, "UNDRIP", *supra* note 1520 at 299. Also see J Clarke, *supra* note 2328 at 106; GN Barrie, "The *Richtersveld* and *Mabo (no 2)* Cases: Resurrecting the *Lex Loci* of British Imperial Law" [2011]:4 J South African Law 730 [Barrie, "British Imperial Law"]; and GN Barrie, "The Quest for Indigenous Land Rights Intensifies: *Mabo (No 2)*, *Delgamuukw*, *Richtersveld* and now *the Endorois of Kenya*" (2011) 26 SA Publiekreg/SA Public Law 497 [Barrie, "The Quest"] at 502–503.

[2425] J Clarke, *supra* note 2318 at 94.

[2426] J Clarke, *supra* note 2318 at 94 n 118.

In response to *Mabo*, the Commonwealth enacted the *Native Title Act*[2427] the following year to resolve native title claims.[2428] An important aspect of native title as per *Mabo* was its retrospective effect, which could potentially invalidate land titles such as pastoral leases.[2429] However, in *Wik Peoples v Queensland*[2430] the High Court ruled that native title rights and pastoral leases may co-exist over the same land and that pastoral leases prevail over native title rights to the extent of any inconsistency.[2431] This gave rise to the passing of controversial amendments to the *Native Title Act* in 1998, notably (for present purposes) in respect of consent determinations and Indigenous Land Use Agreements.[2432]

This is a complex area of the law, and the topic of a considerable body of literature.[2433] I do not intend here to launch into a discussion of Native title itself, given that it has been superseded by legislation in the form of the *Native Title Act 1993* (as amended).

[2427] *Native Title Act* (1993) (Cth). See in this regard Tim Rowse, "How We Got a Native Title Act", in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 111; Murray Goot, "Polls as Science, Polls as Spin: Mabo and the Miners" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 133; Geoffrey W Ewing, "Terra Australis post Mabo: For Richer or for Poorer" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 157; Rick Farley, "The Mabo Spiral", in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 167; Noel Pearson, "From Remnant Title to Social Justice", in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 179; Tim Rowse, "The Principles of Aboriginal Pragmatism" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 194; Murray Goot, "The Wild West? Yes, No and Maybe" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 194.

[2428] See Kent McNeil, "Judicial Treatment of Indigenous Land Rights in the Common Law World" in Richardson, Imai & McNeil, *supra* note 1246, 257 at 264.

[2429] See *ATNS Project*, *supra* note 2424.

[2430] *("Pastoral Leases case")* [1996] NZHCA 40; (1996) 187 NZCLR 1 [*Wik*].

[2431] "*The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* [1996] High Court of Australia (23 December 1996)", *ATNS Project*, online: <http://www.atns.net.au/agreement.asp?EntityID=775>.

[2432] See *ATNS Project*, *supra* note 2424.

[2433] On Mabo, See e.g. Brabara Ann Hocking & Margaret Stephenson, "Why the Persistent Absence of a Foundational Principle? Indisenous Australians, Proprietary and Family Reparations" in Federico Lenzerini, ed, *Reparations for Indigenous Peoples: International & Comparative Perspectives* (2008) 477; Anderson et al, *supra* note 386 at 908; Garth Nettheim, "The Uncertain Dimensions of Native Title" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 55; Michael Kirby, "In Defence of Mabo" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 67; LJM Cooray, "The High Court and Mabo: Legalist or L'Égotiste" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 82; Ian Hunter, 'Native Title: Acts of State amnd the Rule of Law" in Murray Goot & Tim

Jennifer Clarke has pointed out that Australia's colonialization and political maturation took place in the era of Benthamism, arguing that minorities such as Indigenous Australians are still expected to cater to the interests of the majority.[2434] She cites as an example in this regard section 7 of the *Native Title Act* [NTA]. The *Act* permits the allocation of land held under Native title to other parties without the consent of the Native title holders being obtained, and the objective of section 7 is to suggest that such allocations conform to the *Racial Discrimination Act 1975* (Cth) [RDA] that implements the *International Convention on the Elimination of All Forms of Racial Discrimination.*[2435] She argues, however, that section 7 does not suffice to remedy other provisions of the NTA that expressly authorize the discriminatory treatment of Native title land in such a manner that the Native title holders are deprived of the protections of the RDA.[2436] One example of these discriminatory provisions is the compulsory acquisition of Native title land by the Crown for purposes of re-granting it to another private owner.[2437]

More pertinent is the underlying concept of property, notably property as a bundle of rights. This has allowed Indigenous land rights to be fragmented, with the result that an Indigenous clan might be recognized as "Traditional Owners" of a given tract of land, and yet be powerless to prevent its exploitation – something that is particularly perturbing in the context of sacred sites. It is a problem best illustrated at the hand of a concrete example. First, though, we need to understand the mechanics of heritage legislation in Australia.

Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 97.. On the *Native Title Act*, see Anderson et al, *supra* note 386 at 918; Beth Ganz, "Indigenous Peoples and Land Tenure: An Issue of Human Rights and Environmental Protection" (1996) 9 Geo Int'l Envtl L Rev 173; Maureen Tehan, "A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act" (2003) 27 Melbourne U L Rev 523.

[2434] See J Clarke, *supra* note 2318 at 87.

[2435] *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, 660 UNTS 195.

[2436] J Clarke, *supra* note 2318 at 87, n 55.

[2437] J Clarke, *supra* note 2318 at 90, with reference to *Griffiths v Minister of Lands, Planning and Environment* [2008] HCA 20.

6.5.1.3 The Northern Territory Aboriginal Sacred Sites Act 1989 ["Sacred Sites Act"]

The Northern Territory was the first province to enact dedicated sacred sites legislation in 1978 in the form of the *Aboriginal Sacred Sites Act (NT) 1978*.[2438] It has since been substituted by the *Northern Territory Aboriginal Sacred Sites Act 1989*,[2439] as supplemented by the *Northern Territory Aboriginal Sacred Sites Regulations*.[2440]

In the Northern Territory, Indigenous sacred sites are protected "as an integral part of Northern Territory and Australian cultural heritage"[2441] under two Acts: the Commonwealth's *Aboriginal Land Rights Act* –enacted in reaction to *Milirrpum*, as we saw above– and the *Sacred Sites Act*.[2442] The concept of a "sacred site" is defined rather broadly in terms of the *Aboriginal Land Rights Act*, with the *Sacred Sites Act* cross-referring to the former Act:

> ***sacred site*** means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.[2443]

There have been moves afoot to revise this legislation since 2012, sometimes with a less than harmonious impact on the relationship between the Minister for Local Government and Community Services and the Aboriginal Areas Protection Authority (AAPA), the latter being the statutory body in charge of sacred sites protection under the *Sacred Sites Act*. Thus the AAPA's Chairman, Jenny Inmulugulu, is on record as stating –

[2438] *Aboriginal Land Rights (NT) Act 1976* (Cth) [*Aboriginal Land Rights Act*].

[2439] *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) [*Sacred Sites Act*].

[2440] *Northern Territory Aboriginal Sacred Sites Regulations* (SL No 14, 2004), as amended by the *Northern Territory Aboriginal Sacred Sites Amendment Regulations 2011* (SL No 31, 2011).

[2441] Aboriginal Areas Protection Authority (AAPA), *Annual Report for the Aboriginal Areas Protection Authority for the Financial Period 1 July 2015 to 30 June 2016* (Darwin, NT: AAPA, 2016) at 25.

[2442] See AAPA, *supra* note 2441 at 25.

[2443] *Aboriginal Land Rights Act*, *supra* note 2438, s 3(1).

> [In 2013] it became apparent to the Board that the Minister's intention for legislative changes were motivated by the need to create greater economic activity and to reduce red tape for businesses engaging with the *Sacred Sites Act*. The Board felt that its purpose to protect sacred sites and its independence did not sit comfortably with the Government's intentions.[2444]

Although the AAPA dissociated it from the Government's revision endeavours in consequence, it has taken an active role in the Commonwealth-level revision that has been ongoing since the end of 2014.[2445]

The stated objective of the *Sacred Sites Act* is to "effect a practical balance between the recognized need to preserve and enhance Aboriginal cultural tradition" regarding sacred sites in the Northern Territory "and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement".[2446] To this end it establishes the AAPA[2447] and delineates a procedure for the Minister to review the AAPA's decisions.[2448] How successfully it affects this balance might depend on the vantage point of the observer.

The Act creates a non-obligatory procedure whereby developers may apply to the AAPA for an Authority Certificate[2449] that indicates either that the envisaged work may proceed without it involving a "substantive risk of damage to or interference with a sacred site on or in the vicinity of the land"[2450] under development, or that a so-called consent agreement has been reached with the custodians of the site.[2451]

[2444] Jenny Inmulugulu, "Chairman's Report" *Annual Report for the Aboriginal Areas Protection Authority for the Financial Period 1 July 2015 to 30 June 2016* (Darwin, NT: Aboriginal Areas Protection Authority, 2016) at 9.

[2445] See Benedict Scambary, "Chief Executive Officer's Report" in AAPA *Annual Report*, *supra* note 2441, 10 at 11.

[2446] *Sacred Sites Act, supra* note 2439, Preamble.

[2447] See *Sacred Sites Act, supra* note 2439, Part II (ss 5–19).

[2448] *Sacred Sites Act, supra* note 2439, Preamble.

[2449] See *Sacred Sites Act, supra* note 2439, s 19B.

[2450] *Sacred Sites Act, supra* note 2439, s 22(1)(a).

[2451] *Sacred Sites Act, supra* note 2439, s 22(1)(b).

It also puts in place a formal procedure for sacred site registration.[2452] Usually site information is recorded, although the Act does make provision for restrictions on the disclosure of information of information relating to the site. The objective hereof likely is to protect the confidentiality of secret-sacred sites. However, as the contentious Hindmarsh Island Bridge matter has illustrated, such secrecy undertakings are hardly foolproof.[2453]

Should the AAPA refuse an application for an Authority Certificate, or grant one on terms that the Applicant deems unfavourable, such Applicant may approach the Minister to take the matter on revision.[2454]

The Act is not entirely toothless, at least on paper: punishments are envisaged for contraventions of the Act, ranging from a maximum of 12 months' imprisonment or "200 penalty units" for unauthorized entry onto sacred sites[2455] or the contravention of site avoidance conditions[2456] to 24 months' imprisonment or "400 penalty units" in respect of work effected on a sacred site[2457] or desecration of one.[2458] The Act does provide for ignorance[2459] and non-negligence defences.[2460] Section 38 seeks to further enhance secrecy protections by criminalizing confidentiality breaches and attaching thereto a maximal sanction of 2 years' imprisonment or "400 penalty units". However,

---

[2452] See *Sacred Sites Act, supra* note 2439, Division 2 ("Documenting, evaluating and registering sacred sites"), ss 27–29.

[2453] See Robert van Krieken, Kumarank (Hindmarsh Island) and the Politics of Natural Justice under Settler-Colonialism" (2011) 26:1 Law & Social Inquiry 125; James F Weiner, "Culture in a Sealed Envelope: The Concealment of Australian Aboriginal Heritage and Tradition in the Hindmarsh Island Bridge Affair" (1999) 5:2 The Journal of the Royal Anthropological Institute 193; D Bell, *Ngarrindjeri Wurruwarrin*, *supra* note 368 at C 10; P Clarke, *supra* note 362; Geoffrey Partington, "HindmarshIsland and the Fabrication of Aboriginal Mythology" in *Upholding the Australian Constitution Volume 15* (Proceedings of the Fifteenth Conference of the Samuel Griffith Society, 2003) 96; Greg Mead, *A Royal Omission : A Critical Summary of the Evidence Given to the Hindmarsh Island Bridge Royal Commission with an Alternative Report* (Halifax, South Australia: Greg Mead, 1995).

[2454] See *Sacred Sites Act, supra* note 2439, ss 30–32 (Division 3: Review Procedure").

[2455] See *Sacred Sites Act, supra* note 2439, s 33.

[2456] See *Sacred Sites Act, supra* note 2439, s 37.

[2457] See *Sacred Sites Act, supra* note 2439, s 34.

[2458] See *Sacred Sites Act, supra* note 2439, s 35.

[2459] See *Sacred Sites Act, supra* note 2439, s 36(1).

[2460] See *Sacred Sites Act, supra* note 2439, s 36(2).

prosecutions may solely be brought by the AAPA.[2461] I have not been able to find data on actual prosecutions in terms of these provisions.

Although this Act may in fact have laudable intentions, I consider that it is structured in such a manner as to present a Government with a development agenda the opportunity to effectively consent to development projects that impact Indigenous sacred sites even where this goes against the express wishes of the Indigenous community concerned. This is because of the Minister's power to overrule the Authority by means of review, joined with the fact that the Authority or the Minister (as applicable) are merely required to "*take into account* the wishes of Aboriginals relating to the extent to which the sacred site should be protected."[2462]

The Act is not without its benefits for Indigenous peoples so affected: registration constitutes *prima facie* evidence that the place in question is a sacred site;[2463] Indigenous communities have the right to access their sites in accordance with their traditions[2464] and provision is made for access rights to sites across other lands.[2465] However, registers are open for public inspection on the payment of a fee[2466] – likely the strongest disincentive to registration in the Australian context, given what we have learnt about the role of secrecy in the context of the sacred in Australia.[2467]

Possibly the strongest indicator of who concretely benefits from this Act is to be found in the 2015–2016 statistics provided by the Authority: while the AAPA issued 242 Authority Certificates over the course of the financial year – an increase of 32% over the previous period– and completed 636

[2461] See *Sacred Sites Act, supra* note 2439, s 39. This begs the question of what happens where the Authority unreasonably refuses to do so, or even due to some corruption in its midst.

[2462] *Sacred Sites Act, supra* note 2439, s 42 [emphasis added]. As long as the Minister can show that he has done this, I do not see that an aggrieved community would have any basis for review proceedings. There is no inherent requirement of balance, fairness or reasonableness here.

[2463] *Sacred Sites Act, supra* note 2439, s 45.

[2464] See *Sacred Sites Act, supra* note 2439, s 46.

[2465] See *Sacred Sites Act, supra* note 2439, s 47.

[2466] See *Sacred Sites Act, supra* note 2439, s 48.

[2467] See above at 2.4.3.3.2 ("Secrecy About the Sacred: Australia").

formal requests for information from its publically available registers, it registered a total of three sacred sites over the same period.[2468]

As it happens, confidentiality issues also lie at the heart of the problem with the other potential avenue: heritage legislation. It is there that we next turn.

6.5.2 Heritage Legislation

6.5.2.1 Background: Indigenous Spirituality in Australia — Time, Rituals and Secrecy

Prior to contemplating Australian heritage legislation, it is useful to recall Indigenous Australian conceptions in three spheres: time, rituals and secrecy. Three points of importance were made relating to their notions of time: (1) their idea of time is flexible, and includes the notion of the "expanded present" that both reaches back to the past and forward into the future; (2) land that is connected with the Dreaming is considered to be sacred because it incarnates the spiritual power of the Dreaming; and (3) the Dreaming is not an abstract concept to them, but is very concrete, real and fundamental to their lives.

Insofar as rituals are concerned, the following four points should be emphasized: (1) sacred site maintenance requires both physical and spiritual interactions with the site; (2) maintenance duties in respect of sacred sites are ritual-based; (3) rituals perform a pivotal function in that the performer is *transformed into* the ancestor spirit — they thus serve as bridges for access to ancestor spirits and entry into spiritual worlds; and (4) the transformative power of sacred sites has important identitary consequences, as initiates become permanently bonded with the ancestors and thus with the land.

Finally, there also were four points of significance in relation to secrecy: (1) land may have a temporary or a permanent secret-sacred dimension; (2) the sacred character of a site may mean that it is potentially dangerous for those without access rights to visit it; (3) knowledge of sacred sites may be restricted to particular persons or groups; and (4) the place of women in sacred rituals has

---

[2468] See AAPA *Annual Report*, *supra* note 2441 at 17.

been marginalized, notably with the more rigid enforcement of sacredness rules that has accompanied Indigenous identity struggles.

6.5.2.2 The Role of Heritage Protection Legislation in Sacred Site Protection

6.5.2.2.1 Overview of Commonwealth and State Indigenous Heritage Protection Legislation

Table 7 below is provided with the objective of quickly illustrating a nation-wide phenomenon that I do not have the space to dissect in detail: the use of heritage registers in one form or another. It is not really important what form these take, as it is their mechanics that interest me more than the detail. More specifically, they in all probability share the two features that I will be commenting on most strongly in the context of the Northern Territory *Sacred Site Register* below: the need for disclosure of sacred site particulars, and the publication of that information to the general public. While I will be focussing my critique on the problems that this creates in the context of the secret-sacred, it is by no means the only kind of problem that arises: registers have a propensity for freezing whereas oral cultural tradition is flexible; by decontextualizing stories associated with the sacred they are rendered unidimensional and caricaturized; so much meaning is lost in the process of (cultural) translation…

Table VII: Overview of Commonwealth and State Indigenous Heritage Legislation

State or Territory	Legislation	Register	Administering Body
Commonwealth	*Environment Protection and Biodiversity Conservation Act 1999* (EPBC) *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* *Protection of Movable Cultural Heritage Act 1986*	Commonwealth Heritage List National Heritage List	Australian Heritage Council (Indigenous Advisory Committee)
	Native Title Act 1993 s 211	Indigenous Protected Areas Conservation Agreements	

Australian Capital Territory	*Heritage Act 2004* *Heritage Objects Act 1991*	Heritage Register	Department of Territory and Municipal Services
Northern Territory	*Aboriginal Sacred Sites Act 1989* *Heritage Conservation Act 1991*	Register of Sacred Sites	Aboriginal Areas Protection Authority
	Aboriginal Land Rights (Northern Territory) Act 1976		
New South Wales	*Heritage Act 1977* *National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996*	State Heritage Register	Heritage Branch, Department of Planning
Queensland	*Aboriginal Cultural Heritage Act 2003* *Torres Strait Islander Cultural Heritage Act 2003*	Aboriginal and Torres Strait Islander Cultural Heritage Register	Department of Natural Resources and Water
South Australia	*Aboriginal Heritage Act 1988*	Register of Aboriginal Sites and Objects	Department of the Premier and Cabinet
Tasmania	*Aboriginal Relics Act 1975*		Tasmanian Aboriginal Heritage Office, Department of Environment, Parks, Heritage and the Arts
Victoria	*Aboriginal Heritage Act 2006* *Heritage Act 1994*	Victorian Aboriginal Heritage Register	Aboriginal Affairs Victoria, Department of Planning and Community Development
Western Australia	*Aboriginal Heritage Act 1972*	Register of Aboriginal Sites	Department of Indigenous Affairs

6.5.2.2.2 Empirical Study: Commonwealth Heritage Legislation

For purposes of determining the effectiveness of Commonwealth Heritage Legislation in the protection of Indigenous Sacred Sites, I undertook an empirical study of the Australian Heritage Database, as maintained by the Department of the Environment and Energy. This is not so straightforward an undertaking, as a nationwide or even statewide report is not obtainable: I had to first draw and then digest and consolidate 60 regional reports.

The *Environmental Protection and Biodiversity Conservation Act 1999* [EPBC][2469] makes provision for a tri-level classification (World Heritage; National Heritage; Commonwealth Heritage), depending on the importance afforded to the site in question. Sites are nominated, and listed, in broad categories that vary according to the level of listing. Thus listings at 'World Heritage' level follow the UNESCO criteria of 'natural', 'cultural', 'historical' –and presumably 'associative cultural landscape', though I did not uncover one.

Sites at 'National' and 'Commonwealth' level are categorized as being of 'natural', 'historical' or 'Indigenous' heritage value. As well, the mere fact that a site's name appears in the Register does not mean that it is a protected site: the site's status needs to reflect that of a 'Declared property' (World Heritage level) or a 'Listed place' (National or Commonwealth level).

If, in the context of a World Heritage site, a place is reflected as being a 'Declared property, the World Heritage Committee (WHC) has entered it into the World Heritage List; a 'Nominated property' has been nominated to the WHC for assessment by the Australian State; a 'Withdrawn property' has had its nomination withdrawn by the State; an 'Endangered property' has been placed on the 'World Heritage List in Danger' watch list by the WHC; a 'Deleted property' has been removed from the list by the WHC because of the fact that the place has lost the characteristics

[2469] *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) [EPBC].

that originally merited its inclusion; and 'Rejected property' indicates that the site's nomination has not been accepted by the WHC.[2470]

Broadly speaking, the 'National Heritage' and 'Commonwealth Heritage' listings have a shared terminology. While a 'Listed place' has been included in the pertinent List, a site 'Within listed place' falls within a larger site that is on the List – its listing does not indicate that it has been individually assessed or that it definitely has any heritage value.[2471] The rather rigid, cumbersome and formalistic nature of the Act is apparent in its choice of terminology: the Australian Heritage Council (AHC) can only assess places for inclusion on the two Lists if they appear on the annual work plan of the Minister of the Environment and Energy ("the Minister"), and the Minister can only include them if they have been duly nominated ('Nominated place').[2472] Should a Nominated place be considered but not included in the Lists for two consecutive years, it becomes an 'Ineligible place', which can be remedied only through renomination.[2473] The Minister has the power to make an interim 'Emergency listing' where a place is under imminent threat, by first publishing a notice in the *Gazette* that it has been inscribed in the pertinent List and then referring it to the NHC for assessment.[2474] The assessment of an 'Assessed place' has been completed by the NHC, but a 'Destroyed place' was destroyed prior to either assessment or listing.[2475] The Minister exercises a wide discretion: a 'Place not included' is one for which the Minister has received an assessment and that he "has

---

[2470] For the definitions, see "Legal Status and Heritage Place Lists: World Heritage List", *Australian Government Department of the Environment and Energy*, online: < www.environment.gov.au/heritage/publications/australian-heritage-database/legal-status>.

[2471] Cf "Legal Status and Heritage Place Lists: National Heritage List", *Australian Government Department of the Environment and Energy*, online: < www.environment.gov.au/heritage/publications/australian-heritage-database/legal-status>: "***Within listed place*** **–** The place is within the larger area entered in the National Heritage List. Whilst the place has not been specifically assessed, it may have heritage values. Such values may be identified in the record for the encompassing area."

[2472] See "Legal Status and Heritage Place Lists: National Heritage List", *Australian Government Department of the Environment and Energy*, online: < www.environment.gov.au/heritage/publications/australian-heritage-database/legal-status>.

[2473] See "Legal Status and Heritage Place Lists: National Heritage List", *Australian Government Department of the Environment and Energy*, online: < www.environment.gov.au/heritage/publications/australian-heritage-database/legal-status>.

[2474] See "Legal Status and Heritage Place Lists: National Heritage List", *Australian Government Department of the Environment and Energy*, online: < www.environment.gov.au/heritage/publications/australian-heritage-database/legal-status>.

[2475] See "Legal Status and Heritage Place Lists: National Heritage List", *Australian Government Department of the Environment and Energy*, online: < www.environment.gov.au/heritage/publications/australian-heritage-database/legal-status>.

decided not to include" in the pertinent List; a place may be removed from the List by the Minister either due to a lack of continued heritage value, or because he "has decided that it is necessary to do so in the interests of Australia's defence or security."[2476] The listing of an 'Indicative place' is purely informational in status:

> Data provided to or obtained by the Heritage Branch has been entered into the database. However, a formal nomination has not been made and the Council has not received the data for assessment.
>
> The data in the place does not necessarily represent the views of the Council or the Minister.[2477]

To return to the empirical study undertaken: my objective was to see how well (1) Indigenous sites and (2) Indigenous sacred sites are represented among the heritage places protected. The results are portrayed below in Table 9 ("A Snapshot of EPBC Heritage Protection") and Table 10 ("Classification of Indigenous Sacred Sites"). A discussion follows after the two Tables.

[2476] See "Legal Status and Heritage Place Lists: National Heritage List", *Australian Government Department of the Environment and Energy*, online: < www.environment.gov.au/heritage/publications/australian-heritage-database/legal-status>.

[2477] "Legal Status and Heritage Place Lists: National Heritage List", *Australian Government Department of the Environment and Energy*, online: < www.environment.gov.au/heritage/publications/australian-heritage-database/legal-status>.

Table VIII: A Snapshot of EPBC Heritage Protection

List	Category	NSW	Qld	SA	Tas	Vic	WA	ACT	NT	Ext Ter	Total
World Heritage	Natural	3	5	1	1	–	5	–	2	1	18
	Historic	8	–	–	10	–	2	–	–	–	20
	Cultural	2	–	–	–	1	–	–	–	1	4
	Ass Cult Ls	–	–	–	–	–	–	–	–	–	–
National Heritage	Natural	16	8	2	4	9	9	1	2	1	52
	Historic	24	3	5	9	20	6	5	–	2	74
	Indigenous	3	2	1	2	4	1	–	3	–	16
Cwealth Heritage	Natural	4	4	1	1	6	7	3	2	14	42
	Historic	138	17	8	20	38	13	76	9	32	351
	Indigenous	4	–	–	–	–	2	1	1	–	8
Total		202	39	18	47	78	45	86	19	51	585

Table IX: Classification of Protected Indigenous Sacred Sites

Site	Level	Arch/ Hist	Protest	Cultural/ W of Life	Sacred Site	Express	Oblique	Incidental
1. Jervis Bay Territory, NSW	Cwealth				x	x		
2. Crocodile Head Area, NSW*	Cwealth				x*		x*	
3. Currarong Rockshelters Area, NSW*	Cwealth	x						
4. Moree Baths and Swimming Pool, NSW	Nat		x					
5. Myall Creek Massacre and Memorial Site, NSW	Nat	x						
6. Cyprus Hellene Club – Australia Hall, NSW	Nat		x					
7. Cubbitch Barta National Estate Area, NSW	Cwealth			x	x		x	
8. Ngarrabullgan, Qld	Nat				x	x		
9. Wet Tropics World Heritage Area (Indigenous Values), Qld*	Nat				x*		x*	
10. Koonalda Cave, SA	Nat	x		x	x*		x*	
11. Jordan River Levee Site, Tas	Nat	x						
12. Western Aboriginal Cultural Landscape, Tas	Nat			x				
13. Coranderkk, Vic	Nat	x						

Site	Level	Arch/ Hist	Protest	Cultural/ W of Life	Sacred Site	Express	Oblique	Incidental
14. Budj Bim National Heritage Landscape – Mt Eccles Lake Condah Area, Vic	Nat				x		x	
15. Budj Bim National Heritage Landscape – Tyrendarra Area, Vic*	Nat	x*		x*				
16. Mount William Stone Hatchet Quarry, Vic	Nat	x		x*				
17. Dampier Archipelago (incl Burrup Peninsula), WA	Nat	x			x		x	
18. Boulder Hill West Area, WA*	Cwealth	x*		x*				
19. Oombalai Area, WA*	Cwealth	x*		x*				
20. Aboriginal Embassy Site, ACT*	Cwealth		x*					
21. Hermannsburg Historic Precinct, NT	Nat	x						
22. Wave Hill Walk Off Route, NT	Nat	x						
23. Wurrwurrwuy, NT	Nat			x				
24. Uluru – Kata Tjuta National Park, NT	Cwealth				x	x		
25. Kakadu, NT**			x		x**			x**
TOTALS		**9 + 3***	**3 + 1***	**4 + 4***	**6 + 3***	**3**	**3 + 3***	

Key: *Within Listed Place **Not listed in the Indigenous category, but contains a well-known Indigenous sacred site

Table VIII, "A Snapshot of EPBC Heritage Legislation" is illuminating for a number of reasons. My first deduction is that in Australia at least at Commonwealth level cultural assets appear to attract fewer protective efforts than historical or natural ones. I say this for two reasons: first, while Australia has roughly the same number of Declared Natural Heritage Sites in the 'natural' and 'historic' categories –18 and 20, respectively– it only has 4 Declared Cultural Heritage Sites – and none whatsoever in the 'associated cultural landscapes' (sacred site) category; and second, Australia's own heritage system does not offer a category for the protection of sites with a cultural heritage value –the options are 'natural', 'historic' or 'Indigenous'.

My second deduction is that spiritual beliefs hardly ever underlie the motivation for heritage protection on the Australian national stage. This contention I make based on the following observations: first, although there are historical buildings aplenty that feature as 'Listed places' in the National and Commonwealth Heritage Lists, I did not notice one church among them; second, as Table IX ("Classification of Protected Indigenous Sacred Sites") illustrates, a mere 3 of the 24 Indigenous sites protected in terms of the two Lists make explicit reference to spiritual values in their site descriptions, while the descriptions of a further 3 contain elements that obliquely suggest they might be sacred sites. The most explicit reference is to be found in respect of *Ngarrabullgan* (Queensland):

> For the Traditional Owners, the Djungan people, *Ngarrabullgan is a sacred and dangerous place*. Traditional Djungan stories describe how in the Dreaming wallabies, on the advice of the eaglehawk, built a big pile of stones on top of which a swamp pheasant built its nest and hatched its young (Richards 1926 cited in David 1992:77). The Eekoo, a dangerous spirit, killed the pheasants' young. In their anger at the death of their young, the pheasants tried to kill the Eekoo by starting a bushfire which was so intense that it melted the stones and created Ngarrabullgan. In order to save himself, the Eekoo created a lake, Lake Koongarra, on the mountain and took refuge in its waters. The Eekoo still inhabits Lake Koongarra but he also wanders all over the mountain.[2478]

[2478] Australian Heritage Database, "Ngarrabullgan, Mount Mulligan Rd, Dimbulah, QLD, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DNgarrabullgan%2520%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=106025> [emphasis added].

The spiritual importance of cultural practices associated with sacred sites are acknowledged in the case of the *Jervis Bay Territory* (Australian Capital Territory):

> Ceremonial BUNAN or BORA grounds, used for initiation, are known only from the immediate hinterland of Wreck Bay, and nearly all known grinding groove sites are in the catchments of Mary and Summercloud Bays (Booderee National Park Board of Management, 2002). These sites demonstrate past cultural practices and *the BUNAN are spiritually important to the Wreck Bay community*.[2479]

The description of the third site that I have classed as an 'explicit sacred site listing', *Budj Bim National Heritage Landscape* (Victoria), draws a direct link between Indigenous people, the landscape and their spiritual beliefs:

> The link between the eruption of the volcano and *Budj bim* is of outstanding heritage value as *a demonstration of the process through which ancestral beings reveal themselves in the landscape*. This process of revelation has been documented in other parts of Australia where they involve Aboriginal people recognizing (or having revealed to them) the form of an ancestral being in a feature of the landscape (Merlan 1998).
>
> There are two areas in Australia where Aboriginal people witnessed volcanism: the area of the younger volcanics of the Atherton Tablelands; and, the younger volcanics in Victoria, which includes Mt Eccles. *The Aboriginal stories about volcanism on the Atherton Tablelands are cast within the framework of transgressions and reprisals by ancestral beings*. They also provide a clear description of the volcanic activity (Dixon 1996; Toohey 2001). While Aboriginal people also witnessed the eruption of Mt Eccles, their stories are very different to those on the Atherton Tablelands. Mt Eccles is an ancestral creation being *Budj bim* and the scoria cones are described as *tung att* – teeth belong it (Clark 1990a; 1990b; Builth 2003). It therefore demonstrates the process through which Aboriginal creation beings reveal themselves in the landscape.[2480]

[2479] Australian Heritage Database, "Jervis Bay Territory, Jervis Bay Rd, Jervis Bay, ACT, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DJervis%2520Bay%2520Territory%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=105394> [emphasis added].

[2480] Australian Heritage Database, "Budj Bim National Heritage Landscape – Mt Eccles Lake Condah Area, Mt Eccles Rd, Macarthur, VIC, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DBudj%2520Bim%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=105673> [emphasis added].

Insofar as the three sites in respect of which oblique references to sacredness are made are concerned, the following observations can be made: the *Cubbitch Barta National Estate Area* (New South Wales) is one where the Dharawal people are reported to "see evidence of the relationship between their people and the land";[2481] *Koonalda Cave* (South Australia) is said to be "culturally and historically significant particularly for the Mirning people";[2482] and the *Dampier Archipelago (including Burrup Peninsula*) (West Australia) features *inter alia* standing stones that are "*thalu*, which are traditional sites where ceremonies were conducted to increase the natural species or phenomenon (e.g. rain) associated with the place."[2483]

In addition, there are three of the sites 'Within Listed Place' that contain oblique references to Indigenous spirituality: no information is forthcoming on *Crocodile Head Area* (New South Wales), on the basis that it is "confidential";[2484] the "Summary of Significance" in the description of the *Wet Tropics World Heritage Area* (Queensland)'s description makes tantalizing references to "traditional

---

[2481] Australian Heritage Database, "Cubbitch Barta National Estate Area, Old Illwara Rd, Holsworthy, NSW, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DCubbitch%2520Barta%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=105405>.

[2482] Australian Heritage Database, "Koonalda Cave, Old Eyre Hwy, Cook, SA, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DKoonalda%2520Cave%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=106022>.

[2483] Australian Heritage Database, "Dampier Archipelago (including Burrup Peninsula), Karratha Dampier Rd, Dampier, WA, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DDampier%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=105727>.

[2484] This presumably points to a secret-sacred site: see Australian Heritage Database, "Crocodile Head Area, Lighthouse Rd, Currarong, NSW, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: < http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DCrocodile%2520Head%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=105322>].

law" and 'creation beings", without ever going so far as to speak about spiritual value or sacredness;[2485] and from its description the *Aboriginal Embassy Site* (Australian Capital Territory) appears to host a sacred fire.[2486]

Finally, one site –*Kakadu National Park* (Northern Territory)– is listed as a World Heritage site and a National site in the 'natural' –and not 'Indigenous– category, though the historical part to its register entry records:

> The park contains many richly decorated Aboriginal caves with a number of significant art styles, concentrated along the Arnhem land escarpment, some dating back 18,000 years. The area is outstanding in the antiquity and quality of its 1,000 archaeological sites and Aboriginal culture and estimated 7,000 art sites. Excavated sites have revealed evidence of the earliest human settlement in Australia and the world's oldest evidence of edge-ground axes. Pieces of ochre that were used for painting have been found throughout occupational deposits dating to 25,000 years ago. *There are many sacred sites of great religious significance to the Aboriginal people* (DASET, 1991; Gillespie, 1983).[2487]

[2485] "Traditional law provides a conceptual framework that underpins the rainforest Aboriginal people's technical achievement in processing toxic plants. These traditions describe the characteristics of plants, in particular sourness, which establishes the degree of difficulty required to process each species. Examples of traditions about creation beings and toxic plants include the Kuku-Yalanji traditions about Kubirri and about the two sisters, the Yidinji tradition about Damarri and Guyala, and the tradition about Girugarr (the eel man) from the southern region of the Wet Tropics. Particular parts of these stories are inscribed in the landscape of the Wet Tropics as features or paths formed by creation beings. Information provided by creation beings on the methods to be used to process toxic plants are unusual in Australia. These traditions are of outstanding heritage value to the nation": Australian Heritage Database, "Wet Tropics World Heritage Area (Indigenous Values), Cairns, QLD, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: < http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DWet%2520Tropics%2520World%2520Heritage%2520Area%2520%2528Indigenous%2520Values%2529%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=106008>.

[2486] "To the west is a second fireplace in which were cast the ashes of the poet Kevin Gilbert. This Fire for Justice is frequently relit and should not be disturbed": Australian Heritage Database, "Aboriginal Embassy Site, King George Tce, Parkes, ACT, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DAboriginal%2520Embassy%2520Site%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=18843>.

[2487] Australian Heritage Database, "Kakadu National Park, Arnhem Hwy, Darwin NT, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: < http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DKakadu%2520National%2520Park%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=105041> [emphasis added].

I have accordingly classed it as an 'implicit sacred site'.[2488]

6.6 Illustration: Desktop Study 6: – McArthur River Mine, Borroloola, Northern Territory, Australia

6.6.1 Introducing the Desktop Study

The problem at hand involves the McArthur River Mine, the McArthur River Project and the Native Title Claimants affected by the McArthur River Project. The Glencore Xstrata McArthur River Mine is one of the world's biggest producers of zinc, lead and silver.[2489] The McArthur River Project relates to water and land comprised in certain mineral leases held by the Mine,[2490] and the plaintiffs in the matter to be discussed below were the Native Title Claimants with regards to such water and land.[2491]

It is the site of an ongoing dispute, in that the Native Title Claimants say that there are nine registered sacred sites within the area of the mine's lease that they are entitled to visit under the *Sacred Sites Act*, and that at least one of these has been damaged by the mine's activities.[2492] They have complained in interviews that they experience difficulties in accessing those sites.

There is a rich sacred site problem surrounding the McArthur River Project, in that the Native Title Claimants consider the McArthur River to be sacred – it is the Rainbow Serpent to them. The mine, on the other hand, has been on a continuous expansive drive since 2006 and slows no sign of

---

[2488] See in this context MA Hill & AJ Press, "Kakadu National Park: An Experiment in Partnership" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 23.

[2489] "McArthur River Mining: Phase 3 Development Project", *Glencore,* online: <www.mcarthurrivermine.com.au/EN/mineexpansion/Pages/Phase3DevelopmentProject.aspx>.

[2490] See *Lansen* NTSC, *supra* note 35 at para 2.

[2491] See *Lansen* NTSC, *supra* note 35 at para 3.

[2492] Polidor & Tindall, *supra* note 35.

slowing down.[2493] It has been an extended battle – there have been at least ten court proceedings since 2007. For present purposes I am not going to delve directly into the sacred site problematic, but rather enquire into the strategic mechanisms governments employ when they want to have their way. I should clarify this somewhat overly broad statement right away: the issue here is not the legitimate outcome of the doctrines of separation of the powers and parliamentary sovereignty. It is, rather, a particularly cynical mode of employing these doctrines that I question in line with the tenets of the rule of law. Allow me to illustrate.

6.6.2 Contemplating the Fact Set

In 2002 the McArthur River Mine lodged with the Department of Mining an application for an Authorisation for the operation of an "Underground lead/zinc/silver mine, processing plant, and Bing Bong Port facility."[2494] This was congruent with the activities that the mine had been actively engaged in since 1993[2495] and Authorisation No 0059-01 dated 21 January 2003 was duly granted by the Minister to the Mine to enable it to proceed with its operations.[2496] All of this was in accordance with section 35(2) of the *Mining Management Act 2001* (NT), which provides that the mine operator applies for "an Authorisation to carry out on the site the mining activities specified

[2493] It experienced environmental difficulties in 2015, which led to a threat from the Northern Territory Government to close down the mine's operations unless it posted a bigger rehabilitation bond. These difficulties included lead poisoning of the fish in the river's tributaries, heavy metal pollution of the water and disruption of the McArthur River itself: see Polidor & Tindall, *supra* note 35. Nonetheless, the mine intends doubling the capacity and output of its open-pit mine, and prolonging its life by an additional 10 years to 2038: see "McArthur River Mining: Phase 3 Development Project", *Glencore,* online: <www.mcarthurrivermine.com.au/EN/mineexpansion/Pages/Phase3DevelopmentProject.aspx>; C Jamasmie, "Glencore Xstrata McArthur River Mine Expansion Approved" (2013) *Mining.com*, online: <www.mining.com/glencore-xstrata-mcarthur-river-mine-expansion-plan-approved-39488/>.

[2494] See *Lansen* NTSC, *supra* note 35 at paras 31–32.

[2495] See *Lansen* NTSC, *supra* note 35 at para 8.

[2496] *Lansen* NTSC, *supra* note 35 at para 9.

in the application."[2497] Of importance here is the fact that the Minister is not by power to grant an Authorisation that has not been applied for.[2498]

But during 2003 the operator decided to convert its operations from an underground mine to an open-cut one so as to more comprehensively exploit the resources there present, and to extend the life of the mine from 25 to 35 years.[2499] This conversion entailed, *inter* alia, the displacement of the river bed by some 5 km.[2500] In 2006, the Minister of Mines and Energy approved the intended modification.[2501] The way in which he did it, lies at the heart of the ensuing litigation.

6.6.3 The Litigation

In *Lansen* NTSC[2502] the dispute before the Northern Territory Supreme Court centered on two actions of the Minister: (1) his decision to short-circuit the *Mining Act*'s usual procedure that would have involved revocation of the existing Authorisation (underground mining) and an application for an Authorisation that was in line with the kind of mining activities that were now envisaged (open-cast mining), by simply issuing an Authorisation in line with the Mine's amended Mine Management Plan that was submitted under section 41 of the Act; and (2) the fact that in so doing he circumvented the need for the full environmental assessment that would otherwise have been required.[2503]

Justice Angel was not impressed with the Government's proffered argumentation, observing –

[2497] See *Lansen* NTSC, *supra* note 35 at para 33.

[2498] See *Lansen* NTSC, *supra* note 35 at paras 35–36

[2499] See *Lansen* NTSC, *supra* note 35 at para 10.

[25002500] Polidor & Tindall, *supra* note 35. Given that the Native Title Claimants consider the river to constitute the Rainbow Serpent, it appears inevitable that this proposal would create much discord – as, indeed has happened: see *ibid.*

[2501] See *Lansen* NTSC, *supra* note 35 at para 11.

[2502] *Lansen* NTSC, *supra* note 35.

[2503] See *Lansen* NTSC, *supra* note 35 at paras 12–14.

> The Authorisation sought was not "to carry out mining activities" of whatever type, for whatever minerals, and by whatever methods as may from time to time profitably be the subject of a Mining Management Plan acceptable to the Minister for Mines and Energy. The Authorisation sought was for a mine of a particular generic description, namely an "underground lead/zinc/silver mine". The Authorisation as sought and granted no more comprehends an open cut mine than a gold mine or a coal mine.[2504]

The Court per Angel J thus held that the Amended Mine Management Plan did not authorise the proposed open-cut mining operation.[2505]

The Territorial Government responded by passing urgent legislation the very next day retrospectively and prospectively ratifying the Amended Plan.[2506] As legislation goes, the *McArthur River Project Amendment (Ratification of Mining Authorities) Act 2007*[2507] is a rather blunt instrument. It inserts a new section 4AB that reads as follows:

> **4 AB. Ratification of certain instruments**
>
> (1) Despite any law to the contrary, the Authorisation:
> (a) is valid and effective; and
> (b) authorises mining activity of any kind (including the conversion of the Mine from an underground into an open-cut mine).
> (2) Despite any law to the contrary, the Mining Management Plan:
> (a) is valid and effective; and
> (b) was validly approved by the Minister for Mines and Energy on 13 October 2006.
> (3) This section operates retrospectively and prospectively as follows (…)

When the matter came before the Court of Appeal of the Northern Territory in July 2007, Chief Justice Martin felt obliged to overturn the previous judgment pursuant to the changed legal position, remarking:

[2504] *Lansen* NTSC, *supra* note 35 at para 37.

[2505] *Lansen* NTSC, *supra* note 35 at para 38.

[2506] See *Lansen* NTCA, *supra* note 35.

[2507] *McArthur River Project Amendment Act, supra* note 35.

> In my view the legislature has plainly evinced an intention to set aside the results of litigation and to alter the rights of the parties to the benefit of the appellant and to the detriment of the first to seventh respondents. This Court must determine the rights of the parties in accordance with the facts before this Court and in accordance with the law today as it governs those rights.[2508]

The appeal therefore succeeded on the basis that the legislator had intended addressing the Court's criticism of flawed authority in such a manner as to exclude a contrary decision by the Court.[2509]

What makes this legislative approach particularly cynical is that the same pattern happened twice, in relation to a single project, involving two different Ministries at two different levels of government.[2510] I do not have space here to do a similar analysis on the other set of cases, hence I cite the concise summary furnished by Macintosh, Roberts and Constable:

> The project [to expand the McArthur River Mine] was granted approval under the *EPBC Act* on 20 October 2006, the approval decision was quashed by the Full Federal Court on 17 December 2008 and the Minister reapproved the project two months later, on 20 February 2009. The conditions attached to the re-approval were largely the same as those in the original approval, save for the inclusion of an additional requirement that the proponent prepare and abide by an approved water quality monitoring plan.[2511]

The pattern that I am referring to, is one of disregard for judiciary checks and balances that have been built into legislation in a heavy-handed approach that seeks to force through natural resource development projects on the *ratio* that they are good for the economy.

[2508] *Lansen* NTCA, *supra* note 35 at para 12.

[2509] See *Lansen* NTCA, *supra* note 35 at para 10–13. The correctness hereof is confirmed by the Minister for Mines and Energy's Second Reading Speech, which commenced as follows: "The purpose of this bill is to amend the *McArthur River Project Agreement Ratification Act* ro address the technicality identified in the decision of the Supreme Court of the Northern Territory in the matter of Lansen and Others v Northern Territory Minister for Mines and Energy and Others delivered on 20 April 2007": "MacArthur River Project Amendment (Ratification of Mining Authorities) Bill 2007", *supra* note 35.

[2510] The *EPBC Act*, it should be borne in mind, is Commonwealth environmental legislation.

[2511] Andrew Macintosh, Heather Roberts & Amy Constable, "An Empirical Evaluation of Environmental Citizen Suits Under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)" (2017) 39 Sydney L Rev 85 at 103, with reference to *Re Lansen and Minister for Environment and Heritage* (2008) 102 ALD 558; *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14.

6.6.4 Analysis

The problem at hand provides an interesting illustration of ways in which unfavourable Australian judiciary outcomes can be subverted through the simple application of the doctrine of parliamentary sovereignty in the absence of the tempering effects of a *Charter of Rights* such as the Canadian one. Given that the Australian courts have traditionally proven kinder to Indigenous peoples than the State and Commonwealth Governments, this makes for cold comfort – especially in the natural resource development domain, where the government in question stands to benefit financially from such development through royalty payments, political goodwill associated with job creation, and the like.

6.7 Drawing Conclusions

Of the three jurisdictions studied so far, Australia is the one that demonstrates most vividly the core of some of my *propos* to date.

The first is that where there is a disconnect between the law and the Indigenous communities that it purports to serve it can hardly have remarkable results, good intentions notwithstanding. It matters not whether this is due to issues that arise around translation, cultural fossilization, essentialization and reductionism or ethnocentrism.

In the second place, it is difficult to see a state being concerned about the identitary consequences of the destruction of Indigenous sacred sites in the absence of a strong human rights culture.

Third, though the limited scope of this thesis has not permitted me to explore this theme, the reification of the sacred in the context of identity politics has taken on substantial dimensions in the Australian Indigenous land rights debate.

Fourth, whereas I have limited the scope of this thesis to traditionalist Indigenous communities, I point out some of the most obvious discordances between their conceptions of the sacred – evidently, I am painting with a very broad brush here– and the legal solutions on offer for the protection of Indigenous sacred sites in Australia. I have four major concerns:

(1) The importance of maintaining secrecy and possibly restricting information to certain (groups of) people that appears important in so many Indigenous Australian cultures, where the community in question is confronted with having to make extensive disclosures as a matter of law, either to meet an evidential burden if seeking to establish a land claim, or to comply with the registration requirements imposed by the heritage legislation of the Commonwealth and the various states. We need look no further than the Hindmarsh Island Bridge fiasco to appreciate the dangers inherent even in guarantees of protected disclosures.

(2) That, at least to traditionalist Indigenous peoples, spirituality and land are intertwined. Attempting to force Indigenous conceptions of land into a Western property paradigm that is economically-informed creates cultural mistranslations and is unfair: how can we measure whether they meet the Western criteria for property holding when it is informed by a philosophy that is foreign to their traditional way of life?

(3) I have difficulties with the fragmentation that is inherent in the notion of property as a bundle of rights. This is what permits pastoralists to remain on Indigenous lands; this is what enables the State to strip them of the lands' mineral estate. If the core idea of a sacred site is that it should remain intact and undisturbed –I am not here referring to ritual maintenance by mandated custodians– it means that native title as such actually offers very little in the way of sacred site protection to the traditional owners.

(4) Similarly, given that Australia continues to use its state sovereignty as shield against pressure from international bodies such as the United Nations that it comply with its human rights obligations, and given that it continues to treat UNDRIP as an aspirational document, it means that this country lags far behind the United States and Australia in the FPIC debate. Not only is there no informed consent in the Northern Territory –home to 25% of Australia's Indigenous population– there is not even a mandatory consultation requirement when it comes to natural resource developments that may affect unregistered Indigenous sacred sites. And insofar as registered sacred sites are concerned, the Authority is requested not from the community in

question but from a statutory authority that might be pro-development[2512] and whose decisions are subject to revision by the Minister. This paints a potentially grim picture.

In sum, Australia has *Mabo* and the *Sacred Sites Act* – in its original incarnation it was one of the first pieces of *sui generis* sacred site legislation in the world. But on closer inspection it presently appears to be in need of inspiration.

[2512] Here I am simply invoking a political possibility, not casting asperities on the AAPA, whose present CEO is the respected international jurist Benedict Scambary.

Chapter 7: Aotearoa New Zealand

> The values of a society, its metaphysical or spiritual beliefs and customary preferences are regularly applied in the assessment of proposals without a thought as to their origin. Some societies make rules about noise on Sunday while others protect sacred cows. When Maori values are not applied in our country, but western values are, we presume our society is monocultural. In our multicultural society the values of minorities must sometimes give way to those of the predominant culture, but in New Zealand, the Treaty of Waitangi gives Maori values and equal place with British values, and a priority when the Maori interest in their taonga is adversely affected. The recognition of Maori values should not have to depend upon a particular convenience as when the meat industry found it convenient to introduce Halal killing practices to accommodate Islamic religious values.[2513]

7.1 Introduction

We commence, once again, with a non-exhaustive timeline (7.2), whereafter we seek to uncover the legal *mentalité* of Aotearoa New Zealand (7.3) with reference to its legal system (7.3.1), constitutional culture (7.3.2), approach to and relationships with Indigenous peoples (7.3.3) and approach to International law (7.3.4). This is followed by a summary of pertinent sources that may feature in the unfolding narrative (7.4). We then contemplate the legal response of Aotearoa New Zealand to the protection of Māori sacred sites (7.5). Here we kick off the discussion by summarizing key insights from Chapter 2 on Māori conceptions relating to time, space and the sacred (7.5.1). Next, we pause to consider the *Treaty of Waitangi*, Aotearoa New Zealand's foundational document (7.5.2), before looking at three mechanisms that may be mobilized in the sacred site protection endeavour: the Waitangi Tribunal (7.5.3), the Aotearoa New Zealand Court system (7.5.4), and direct negotiations with the Crown (7.5.5). In the last part of the Chapter we illustrate the practical functioning of the

[2513] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, WAI-8, (1985) par 7.2 at 96.

Aotearoa New Zealand system with regards to a concrete example (7.6), and then draw a number of conclusions (7.7).

7.2 Timeline

> There is a view that the sovereignty of the Crown over Te Waipounamu (South Island) stems from 'right of discovery' and not from an act of cession by treaty. This view, which has periodic currency in public argument about treaty rights and race relations, causes a certain amount of hilarity amongst Ngāi Tahu who rhetorically ask, 'Discovery by whom?'[2514]

Table X: Brief Historical Survey – Aotearoa New Zealand

DATE	ITEM
200–1300	**Settlement of Aotearoa New Zealand** by the Polynesian forebears of the Māori. This fact would have rendered it implausible for another nation to subsequently 'discover' it.
1642	Dutch explorer, **Abel Tasman**, arrives. This visit gave the country its Western name, New Zealand.[2515]
1769	**Cook's first visit**.[2516]
1773	**Cook's second visit**.[2517]
1777	**Cook's third visit**.[2518]
1831	Pursuant to a false rumour allegedly started by land speculators, the **Māori chiefs in the North sent a petition to the British Crown,** asking for protection against a French Warship that they believed intended to annex New Zealand and found a French colony.[2519]

[2514] *Cf* Tipene O'Regan, "The Ngāi Tahu Claim" in Kawharu, *supra* note 2537, 234 at 239.

[2515] Catherine J Iorns Magallanes, "Reparations for Maori Grievances in Aotearoa New Zealand" in Federico Lenzerini, ed, *Reparations for Indigenous Peoples: International & Comparative Perspectives* (2008) 523 at 524.

[2516] See Magallanes, *supra* note 2515 at 524.

[2517] See Magallanes, *supra* note 2515 at 524.

[2518] See Magallanes, *supra* note 2515 at 524.

[2519] See Magallanes, *supra* note 2515 at 524–525.

1831	**British traders, settlers and missionaries appealed to the British Crown,** requesting protection from lawless British subjects.[2520]
1832	**Appointment of James Busby as British Resident** – a kind of ambassador responsible both to promote British trade in New Zealand and to protect the Māori and the British settlers against lawless British subjects.[2521]
1835	**Māori Declaration of Independence** in the face of growing numbers of European settlers ("Pākehā").[2522]
1837	Sir Edward Gibbon Wakefield requested British Parliamentary approval for the **private colonization of New Zealand: through his New Zealand Company** he intended to purchase land from the Māori and then resell it to settlers whom he would transport from England.[2523]
1839	**Lord Normanby instructed Captain Hobson** to obtain land from the Māori through a negotiated treaty.[2524]
1840	Hobson arrived in New Zealand on 29 January 1840. The following day he issued **restrictions on the sale and purchase of land from Māori**.[2525]
1840	Signature of the ***Treaty of Waitangi***, New Zealand's foundational document in two versions – English and Māori– that differed in important respects.[2526]
1840	**Hobson proclaimed sovereignty over New Zealand** in May 1840 on the basis of signatures collected from Māori chiefs on the *Treaty of Waitangi*.[2527]

[2520] See Magallanes, *supra* note 2515 at 525.

[2521] See Magallanes, *supra* note 2515 at 525.

[2522] Te Ururoa Flavell, "'Being Māori Today' — Māori Identity and Influence on New Zealand Society" (2012) 44 Journal of the Hamburg Museum of Ethnology, Special Edition, *House Rauru: Masterpiece of the Maori* 437 at 440. But see See Magallanes, *supra* note 2515 at 524 who refers to the Declaration of Independence as having been drafted by James Busby and translated into Māori by the Missionaries. It was signed by all 34 the Northern chiefs in October 1835: *ibid.* According to the explanation proffered by Magallanes, the trigger was another rumoured threat of French colonization, not issues with the settlers as such: *ibid.*

[2523] See Magallanes, *supra* note 2515 at 526 n 12.

[2524] See Magallanes, *supra* note 2515 at 526–527 for more detail on the British Colonial Office debate regarding what was to be the future fate of New Zealand.

[2525] See Magallanes, *supra* note 2515 at 528.

[2526] See the discussion at 7.5.2 below ("The *Treaty of Waitangi*").

[2527] See Magallanes, *supra* note 2515 at 532.

1840	**Official confirmation of the proclamation of sovereignty** was published in the *London Gazette* in October 1840.[2528]
1850s	A **Māori King was appointed** by the North Island Māori pursuant to discussions throughout the 1850s "in order to signify and assert their independence and authority."[2529]
1852	**New-Zealand was granted self-government,** "but this was a settler government without participation from Maori, who continued to maintain their autonomy."[2530]
1860's	**New Zealand wars:** "In the 1860's (…) conflicts arose over land and resources, eventually resulting in wars on the North Island, known as the New Zealand wars. Maori leaders wanted to retain control over their land and resisted the increasing imposition of outside governance."[2531]
1863	***New Zealand Settlements Act* of 1863** was passed with the objective of granting settlers improved access to land and resources. It gave rise to the confiscation of more than four million acres of Māori land.[2532]
1865	**4 Dedicated Māori Parliamentary seats** were established.[2533]
1865	**Parliamentary reconsideration of the two versions of the *Treaty of Waitangi***. The Government's reaction to the English translation of the Māori version was to have the English version translated into Māori for circulation among the Māori as the official Treaty.[2534]
1865	The **establishment of Native Land Court** led to further land losses for Māori. It functioned by converting customary Māori title into individual title, which made it easier for settlers to obtain land. Anderson et al argue that "[m]any of the practices were deceptive or fraudulent."[2535]

[2528] Magallanes, *supra* note 2515 at 532.

[2529] Magallanes, *supra* note 2515 at 533–534.

[2530] Magallanes, *supra* note 2515 at 533.

[2531] Anderson et al, *supra* note 386 at 921. Also see Magallanes, *supra* note 2515 at 534.

[2532] See Anderson et al, *supra* note 386 at 921. Magallanes names it as one of a trio of "draconian legislation" that was passed as a punitive measure in order to confiscate Māori land and redistribute it among settlers. The other two were the *Suppression of Rebellion Act 1863* and the *Loan Act 1863*: *supra* note 2515 at 534. She notes that all three were passed as emergency legislation, in the process bypassing the usual parliamentary checks and balances: *ibid* at 543 n 26.

[2533] See Magallanes, *supra* note 2515 at 536.

[2534] See the discussion in Magallanes, *supra* note 2515 at 534.

[2535] Anderson et al, *supra* note 386 at 921.

1870's	In the 1870s the New Zealand government launched an **"aggressive" land purchase program launched in relation to Māori lands.**[2536]
1877	In ***Wi Paratha v Bishop of Wellington and the Attorney-General*** Chief Justice Prendergast held "that the Maori were incapable of either holding or ceding sovereignty and thus the treaty itself 'must be regarded as a simple nullity'."[2537]
1880s	The **Māori approached the Queen and British Parliament directly** with their concerns about Treaty breaches, but not even an investigation followed.[2538]
1900	"By 1900 **Maori had lost most of their land** through a combination of: Crown purchase; individualization of title and subsequent settler purchase; and confiscation by the Crown by law and force (for reasons ranging from tax debt recovery to being defeated in battle). Their natural resource uses were restricted, as was their autonomy. Indeed, laws were passed to directly affect the practice of some of their customs and thus ways of life."[2539]
1901–1903	The **Privy Council upheld Māori's title to their traditional lands,**, both under statute and common law, in *Nireaha Tamaki v Baker* (1901) and *Wallis v Solicitor-General* (1902–1903) and criticized the *Wi Paratha* decision.[2540]
1909	**Legislation** was passed with the objective of **preventing New Zealand courts from recognizing common law Aboriginal title**, which meant that the Māori could only rely on statutory remedies.[2541]
1910's	The cumulative effect of the aforementioned measures (*New Zealand Settlements Act*, the Native Land Court and the government purchase program) was that by the 1910s **a mere quarter of North Island remained in Māori hands, and only 1% of South Island.**[2542]

[2536] Anderson et al, *supra* note 386 at 921.

[2537] *Wi Parata v Bishop of Wellington and the Attorney-General* (1877) 3 NZ Jur (NS) SC 72 Pendergast CJ, cited in Magallanes, *supra* note 2515 at 535. See here the critique by F M Brookfield, "The New Zealand Constitution" in I H Kawharu, ed, *Waitangi: Māori & Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 1 at 10–13. Also see the contribution by Frederika Hackshaw, "Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi" in Kawharu, *supra* note 2537, 92 – she contrasts the reasoning of the courts in *R v Symonds* (1847) and *Wi Parata* in their historical context, ultimately concluding that the approach followed in *Symonds* was the more accurate reflection on "European State practice in respect of conduct towards the inhabitant of colonized territories": *ibid*, at 92–93.

[2538] See Magallanes, *supra* note 2515 at 535.

[2539] Magallanes, *supra* note 2515 at 535.

[2540] See Magallanes, *supra* note 2515 at 535 nn 28–29. She records that reaction in New Zealand was exceptionally unfavourable, with lawyers, judges and politicians openly criticizing the Privy Council: *ibid.*

[2541] Magallanes, *supra* note 2515 at 535.

[2542] See Magallanes, *supra* note 2515 at 532–536; Anderson et al, *supra* note 386 at 921.

1930s	**4 Māori MPs joined forces with Opposition Party** to jointly work towards the upholding of the *Treaty*.[2543]
1940	**Celebration of the anniversary of the signing of the *Treaty*** and its history was uncovered.[2544]
1941	***Hoani Te HeuHeu Tukino v Aotea District Maori Land Board***:[2545] the Privy Council confirmed the *Treaty of Waitangi* to be a "valid international treaty of cession of sovereignty".[2546]
1947	Aotearoa New Zealand reached independent national status through adoption of the **Statute of Westminster**.[2547]
1950s	**Annual *Treaty* signing commemoration** "with the theme of forging one nation."[2548]
1975	**Māori land march**: "The Maori protest movement, sparked by paternalist legislation passed in 1967, culminated in a land march in 1975 by thousands of Maori of all ages. The march covered the length of North Island ending at the New Zealand Parliament, and highlighted the extensive land loss by Maori people, from 66 million acres in 1840, to approximately three million. Maori activism resulted in a revitalization of the Treaty of Waitangi and a range of legal and social measures to restore the Maori population."[2549]
1975	***Treaty of Waitangi Act*, Act No 114 of 1975** established the Waitangi Tribunal, which is a permanent commission of enquiry with the power to make recommendations regarding Māori claims in respect of purported Crown breaches of the *Treaty of Waitangi*.[2550]
1985	***Treaty of Waitangi Amendment Act 1985***: significantly expanded the jurisdiction of the Waitangi Tribunal – henceforth it could also hear claims based on historical grievances, dating back to signature of the *Treaty of Waitangi*.[2551]
1986	The ***Constitution Act*, No 114 of 1986** is an ordinary piece of legislation: it is neither entrenched, nor elevated above any other legislation.

[2543] See Magallanes, *supra* note 2515 at 536.

[2544] Magallanes, *supra* note 2515 at 536.

[2545] *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC).

[2546] Magallanes, *supra* note 2515 at 535. This has important implications for the enforceability of the *Treaty*: see below at 7.5.2 ("The *Treaty of Waitangi*").

[2547] See the discussion by Brookfield, *supra*, note 2537 at 6.

[2548] Magallanes, *supra* note 2515 at 536.

[2549] Anderson et al, *supra* note 386 at 922. Also see Magallanes, *supra* note 2515 at 536.

[2550] See Ministry of Justice Tahū o te Ture, "Waitangi Tribunal Te Rōpū Wakamana I Te Tiriti O Waitangi", *justice.gov.nz*, online: < https://www.waitangitribunal.govt.nz >.

[2551] See discussion below at 7.5.2 ("The *Treaty of Waitangi*"). Before this amendment, claims were restricted to present-day and future breaches of the *Treaty*.

1986	In ***Te Weehi v Regional Fisheries Officer*** **[1986] 1 NZLR 680** the High Court partially reintroduced the doctrine of Native title into the common law of Aotearoa New Zealand. The matter concerned violations of customary Māori fishing rights.
1987	In ***New Zealand Maori Council v Attorney General*****, 1 NZLR 641 (1987)** the Court of Appeals described the Crown's duties towards the Māori in fiduciary terms, holding that the Crown was liable to protect "active protection" to the Māori and their resources.[2552]
1987	In ***Haukina Development Trust v Waikato Valley Authority*** **2 N.Z.L.R. 188 (1987) [New Zealand]** "the court described the Treaty as part of the 'fabric of New Zealand society' and relied on Maori cultural and spiritual values to interpret its provisions."[2553]
1990	The ***New Zealand Bill of Rights Act*****, 1990, Act No. 109 of 1990** "instructs the courts to interpret subsequently-enacted legislation as being consistent with the *Bill of Rights* 'where such an interpretation is fairly possible without violating ordinary rules invoked in statutory interpretation'".[2554]
1992	***The Treaty of Waitangi (Fisheries Claims) Settlement Act*** **of 1992** was passed pursuant to the judgment in *Te Weehi* for settlement implementation purposes. Main terms included the following: (1) the Māori waived all commercial fishing claims in exchange for government funding for a joint venture purchase of Sealords, the largest fishing company in Aotearoa New Zealand; (2) the Māori received 20% of future commercial fishing quotas for all new species purchased under the management system of Aotearoa New Zealand; (3) the Māori retained their traditional fishing rights for personal and customary use.[2555]
1993	***Treaty of Waitangi Amendment Act 1993***: removed the Waitangi Tribunal's capacity to recommend that the Crown repurchase 'private land' –including land owned by local authorities– for restitution to the Māori.[2556]
1993	The ***Human Rights Act*****, 1993, No. 82 of 1993** is an ordinary piece of legislation: it is neither entrenched, nor elevated above any other legislation.
2003	In ***Attorney-General v Ngati-Apa*** **[2003] 3 NZL 643** the Court of Appeal reintroduced the doctrine of native title in its entirety into the common law of Aotearoa New Zealand.

[2552] Anderson et al, *supra* note 386 at 922.

[2553] Anderson et al, *supra* note 386 at 922.

[2554] Mark Tushnet, "Comparative Constitutional Law" in Mathias Reimann & Reinhard Zimmermann, eds, *Oxford Handb Comp Law* (Oxford: Oxford University Press, 2006) 1225 at 1247.

[2555] See Anderson et al, *supra* note 386 at 922–923; Magallanes, *supra* note 2515 at 557–560; Michael A. Burnett, "The Dilemma of Commercial Fishing Rights of Indigenous Peoples: A Comparative Study of the Common Law Nations" (1996) 19 Suffolk Transnat'l L Rev 389.

[2556] *Treaty of Waitangi Amendment Act 1993*, inserting s 6(4A) : see Magallanes, *supra* note 2515 at 540.

2010	**New Zealand reversed its opposition to *UNDRIP*:** New Zealand Maori Affairs Minister Dr Pita Sharples made the announcement at the UN Permanent Forum on Indigenous Issues in New York, stating, "This is a non-binding declaration, which was drafted by indigenous peoples' representatives and negotiated with state parties over more than twenty years. It recognises the rights of indigenous peoples to self-determination, to maintain their own languages and cultures, to protect their natural and cultural heritage and manage their own affairs."[2557]

7.3 Background: Uncovering the Legal *Mentalité* of New Zealand

7.3.1 Legal Family/Legal Tradition

Aotearoa New Zealand has a common law legal system and accordingly follows the doctrine of precedent. Aotearoa New Zealand's joint history commenced with the *Treaty of Waitangi*[2558] which, at least on the face of the Māori version,[2559] promised extensive recognition and protection of Māori rights,[2560] an approach that was soon to be marked by assimilationist policies[2561] akin to those in Canada, Australia and the United States.[2562]

[2557] Pita Sharples, "Supporting UN Declaration restores NZ's mana" (20 April 2010), *beehive.govt.nz*, online: < https://www.beehive.govt.nz/release/supporting-un-declaration-restores-nz039s-mana>.

[2558] *Treaty of Waitangi 1840* (NZ).

[2559] It should be noted that there is a deep polemic in Aotearoa New Zealand pertaining to differences between the English and Māori versions of the *Treaty* and its consequent reach. While the English version cedes sovereignty to the British Crown, the Māori version speaks of '*kawanatanga*' (governance): see the discussion below at 7.5.1 ("The *Treaty of Waitangi*").

[2560] See e.g. *Flavell*, *supra* note 2522 at 440.

[2561] See e.g. *Flavell*, *supra* note 2522 at 440.

[2562] See Jacinta Ruru, "The Māori Encounter with Aotearoa: New Zealand's Legal System" in Richardson, Imai & McNeil, *supra* note 1246, 111 [Ruru, "Māori Encounter"] at 115–119.

7.3.2 Constitutional Culture

Aotearoa New Zealand is a unitary state with a unicameral parliamentary system,[2563] namely the House of Representatives.[2564] Like the other three countries it has been subject to British sovereignty[2565] but has subsequently become independent or self-governing.[2566] Like Canada and Australia, Aotearoa New Zealand is a member of the Commonwealth of Nations. Similarly, is also a Constitutional Monarchy, meaning that while the "Head of State is a hereditary monarch (the Sovereign), the powers and functions of the Sovereign are exercised within constitutional constraints."[2567]

Although constitutionalism has been achieved in all four of the jurisdictions under comparison[2568] and all of them also have a constitution[2569] (albeit not necessarily a codified one), there appear to be considerable differences between their constitutional and legal cultures. Thus the Aotearoa New Zealand constitution is uncodified and comprises multiple documents, *inter alia* the foundational *Treaty of Waitangi* of 1840, signed between the British and the Māori, and the *New Zealand Bill of*

[2563] See David Erdos, "Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill of Rights Act (1990)" (2007) 5:2 I•CON 343 at 345–346.

[2564] It had a bicameral system until 1950: see "Parliament Brief: What is Parliament?", *New Zealand Parliament Pāremata Aotearoa*, online: <https://www.parliament.nz/en/visit-and-learn/how-parliament-works/fact-sheets/pbrief7/>.

[2565] As previously noted, the English version of the *Treaty of Waitangi* cedes sovereignty to the British Crown, while the Māori version speaks of '*kawanatanga*' (governance): see *supra*, note 2559.

[2566] For an overview of the Aotearoa New Zealand process from both the Western and the Māori angles, see: Waitangi Tribunal, *Te Roroa Report*, *supra* note 381 at 6.

[2567] *New Zealand Parliament*, *supra* note 2564.

[2568] See Grimm, *supra* note 908 at 103–104.

[2569] Having a constitution is no guarantee of the achievement of constitutionalism and, conversely, constitutionalism does not require that a state have a (written) constitution: see Grimm, *supra* note 908 at 105–106.

Rights Act, 1990.[2570] Both the *Constitution Act,* 1986[2571] and the *Human Rights Act,* 1993[2572] are ordinary pieces of legislation, i.e. they are neither entrenched nor elevated above any other Act. The Human Rights Review Tribunal hears *inter alia* cases of alleged discrimination by the Crown but does not have the status of a court.[2573] Similarly, the Waitangi Tribunal[2574] makes rulings that ultimately are non-binding recommendations to Government, meaning that it is left up to Government to negotiate settlements in respect of *Treaty of Waitangi* breaches that have been ruled on by the Tribunal.[2575] It is a system that fully subscribes to the British concept of parliamentary sovereignty.[2576]

7.3.3 Approach to and Relationship with Indigenous Peoples

7.3.3.1 Self-Identification and State Identification

In Aotearoa New Zealand, legislation defines 'Māori' to include any person who has Māori ancestry.[2577] The National Population Estimates of Statistics New Zealand indicated a Māori

---

[2570] *New Zealand Bill of Rights Act 1990* (NZ), 1990/109. Tushnet points out that the Aotearoa New Zealand *Bill of Rights* contains a particularly weak form of judicial review in the form of a pure interpretative mandate: it instructs the courts to interpret subsequently-enacted legislation as being consistent with the *Bill of Rights* "where such an interpretation is fairly possible without violating ordinary rules invoked in statutory interpretation": Mark Tushnet, "Comparative Constitutional Law" in Reimann & Zimmermann, *supra* note 267, 1225 at 1247. Also see in this regard Erdos, *supra* note 2563.

[2571] *Constitution Act 1986*, 114/1986.

[2572] *Human Rights Act 1993*, 82/1993.

[2573] A complaint must first be made to the Human Rights Commission, who will attempt to mediate the matter. See Ministry of Justice *Tahū o te Ture,* "Human Rights Review Tribunal", (2014), online: <www.justice.govt.nz/tribunals/human-rights-review-tribunal>. The Tribunal's decisions can be appealed to the High Court, the Court of Appeal and the Supreme Court.

[2574] The Waitangi Tribunal was established in 1975 by the *Treaty of Waitangi Act 1975*, 114/1975. It is a permanent commission of enquiry with the power to make recommendations on Māori claims in respect of alleged Crown breaches of the *Treaty of Waitangi*: *ibid*. See the discussion at 7.5.3 below ("The Waitangi Tribunal").

[2575] See Ngarino Ellis, "Pan-Pacific Connections — Tracing the Past Across the Waves" (2012) 44 Journal of the Hamburg Museum of Ethnology, Special Edition, *House Rauru: Masterpiece of the Māori* 65 at 73 n 6.

[2576] See Ruru, "Māori Encounter", *supra* note 2562 at 128; Richardson, "Ties that Bind", *supra* note 1246 at 337.

[2577] Ruru, "Māori Encounter", *supra* note 2562 at 129.

population of 692,300 as at 30 June 2013, comprising 15.8% of the total Aotearoa New Zealand population.[2578] Matunga provides a more traditional definition of the Māori:

> Maori people are the *tangata whenua* (people of the land, indigenous people) of Aotearoa (New Zealand), having migrated to Aotearoa from Hawaiki over a thousand years ago. There are over fifty *iwi* (tribes) in the country, and prior to the coming of the Paheka (European settlers) in the early 1800s, they were the *kaitaiki* (guardians) over all natural resources, *whenua* (lands) and *taonga* (treasured possessions), including *wahi tapu* (sacred places*)* within their *rohe* (territory).[2579]

These potentially contradictory classifications are explained by Kukutai, who observes that subsequent to a historical evolution of classification along blood quantum lines,[2580] Aotearoa New Zealand now utilizes three different criteria for calculating Māori identity, with disparate outcomes: descent, ethnicity and tribal affiliation.[2581]

'Māori descent' yields the largest numerical proportion, because not all who claim Māori ancestry identify as being ethnically Māori. In addition, the majority of Māori now live outside of their tribal affiliation, making the hard-core 'tribal affiliation' identified group the smallest in number. Claiming Māori ancestry is important for legal purposes: it determines matters like eligibility for Māori voter roles, *locus standi* to bring a claim before the Waitangi Tribunal, as well as entitlement to apply for certain educational scholarships.[2582] In practice proof of descent is rarely required, although it is

---

[2578] Statistics New Zealand Tatauronga Aortearoa, "National Population Estimates: At 30 June 2014", (14 August 2014), online: <http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/NationalPopulationEstimates_HOTPAt30Jun14.aspx>. Kukutai, *supra supra* note 95 at 33 points out that Aotearoa New Zealand is the only of the "white settler-states of North America and Oceania" to have an Indigenous "'majority' minority". According to forecasts, this will grow to 21% by 2051, partly due "the new pride in identifying oneself –and willingness to be counted– as Maori": Feinberg & Macpherson, *supra* note 82 at 137.

[2579] Matunga, *supra* note 19 at 217.

[2580] Kukutai, *supra* note 95 at 35–42.

[2581] See *ibid* at 34.

[2582] *Ibid* at 42.

intended to act as an objective screening mechanism.[2583] Māori descent data is not considered to constitute either a significant measure of identity or a determinant of social inequality.[2584]

Although the second reference group, 'Māori ethnic group', is deemed to constitute a better indicator on these two scores, it does not necessarily indicate someone who identifies as being exclusively Māori — it is possible to claim several ethnicities.[2585] Thus the group who identify themselves exclusively as Māori by descent, ethnicity and tribe had roughly a third of the members the one made up by members of Māori descent did in 2006.[2586] The smaller group fares worse on most indicators than the Māori descent-group (who already fares much worse than the general population).[2587]

The Māori themselves tend to define themselves in terms of *whakapapa*, a classical Māori conception of group membership most closely conveyed by the notion of tribal membership based on shared ancestry.[2588] Kukutai explains as follows:

> Karetu (1990) has described *whakapapa* as the glue that connects individuals to a specific place or places, and locates them within a broader network of kin relations. *Whakapapa* also endows certain rights in terms of land succession and usufruct rights in Maori land. Historically, residence near one's ancestral land was closely tied with *whakapapa*, but urbanisation and labour market transformations means that the majority of Maori now live outside their tribal area (Statistics New Zealand 2002).[2589]

[2583] *Ibid* at 42–43.

[2584] *Ibid* at 43.

[2585] *Ibid.*

[2586] *Ibid.*

[2587] *Ibid* at 45.

[2588] Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440 question the continued relevance of ancestry as criterion, given the fact that modern Māori society is largely urban and demonstrates "multi-layered, multi-textured identity formations" (at 85) and that identity issues are arising in the context of *Treaty* settlements (at 86). They argue that privileging the *iwi* structure as identity basis may hold several negatives for urbanized Māori and that it "glosses over the difficulties that urban Māori confront when attempting to participate in tribal affairs (at 88).

[2589] Kukutai, *supra* note 95 at 43.

Māori recitals always begin with *whakapapa* that relate their creation belief systems, an intricate combination of oral history and symbolic myth.[2590] Toanui points out various errant historical accounts, sometimes replicated by Indigenous scholars, "which in turn wrongly added to the impression of indigenous authenticity".[2591] Thus the oft-repeated claims of settlement by "a fleet of seven canoes"[2592] are being debunked: in fact, oral traditions account for more than 300 canoes in a variety of "first arrivals".[2593]

Toanui further argues that migratory and autochthones traditions in Polynesian oral tradition obscure the identities of the actual first arrivals through myth and nature personified.[2594] Oral traditions, he emphasizes, have historical, as well as symbolical elements.[2595] The Polynesian oral traditions incorporate many mythological elements but migrated with relatively few historical components[2596] and normally refer to "the founders of particular communities rather than first discoverers",[2597] accounting for the gap between the genealogical date for "first arrivals" and the much earlier archaeological dates for "first occupation".[2598] Graham Harvey cautions against "the conglomeration of [such] genealogies and oratorical references into a single migration of a great fleet of canoes", noting that this is unjust to the genealogies in question, as "each of these reaches

---

[2590] See Rawiri Toanui, "Māori Origins in Creation, and Navigation" (2012) 44 Journal of the Hamburg Museum of Ethnology, Special Edition, *House Rauru: Masterpiece of the Māori* 45 [Toanui, "Māori Origins"] at 45 and Rawiri Toanui, "Migratory Canoe Traditions" (2012) 44 Journal of the Hamburg Museum of Ethnology, Special Edition, *House Rauru: Masterpiece of the Māori* 75 [Toanui, "Canoe"] at 75–79.

[2591] Toanui, "Canoe", *supra* note 2590 at 75.

[2592] Toanui, "Canoe", *supra* note 2590 at 79.

[2593] Toanui, "Canoe", *supra* note 2590 at 79–80. For an example of the "fleet of seven canoes" narration, see Feinberg & Macpherson, *supra* note 82 at 131.

[2594] Toanui, "Canoe", *supra* note 2590 at 76–77.

[2595] Toanui, "Canoe", *supra* note 2590 at 76.

[2596] Toanui, "Canoe", *supra* note 2590 at 76.

[2597] Toanui, "Canoe", *supra* note 2590 at 79.

[2598] Toanui, "Canoe", *supra* note 2590 at 79.

back to different dates and implies a number of different migrations, perhaps in individual ocean-going canoes".[2599]

Whakapapa is utilized by tribes to circumscribe their own constituencies, such as tribal registers.[2600] Here applicants are typically required to provide details of their *whakapapa* ties to the tribe by naming two generations of their ancestors,[2601] in addition to their sub-tribal or *marae* (communal meeting place) affiliations.[2602]

7.3.3.2 Evolving Approach

All four of my jurisdictions are former British colonies (albeit rather briefly and contentiously in the case of the United States). They thus share a heritage of settler-colonialism, which may account for some of the similarities between them. But there are important differences as well. One of the biggest points of difference relates to the Māori: where the communities studied in the other systems are all considered to be indigenous in the more literal sense of the word, Māori *whakapapa* (genealogy) indicates that their forebears were a seafaring Polynesian nation,[2603] descended from the Lapita People,[2604] who discovered and settled Aotearoa New Zealand between 200–1300 AD,[2605] in the process intermarrying with existing inhabitants.[2606] They have a proud navigation heritage[2607]

2599 Graham Harvey, "Performing Identity and Entertaining Guests in the Maori Diaspora" in Graham Harvey & Charles D Thompson Jr, eds, *Indigenous Diasporas and Dislocations* (Aldershot, England: Ashgate, 2005) 121 [Harvey, "Maori Diaspora"] at 125.

2600 *Ibid* at 48.

2601 Pere, "Celebration", *supra* note 722 at 150 explains that traditionally it is expected of adults that they be able to trace their descent back to their ancestors, or at a minimum to the ancestor whose name the group bears. Also see Kukutai, *supra* note 95 at 48.

2602 *Ibid*. Another argument raised by Maaka & Fleras, *supra* note 440 at 88 against what they term "tribal fundamentalism" (*iwi*-based identity definitions) centers on the reluctance of women and the youth to speak in *marae*.

2603 "Polynesia" literally means "Many Islands": Feinberg & Macpherson, *supra* note 82 at 101.

2604 Toanui, "Māori Origins", *supra* note 2590 at 50.

2605 *Ibid* at 52; Kukutai, *supra* note 95 at 35.

2606 Ellis, *supra* note 2575 at 71. Also see Aotearoa New Zealand, Waitangi Tribunal, *The Ngāti Awa Raupata Report*, WAI 46 (1999) [Waitangi Tribunal, *Ngāti Awa Raupata Report*].

2607 See Ellis, *supra* note 2575 and Feinberg & Macpherson, *supra* note 82 at 108–114.

and a distinct form of bodily adornment[2608] (both in terms of tattoos[2609] and intricately carved decorative objects such as jewellery and combs[2610]). Their language would appear to be much more intact,[2611] they have their own political party[2612] and percentage wise they have a much stronger physical presence.[2613] However, they have not escaped the usual difficulties shared by postcolonial Indigenous peoples worldwide: disproportionate incarceration and unemployment rates, as well as social indices and educational success rates below those of Aotearoa New Zealand community as a whole.[2614] Māori tribes are known as *iwi*, the sub-tribes as *hapū*, and the extended families as

---

[2608] See Ellis, *supra* note 2575.

[2609] *Ibid* at 65, 68. Harvey, "Maori Diaspora", *supra* note 2599 at 122 points out that such tattoos were traditionally carved into the skin.

[2610] Ellis, *supra* note 2575 at 68–71; *Flavell*, *supra* note 2522 at 301.

[2611] See *ibid*. Flavell's piece speaks to the richness and vibrancy of the Māori language (*Flavell*, *supra* note 2522 at 437–438) but also details specific steps that needed to be taken to ensure its survival among the young, including the establishment of 'kōhanga reo' ("Maori Language Nests", or pre-schools: at 442–443), as well as primary ('kura kaupapa Māori': at 443) and secondary school (*whare kura*: at 443) initiatives. He points out that these initiatives are Māori-led, against the background of a 1971 research report that found the language to be "in a critical near-death state" (at 443). Other initiatives include the founding of at least 21 Māori radio stations (at 443), in addition to Māori Television. The latter is a State initiative intended to promote the Māori language. It broadcasts mainly in Māori and is available online at <www.maoritelevision.com>. Māori Television has two core stakeholder groups: the Crown (through the Minister of Māori Affairs and the Minister of Finance) and Te Pūtahi Pāoho (Māori Electoral College). See: "About Maori Television", online: *Maori Television* <http://www.maoritelevision.com/about/about-maori-television>. On Māori language schools and other cultural efforts, see also Feinberg & Macpherson, *supra* note 82 at 138–139. On Māori language revitalization and preservation efforts as part of the broader post-colonial politics of indigeneity, see Maaka & Fleras, "Sovereignty Lost", *supra* note 666 at 128. But see Pere, "Celebration", *supra* note 722 at 145 who bemoans the fact that "sadly there are many young people that cannot speak or understand the Maori language today."

[2612] See *Flavell*, *supra* note 2522 at 440 and 444. The Māori had been guaranteed representation in Parliament since 1867 in terms of the *Treaty of Waitangi*, but until 1975 when they received the right to vote in general elections, such representation was confined to 4 seats out of 180: see Feinberg & Macpherson, *supra* note 82 at 133 and at 135-136 on growing Māori political awareness. Also see Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440 at 69–70 and Maaka & Fleras, "Sovereignty Lost", *supra* note 666 at 129–134 for a more critical take.

[2613] They account for 16% of New Zealand's total population: Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440 at 65. According to Feinberg & Macpherson, *supra* note 82 at 134, Māori numbers returned to precontact levels in 1945. They ascribe this to improvements in public health, primary healthcare, and an improved social status for the Māori pursuant to land reform and political and economic reform efforts undertaken by a growing body of Māori politicians such as the scholar and lawyer Sir Apirana Ngata. One of his main drives was to consolidate Māori land that had become fragmented as a result of European succession laws, and to commercialize production on such consolidated lands.

[2614] See *Flavell*, *supra* note 2522 at 440; Kukutai, *supra* note 95 at 45. Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440 at 68–69 for contradictory positive indicators of Māori making headway in spheres such as education, health, life expectancy, birth mortality, self-employment and employment levels. They concede, though that it is a relative success,

whānau.[2615] The latter constitute the smallest units of Māori society. There are in the region of 40 *iwi* and hundreds of *hapū*.[2616] Like colonial peoples elsewhere they have lost the majority of their lands to white settlers, known as *Pākehā*.[2617] In Aotearoa New Zealand this process took the somewhat familiar form of a combination of "military defeat, […] sale, fraud, legal subterfuge, governmental confiscations of land from tribes which resisted, population decline resulting from introduced diseases, and the sheer weight of growing settler numbers".[2618]

As was the case with the Indigenous peoples in the other three jurisdictions studied, the colonial powers attempted to undermine their language and culture by means of "Native Schools"[2619], they faced assimilationist policies and there have been accusations of genocide.[2620] With World War II came empowering urban industrial work opportunities for Māori women and battle glory for Māori men who elected to participate in significant numbers as members of a highly successful Māori battalion led by their own officers.[2621] Urbanization was encouraged by a post-war government program that offered new career paths with better earning possibilities and improved housing at generous rates, so that 86% of Māori had become urbanized by the mid-1990s.[2622] This inevitably

---

in that the positive figures relate to Māori/ Māori data comparisons. When Māori /non- Māori data is compared, the Māori still lag far behind: *ibid* at 69.

2615 See e.g. "Māori Culture", (2014), *New Zealand Tourism Board,* online: <www.newzealand.com/travel/en/media/features/maori-culture/maori-culture_aotearoa-maori-culture_feature.cfm>; Kukutai, *supra* note 95 at 35; Feinberg & Macpherson, *supra* note 82 at 131. But see below at 3.3.3.1.3 ("Issues of Cultural Cross-Translation: Aotearoa New Zealand: Māori Traditions") for a more cautious explanation of the "*iwi*" and "*hapū*" concepts.

2616 Ruru, "Māori Encounter", *supra supra* note 2562 at 112.

2617 See Maaka & Fleras, "Sovereignty Lost", *supra* note 666 at 97.

2618 Feinberg & Macpherson, *supra* note 82 at 133.

2619 See *ibid* at 133; Maaka & Fleras, "Sovereignty Lost", *supra* note 666 at 114–117.

2620 Feinberg & Macpherson, *supra* note 82 at 138. But see also Maaka & Fleras, "Sovereignty Lost", *supra* note 666 at 114–117 for a more nuanced discussion. They emphasize that the Māori were not opposed to education: to the contrary, they sought out literacy and English skills, as it improved both their capacity for trade and their standing in the eyes of other tribes (at 114). Furthermore, even when school attendance became compulsory with the passage of the Education Act in 1877, Māori children were not confined to Native Schools, but had the option of attending public schools (at 115). Finally, they note that "Native Schools advanced Mori cultural and intellectual interests, albeit within the historical framework in which they worked" (at 116).

2621 See Feinberg & Macpherson, *supra* note 82 at 134.

2622 *Ibid* at 134–135; Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440 at 80–82.

impacted rural Māori society profoundly due to the steady loss of young people.[2623] One such impact that is important for purposes of this research is the rise of new 'pantribal' groups who seek to participate in tribal settlements on behalf of their urbanized members. Feinberg and Macpherson sketch the following picture of the tensions that arise in consequence:

> The possibility has also emerged that further progress may be hindered by tension among Maori, themselves. Settlement of claims has resulted in the return of assets and cash to properly constituted tribal authorities, representing descendants of the signatories of the Treaty. Many urban Maori have lost contact with their tribal roots and have become members of new urban "pantribal" organizations, which represent their interests in negotiations with the government. These urban Maori organizations are seeking the right to share in the distribution of resources on behalf of their urban constituents who are, they argue, also descendants of the signatories and, therefore, entitled to share the benefit of settlements. Part of the argument advanced in support of this claim is that these new urban groups are the Maori "tribes" of the present. They live in and identify with particular locales, have a common history, have *marae* "tribal meeting places" and *whare nui* "meeting houses," which both establish their connection with the place and embody their *mana*. They provide social and economic support and leadership for their members in the ways which tribes did in earlier days.[2624]

7.3.4 Approach to International Law

Four main points were made in the context of our discussion on the domestic implementation of international law in Aotearoa New Zealand at 3.4.5 above: (1) although it is a primarily dualist system, the courts display a growing willingness to apply unincorporated international instruments; (2) customary international law is regarded as forming part of the common law; (3) as a principle of statutory interpretation, legislation is interpreted in accordance with the country's international obligations to the greatest extent possible; and (4) contrary to Australia who wards off intervention by international bodies, Aotearoa New Zealand has actively sought out such protection, as was illustrated by the fact that it incorporated the provisions of the UNESCO Convention into its

---

[2623] Feinberg & Macpherson, *supra* note 82 at 135. Impacts were not restricted to the rural Māori communities: the circumstances of the urban Māori were far from idyllic — they had to contend with the restrictions imposed by a lack of formal education and job qualifications, as well as employer racism: *ibid.*

[2624] *Ibid* at 138. But see Maaka & Fleras, "Ngā Tangata Whenua", *supra* note 440 at 82–84 on the role of what they term "multi-tribal" and "pan-Māori" in the identity politics game that is presently playing out in Māori society.

domestic legislation after a failed attempt to prevent the Sotheby's sale of an intricately carved set of doors of great Māori cultural significance by a collector of Polynesian artifacts in the *Ortiz*[2625] case.

7.4 Summary of Pertinent Sources

As was the case in the previous jurisdictions, I reflect more sources below that I can hope to deal with in the scope of this thesis; I do not, however, pretend that they constitute the only ways in which sacred sites could possibly be protected in the New Zealand context. They strike me as the most pertinent for purposes of the present conversation.

Table XI: Overview of the Legal Framework of Aotearoa New Zealand

AOTEAROA NEW ZEALAND	
Express Constitutional Protection	
Implicit Constitutional Protection: Fundamental Rights Protection	**Freedom of Religion & Manifestation of Religion & Belief** *Bill of Rights Act* (1990): s 13 & s 15 *Human Rights Act (1993): s 21(1)(c)* (Weak review)
Implicit Constitutional Protection Minority Rights Protection	**Minority Rights** *Bill of Rights Act* (1990): s 20 *Human Rights Act* (1993): s 21(1)(f) & (g) (Weak review)
Statutory Provisions: Sui Generis Legislation	**Negotiated Settlements (Some Illustrations)** *Whanganui River Settlement Act* (2017) *Ngai Tahu Claims Settlements Act 1998*

[2625] *Ortiz*, *supra* note 1021.

	Waikato Raupata Claims Settlement Act 1995
Statutory Provisions: Indigenous Peoples (Non-Exhaustive)	
Statutory Provisions: General Legislation (Non-Exhaustive)	**Heritage Legislation** *Heritage New Zealand* Pouhere Taonga *Act* (2014) **Environmental Legislation** *Environment Act* (1986) *Resource Management Act* (1991) *Environment Protection Authority Act* (2010) (Specialist Environmental Court) **Land Legislation** *Marine and Coastal Area* Takutai Moana *Act* (2011)
Common Law Provisions: Aboriginal Title	**Doctrine of Common Law Aboriginal Title** *Te Weehi v Regional Fisheries Officer* (1986) *Te Runangannui o Te Ika Whenua Inc Society v Attorney-General* (1994) *Attorney-General v Ngati Apa* (2004)
Common Law Provisions: Treaty Rights	**Treaty of Waitangi** *Treaty of Waitangi Act* (1975) *Treaty of Waitangi (Fisheries Claims) Settlement Act* (1992)

7.5 The Legal Response of Aotearoa New Zealand to Indigenous Sacred Site Issues

7.5.1 Background: Māori Conceptions of Time, Space, and the Sacred

> However, a tribe that lost its pākāinga and its sacred places, undoubtedly lost much of its mana. The group's whole universe would have been shaken, its kinship network ruptured, its very identity threatened.[2626]

7.5.1.1 Māori Conceptions of Time

Insofar as Māori conceptions of time are concerned, three specific and twelve general observations were made in the context of 2.4.1.3 above ("Indigenous Conceptions of Time: Aotearoa New Zealand). The specific comments were that (1) they see themselves as forming part of living history, meaning that the connection to their ancestors through the *whakapapa* (genealogy) is both strong and has present-day value to them; (2) it accordingly is intrinsically irrelevant to them whether an event occurred in the immediate or remote past; and (3) the clear process of cultural disintegration and concerted cultural reconstitution means that a strong grasp of the history of Aotearoa New Zealand is essential to understanding and correctly interpreting sacred site protection endeavours in Aotearoa New Zealand.

The general observations can be summarized as follows: (1) the concept of "Māori" as a nation is a recent construct; (2) the notion of 'the Māori" has been actively embraced as part of Indigenous mobilization efforts; (3) yet much internal diversity and dissent remains; (4) diversity may be along tribal lines or according to other factors such as urban migration; (5) the tribe is the main unit of social organization; (6) with urbanization new 'tribes' form in a pantribal movement; (7) historically they also were subjected to colonial assimilation efforts through Christianization attempts; (8) but

---

[2626] Waerete Norman, "The Muriwhenua Claim" in Kawharu, *supra* note 2537, 181 at 200.

the Māori actively sought out education and did not resist Christendom;[2627] (9) a large percentage of the Māori both belong to Christian churches and follow traditional customs and culture without seeing any contradiction therein; (10) thus the sacred site conversation in Aotearoa New Zealand is couched in terms of customs, traditions and culture rather than religion; (11) the majority consensus is that Māori culture is dynamic in nature; and (12) re-tribalization involves a far more stereotypical conception of the tribe than the traditional *iwi* notion used to imply.

7.5.1.2 Māori Conceptions of Space

There are four points of importance to be kept in mind in the context of Māori conceptions of the land: (1) they are *tangata whenua* – literally, "people of the land", in the sense of their placentas being buried there; (2) the Māori wars were fought over land, *mana* and sovereignty; (3) loss of land has driven self-determination aspirations from the 1970's onwards; and (4) while the *Treaty of Waitangi* debate still carries on, natural resources have largely fallen into the control of the Crown and/or the private sector.

7.5.1.3 Māori Conceptions of the Sacred

The main ideas to emerge from the discussion of Māori conceptions of the sacred in the context of 2.4.3 above ("Indigenous Conceptions of the Sacred") can be summarized in the following seven points: (1) language takes on a particularly important role for the Māori, oratorical skills being highly praised; (2) language functions also at a hidden and symbolic level; (3) two thirds of Māori communication is completely abstract; (4) Māori is particularly difficult to translate due to embedded cultural differences; (5) culturally loaded terms require a conceptual explanation; (6) due to their deceptive accessibility, some terms are regularly translated with apparently simple English substitutes, but then prove to have a quite different meaning when probed; (6) for most tribes, *tino rangatiratanga* as self-determination comes down to local control for local resources; (7) the universalization of Māori identity is simplistic and reductive both in its traditional version and in

---

[2627] Also see Magallanes, *supra* note 2515 at 524, who notes that the Māori gave the church substantial tracts of land on the urging of the missionaries. See especially at 524 n 3.

the form of the new stereotypical one that is being embraced by the Government and the leaders of Māori national organizations alike; (8) ritual plays an important role, in that there is a need for conformance with the correct ceremonial procedures; (9) even minor errors are deemed to constitute ill omens that will invoke retribution; (10) failure to comply with ancestral/spiritual customs / omission of some of the ritual elements will accordingly bring harm to the community; (11) Māori teachings are passed down in symbolic form over generations in order to protect them; and (12) the elders are limited in what they may share about their ancient wisdom traditions as the contents of these are not public knowledge, but they may relate their personal experiences in that regard.

Against the background of the above, and bearing in mind the Aotearoa New Zealand Timeline as detailed in 7.2 above ("Timeline"), we now proceed to consider from up close the Aotearoa New Zealand legal framework for the protection of sacred sites.

7.5.2 The Treaty of Waitangi

> The Treaty of Waitangi has always assumed great importance in the eyes of the Maori. He believes that by the solemn agreement made with the Queen of England the peaceful colonization of New Zealand became possible (…) The European on the other hand generally regarded the Treaty as an historical event which does not have much impact on modern New Zealand. This view springs largely from the judicial decisions in cases when the legal consequences of the Treaty have been in question and which have led to the conclusion that it has no place in New Zealand law.[2628]

Magallanes ascribes the striking structural differences in Indigenous rights as acknowledged in Australia and Aotearoa New Zealand to the latter's foundational document, the Treaty of Waitangi.[2629] Although the Treaty is by no means exempt from controversy, the very fact of its

---

[2628] Waitangi Tribunal, *Finding of the Waitangi Tribunal on the Kaituna Claim* (WAI-4) (30 November 1984) [*Kaituna Report*] at paras 5.2–5.2.

[2629] Magallanes, *supra* note 2515 at 523; also see Claudia Orange, *The Treaty of Waitangi* (1987), Anderson et al, *supra* note 386 at 919–920.

existence stands in stark contrast to Australia, which, as we saw in 6.3.2 above ("Constitutional Culture: Australia") has no treaty-making history.

The Treaty of Waitangi provides a concrete instance of the difficulties that cultural cross-translation may pose.[2630] The controversies alluded to above are all related to differences between the English and Māori versions of the text, both texts having equal status.[2631] I cite three such instances by way of illustration. First, while Article 1 of the English version refers to "sovereignty", the Māori word "kāwanatanga" means "governance".[2632] Accordingly, the Māori argue that they have consented to governance of issues within their territorial bounds, but that it does not cede their authority for issues that are inter-Māori.[2633] Second, Article 2 of the English version determines that the Māori retain "full exclusive and undisturbed possession" of their lands and resources, but, so Magellanas argues, the Māori phrase that refers to retention of *te tino rangatiratanga* over their lands, villages and treasures, "refers to the highest or absolute chieftainship, and would be the best Maori term to use to refer to sovereignty."[2634] In the third place, the English version of Article 2 provides for a pre-emption right, but the Māori version only makes reference to purchases of land that the Māori were willing to sell.[2635] This kind of discrepancy, coupled with the fact that neither text takes precedence

---

[2630] We discussed the notion of cultural cross-translation in more depth at 2.4.3.1 above ("Issues of Cultural Cross-Translation").

[2631] A lot has been written on the disparaties in the two texts. See e.g. David V Williams, "*Te Tiriti o Waitangi* – Unique Relationship Between Crown and *Tangata Whenua*?" in Kawharu, *supra* note 2537,64 at 78–80.

[2632] *Cf* Magallanes, *supra* note 2515 at 530: "In the first article, whereas the English version refers to sovereignty, the Maori word chosen is '*kawanatanga*'. Unfortunately, this does not refer to sovereignty but literally to governorship – the term comes from '*kawana*', which is a Maori transliteration of the English word, 'governor'. Maori knew this term both from reference to the governors of the Australian colonies and from the Bible (Pontius Pilate was a *kawana*). This is to be contrasted with reference to kings and their authority ('*kingitanga*') or chieftainship ('*rangatiratanga*). In missionary-Maori '*rangatiratanga*' was used to refer to the kingdom of God. In the 1835 Declaration of Independence '*rangatiratanga*' was used to refer to sovereignty. It was also used in an 1840 notice by Hobson to refer to the sovereignty of the Queen." Also see Anderson et al, *supra* note 386 at 921–922; Ministry for Culture and Heritage, "Treaty FAQs", (2014), *New Zealand History Nga korero a ipurangi o Aotearoa*, online: <www.nzhistory.net.nz/politics/treaty/treaty-faqs>. Also see Waitangi Tribunal, *Te Roroa Report*, *supra* note 381 at 4–5; *Flavell*, *supra* note 2522 at 440; Kukutai, *supra* note 95 at 49, n 4.

[2633] See Magallanes, *supra* note 2515 at 530; Anderson et al, *supra* note 386 at 921–922.

[2634] Magallanes, *supra* note 2515 at 530. Also see Anderson et al, *supra* note 386 at 922. On the meaning and origins of *rangatiratanga*, see the superb exposé by P.G. McHugh, "Constitutional Theory and Māori Claims" in Kawharu, *supra* note 2537, 25.

[2635] Magallanes, *supra* note 2515 at 531. Also see Anderson et al, *supra* note 386 at 922.

over the other, has given rise to a de facto situation where there are three versions of the Treaty of Waitangi: the English version, the Māori version, and the accepted English translation of the Māori version.

It is important to bear in mind in this context some of the points made earlier about the role of language in Māori culture, notably (1) the fact that language is important and oratorical skills are highly praised; (2) that some concepts are difficult to translate due to embedded cultural differences;[2636] (3) that language often operates at a hidden and symbolic level;[2637] and (4) that culturally loaded terms often require a conceptual explanation. From this perspective, is it really surprising that the wording of the Treaty is so important to them?[2638]

Insofar as the mechanics of protecting sacred sites are concerned, the Treaty of Waitangi is of particular interest. Article 2 of the Treaty guarantees the Māori the undisturbed possession and enjoyment of their taonga under British rule[2639] — a taonga is a treasured thing in Māori culture, whether tangible or intangible in nature.[2640] Tangibles include heirlooms and artefacts, natural resources and access to natural resources, as well as places and things associated with life and death.[2641] Intangibles include spiritual values.[2642] Taonga thus have constitutional significance. According to the Waitangi Tribunal the Māori worldview entails that they have an obligation of

---

[2636] On the use of transliteration in the translation of concepts such as 'sovereignty', see MPK Sorrenson, "Towards a Radical Reinterpretation of New Zealand History: The Role of the Waitangi Tribunal" in Kawharu, *supra* note 2537,158 at 158–159.

[2637] E.g. in the Motunui claim the Waitangi Tribunal stated with regards to interpretation of the *Treaty of Waitangi* that a Māori approach to the *Treaty* "would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place.": Waitangi Tribunal, *Findings and Recommendations of the Waitangi Tribunal on an Application by Alia Taylor in Relation to Fishing Grounds on the Waitara District*, WAI-6 (1983) at 61.

[2638] One should also remember that the English version –often treated as the 'official version'– was signed only by 39 Māori chiefs; the Māori version was signed by more than 500 of them: see Sorrenson, *supra* note 2636 at 158.

[2639] Waitangi Tribunal, *Te Roroa Report*, *supra* note 381 at 4.

[2640] Waitangi Tribunal, *Te Roroa Report*, *supra* note 381 at 218, 237.

[2641] Waitangi Tribunal, *Te Roroa Report*, *supra* note 381.

[2642] Waitangi Tribunal, *Te Roroa Report*, *supra* note 381.

stewardship (the duty of Kaitiakitanga) towards taonga, from which they derive their spiritual identity.[2643]

A very important dimension of the Treaty is the effect of the 1941 Privy Council ruling in *Hoani Te HeuHeu Tukino v Aotea District Maori Land Board*.[2644] Here the Privy Council held the Treaty of Waitangi to be a valid international treaty that ceded sovereignty. The impact of this ruling, given Aotearoa New Zealand's dualist approach to international law,[2645] is that the *Treaty of Waitangi* would have to be incorporated into national law by means of implementing legislation in order to be enforceable within the state. In other words: Māori cannot litigate in the courts of Aotearoa New Zealand on the basis of the *Treaty of Waitangi*. There is a bitter irony to this, when one considers that their interest in signing the Treaty was expressly so that they would be better able to protect their Aotearoa lands and resources…[2646]

We proceed, next, to contemplate the mechanics of measures available to Māori for the protection of their sacred sites. There are essentially three such mechanisms: the Waitangi Tribunal, the court system and direct negotiations with the Crown. We look at each of these in turn.

7.5.3 The Waitangi Tribunal

In 1975 the *Treaty of Waitangi Act*[2647] called into being the Waitangi Tribunal for purposes of investigating claims of governmental breaches of principles of the *Treaty of Waitangi*.[2648] Its establishment was a direct consequence of the protest action that characterized the 1960s and 1970s,

---

[2643] Waitangi Tribunal, *Te Roroa Report*, *supra* note 381 at 220. I do not enter into the debate on Indigenous identity, essentialization, reductionism, romanticization and authenticity here. See above at 2.2.1 ("Romanticization, Reductionism and Essentialization"), 2.2.2 ("Identity Politics") and 2.2.3 ("Authenticity and Representation").

[2644] *HeuHeu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC). See in this context the interesting reflection by Benedict Kingsbury, "The Treaty of Waitangi Some International Law Aspects" in Kawharu, *supra* note 2537, 121.

[2645] See above at 7.3.4 ("Aotearoa New Zealand: Approach to International Law").

[2646] See the discussion in Magallanes, *supra* note 2515 at 531–536.

[2647] *Treaty of Waitangi Act 1975* (NZ) 1975/114 [*Treaty of Waitangi Act*].

[2648] For a thorough discussion of the Waitangi Tribunal in its socio-political context, as well as a comment on its first ten years of operations, see Sorrenson, *supra* note 2636.

which drew a political promise that a tribunal would be established to consider Māori grievances.[2649] Although its jurisdiction was initially restricted to present or future state actions,[2650] the *Act* was amended in 1985[2651] to bring within its ambit also historical wrongs going back to 1840, i.e. the date on which the *Treaty* was concluded.[2652]

The Tribunal is not a court: it is a permanent commission of enquiry tasked with the making of recommendations on the practical application of the *Treaty*. Its decisions are not legally enforceable and it has no sanctioning powers: it makes recommendations for government action that are not binding upon government but that carry significant weight in political real terms.[2653] For instance, it may make recommendations pertaining to Māori claims in respect of alleged Crown breaches of the *Treaty*.[2654] The Tribunal has, as a matter of fact, exclusive jurisdiction in the determination of whether Crown conduct complained of was in breach of the *Treaty* or not.[2655] It is also tasked with reconciling the two versions of the *Treaty* text "and to decide issues raised by the difference between them."[2656] Once again, this is within the exclusive domain of the Waitangi Tribunal.[2657]

The linguistic differences between the two versions of the *Treaty* have been raised before the Tribunal:

> The Tribunal has taken a broad approach to both texts, focusing on the spirit of the Treaty to be derived from the texts and their surrounding circumstances. Despite the historical

---

[2649] Magallanes, *supra* note 2515 at 536–537.

[2650] See Magallanes, *supra* note 2515 at 537.

[2651] *Treaty of Waitangi Amendment Act 1985*, s(1), amending the *Treaty of Waitangi Act*, *supra* note 2647, a 6(1). See Magallanes, *supra* note 2515 at 537.

[2652] On the immense impact this Amendment had for Māori, see I H Kawharu, "Mana and the Crown a Marae at Orakei" in Kawharu, *supra* note 2537, 211 at 214.

[2653] See Magallanes, *supra* note 2515 at 539: there are some negotiated statutory exceptions to this general statement. Also see Sorrenson, *supra* note 2636 at 160.

[2654] "Waitangi Tribunal Te Rōpū Wakamana I Te Tiriti O Waitangi", (2014), *Ministry of Justice Tahū o te Ture*, online: <http://www.justice.govt.nz/tribunals/waitangi-tribunal>.

[2655] *Treaty of Waitangi Act*, *supra* note 2647, s 6(1).

[2656] *Treaty of Waitangi Act*, *supra* note 2647, s 5(2).

[2657] See Sorrenson, *supra* note 2636 at 160.

> shortcomings surrounding the understandings and signing of the Treaty, the Tribunal has upheld the cession of sovereignty by Maori giving the (then British) government the right to make laws for the country. The Tribunal considers that the principle of exchange is fundamental, whereby cession of Maori sovereignty was made in exchange for the protection of Maori *rangatiratanga* and thus protection of Maori interests.[2658]

To date it has refused to uphold an interpretation of Article 1 that sees the Māori retaining their sovereignty, but it has held the Māori's retention of *te tino rangatiratanga* over their lands, villages and treasures as per Article 2 includes the authority of control over such lands, villages and treasures.[2659] Less clear is what exactly these "treasures" encompass.[2660]

Three of the principles determined thus far by the Tribunal are of specific pertinence in the present context: the partnership principle;[2661] the consultation principle –"whereby the Crown should consult the other Treaty partner before making important decisions which concern them"[2662]– and a "fiduciary duty to act fairly".[2663] In addition to principles, the Tribunal has been busy defining the Māori interests that are to be protected, as well as what priority they should be accorded.[2664]

An interesting feature of the Waitangi Tribunal is its pragmatism:

> The Tribunal (…) deliberately separates the determination of the breach from the recommendations for redress. Even for significant breaches, the Tribunal's recommendations are often the result of a considered compromise with a view to what might realistically be achievable in the prevailing political and economic climate. It acknowledges that claimants cannot 'expect to receive total redress for the prejudicial effect

---

[2658] Magallanes, *supra* note 2515 at 538.

[2659] See Magallanes, *supra* note 2515 at 538; Anderson et al, *supra* note 386 at 922.

[2660] See Magallanes, *supra* note 2515 at 539 for a list of matters that have to date been both included and refused. Of interest for present purposes is the inclusion of: rivers and lakes, geothermal energy, petroleum reserves and modern aquaculture.

[2661] I.e. the parties have to treat each other reasonably and with the utmost good faith: Waitangi Tribunal, *The Ngai Tahu Report 1991*, at 242–243.

[2662] Magallanes, *supra* note 2515 at 538.

[2663] Magallanes, *supra* note 2515 at 538, with reference to Waitangi Tribunal, *Interim Report on the Rangitaiki and Wheao Rivers Claim*, 1993, at 4.

[2664] See Magallanes, *supra* note 2515 at 538.

> of Crown Treaty breaches and avoids creating further conflict, such as by upsetting other third-party interests.[2665]

Insofar as the determination of remedies are concerned, the Tribunal's approach is restorative and flexible.[2666] It typically proposes a range of remedies that include restitution of land and assets, as well as the payment of a monetary sum, and also makes recommendations regarding significant natural resources and law and policy changes.[2667]

With regards to land claims, a distinction is made between Treaty Settlements and 'contemporary claims'.[2668] All claims arising post 21 September 1992[2669] are necessarily contemporary claims and are dealt with through separate processes. Treaty Settlements make use of the Waitangi Tribunal mechanism and have various requirements, including that the claimants demonstrate how the averred breach of the *Treaty of Waitangi* has harmed their *tapuna* (ancestors).[2670]

However, Dinah Shelton points out that the (then) Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen considered it to be–

> inadequate to establish a judicial and administrative procedure leading possibly to an order establishing customary rights. The Special Rapporteur established that reparations by way of settlements over the past decade have been at a rate of less than 1 per cent of the current value of the land. In addition, the Maori argued that the cultural redress is insufficient

---

[2665] Magallanes, *supra* note 2515 at 539.

[2666] See Magallanes, *supra* note 2515 at 539.

[2667] See Magallanes, *supra* note 2515 at 539. She notes that the Tribunal also on occasion leaves it to the parties for negotiation : *ibid.*

[2668] *ATNS Project*, *supra* note 2424.

[2669] The date of the *Treaty of Waitangi Fisheries Settlement*, also known as the "Sealord Deal". This was a formal settlement of all claims to commercial fisheries, seeking to give effect to the *Treaty of Waitangi's* guarantee of "full, exclusive possession of their fisheries" to the Māori – a matter of dispute for over a century. The agreement was enshrined in the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* (NZ) 1992/121 and constituted both the first agreement to extinguish claims and the first to affect all Iwi. See *ATNS Project*, *supra* note 2424.

[2670] *ATNS Project*, *supra* note 2424.

> because settlements do not always restore ancestral homelands to the claimant group. Resource rights, including fishing, is also a matter for concern.[2671]

Reviews of the Tribunal's performance have on the whole been favourable, though it is under resourced and there is a "huge backlog of claims and significant delays in their processing".[2672] It also appears to be dependent on a fair amount of political goodwill: underfunding affects its performance; many plaintiffs require funding assistance to even access the Tribunal – and even then, disparities remain; the Government rather perversely approaches it like a judicial forum – taking on an adversarial role, placing even historical evidence in dispute– but then drags its feet in implementing recommendations or refuses to implement them at all.[2673]

Yet the Tribunal's political *savoir faire* has meant that it is not actively seeking the power to make binding rulings. Magallanes argues that in its present form it is fulfilling a major reconciliatory and economically equalizing role in Aotearoa New Zealand and that changes to its legal mandate would "be more restrictive rather than less. because of the political considerations involved."[2674] Its most important benefit, so she argues, has been 'the depoliticization and depersonalization of race politics" in the sense that claims are lodged against the Crown rather than against individual New Zealanders, and the Tribunal's capacity to "handle claims calmly, without political hyperbole, and 'out of the inflaming public eye'."[2675]

7.5.4 The Aotearoa New Zealand Court System

For purposes of the discussion below, I follow the useful categorization identified by Magallanes in respect of reparations mechanisms utilized by the courts of Aotearoa New Zealand to extend reparations to Māori: (1) common law Aboriginal title; (2) upholding the principles of the *Treaty of*

[2671] Shelton, *supra* note 905 at 71.

[2672] Magallanes, *supra* note 2515 at 540.

[2673] Discussed at length in Magallanes, *supra* note 2515 at 540.

[2674] See Magallanes, *supra* note 2515 at 540–541.

[2675] Magallanes, *supra* note 2515 at 541.

Waitangi as incorporated in legislation; and (3) utilizing the Treaty as an extrinsic aid to legislative interpretation where it has not been so incorporated.

7.5.4.1 Common Law Aboriginal Title

In Aotearoa New Zealand, the doctrine of aboriginal title was reintroduced at first partially by the High Court in *Te Weehi v Regional Fisheries Officer*[2676] in 1986 and then in its entirety in 2004 by the Court of Appeal in *Attorney-General v Ngati Apa*.[2677] In *Te Weehi*, the High Court held that the establishment of British sovereignty did not abrogate the Māori's local laws and property rights. In 1994, the Court of Appeal said in a general discussion on aboriginal title in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*[2678] that "aboriginal title" forms part of Aotearoa New Zealand law and is interchangeable with the term "Māori customary title";[2679] that the Crown acquires radical title upon colonialization, but that it does so subject to existing "native rights";[2680] and that existing native rights are usually, but not necessarily, collective in nature.[2681] In *Ngati Apa* the Court of Appeal endorsed both *Te Weehi* and *Runanganui* and relied heavily on the Canadian *Delgamuukw*[2682] and the Australian *Mabo*[2683] cases in its reasoning.[2684]

This ruling resulted in the enactment of the controversial *Foreshore and Seabed Act*[2685] of 2004, which effectively vested full legal ownership of the foreshore and seabed in the Crown, extinguishing any

---

2676 *Te Weehi v Regional Fisheries Officer* [1986] 1 NLR 680 (HC) [*Te Weehi*].

2677 *Attorney General v Ngati Apa* [2003] 3 NZLR 643 (CA) [*Ngati Apa*]. See in this regard, Ruru, "Māori Encounter", *supra* note 2562 at 126–127.

2678 [1994] 2 NZLR 20 [*Te Runanganui*].

2679 *Ibid* at 23.

2680 *Ibid* at 24.

2681 *Ibid.*

2682 *Delgamuukw*, *supra* note 550.

2683 *Supra* note 2421.

2684 *Ngati Apa*, *supra* note 2677 at 656. See the discussion in Barrie, "UNDRIP", *supra* note 1520 at 299299–300.

2685 *Foreshore and Seabed Act 2004* (NZ), 2004/93.

unidentified Māori customary title.[2686] In 2011, the Act was repealed and replaced by the *Marine and Coastal Area (Takutani Moana)* Act (MACA)[2687], which replaced the Crown's ownership of the foreshore and seabed with a 'no ownership'-regime and restored any Māori interests that had been extinguished by the *Foreshore and Seabed Act*.[2688]

The major difference in a customary title claim and a section 2 *Waitangi Treaty* right is that the former, being a common law right, is directly enforceable by the courts.[2689] As noted previously, the impact of *Hoani Te HeuHeu Tukino*[2690] is that *Waitangi Treaty* rights form part of international law, i.e. they need to be incorporated by legislation before they can be directly enforced by courts in Aotearoa New Zealand.[2691] On the whole, she argues, it has not been necessary for Māori to pursue common law aboriginal title because of the fact that the Government is willing to enter into settlement negotiations.[2692]

7.5.4.2 Treaty of Waitangi Incorporated in Legislation

The *Treaty of Waitangi* has not been incorporated into the legislation of Aotearoa New Zealand as a whole. Instead, its principles have been incorporated to varying degrees, depending on the political will of the government of the day.[2693] It would appear that initial incorporating acts gave stronger effect to the *Treaty*'s principles than subsequent ones. Thus, the *Conservation Act 1987*[2694] determines that the Act is to be "interpreted and administered to give effect to the principles of the Treaty",

---

[2686] Kirsten Price, "Shifting Sands: A New Approach to Ownership of the Foreshore and Seabed", *Australasian Legal Business Magazine* 9:9 (9 September 2011) 8.

[2687] *Marine and Coastal Area (Takutai Moana) Act 2001* (NZ) 2001/3 [*MACA*].

[2688] Price, *supra* note 2686.

[2689] Magallanes, *supra* note 2515 at 542.

[2690] *Hoani Te HeuHeu Tukino*, *supra* note 2644.

[2691] Also see Magallanes, *supra* note 2515 at 543.

[2692] See Magallanes, *supra* note 2515 at 543.

[2693] See Magallanes, *supra* note 2515 at 544–545. She cites various examples.

[2694] *Conservation Act 1987*, s 4.

while the later *Resource Management Act 1991*[2695] simply requires that the *Treaty*'s principles be "take[n] into account". For present purposes, it is the latter Act that likely is the most relevant.

7.5.4.3 Treaty of Waitangi as an Extrinsic Aid to Statutory Interpretation

In 1987 the New Zealand High Court, in an environmental law case, set an important precedent pertaining to the use of the *Treaty of Waitangi* as an extrinsic aid to statutory interpretation:

> There can be no doubt that the Treaty is part of the fabric of New Zealand Society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.[2696]

Although this does not have the same effect as a direct incorporation of the *Treaty* into the law of Aotearoa New Zealand would have, it has been argued that it both provides protection where such incorporation is lacking, and serves to "demonstrat[e] the fundamental status of the Treaty (…) as part of the New Zealand constitution."[2697]

Another important dimension of this case is the authoritative weight that it gave to the ruling of the Waitangi Tribunal in the *Manukau*[2698] matter, not on the basis that the Waitangi Tribunal makes binding judgments, but because –

> The expertise of the Waitangi Tribunal lies in its understanding of the Treaty of Waitangi as The Tribunal interprets that Treaty. A moments (*sic*) reflection upon the provisions of the Treaty of Waitangi Act, its extremely important statutory functions, the constitution of the Waitangi Tribunal and its reported findings must lead to the conclusion that it is an expert source within is (*sic*) field for instruction in Maori values. While, so far as the present case is concerned, no report of that Tribunal is in any way binding on this Court, its considered opinions, within the area of its expert functions, ought to be accorded due weight in this Court. The way in which the Waitangi Tribunal has dealt with the concept of

---

[2695] *Resource Management Act 1991*, s 8.

[2696] *Haukina Development Trust v Waikato Valley Authority* [1987] M430/86 (2 June 1987) Chilwell J [*Haukina Development Trust*] at 51.

[2697] Magallanes, *supra* note 2515 at 547.

[2698] *Manukau*, *supra* note 2513.

> Maori spiritual values in regard to water established, sufficiently for the determination of this branch of the appellant's case, that those values cannot be dismissed in a general sort of way by referring to them as personal to the individual or as something which the community at large may trample upon, at least in the context of the indigenous population of this country which places great value upon the principles of the Treaty of Waitangi. Nor should the benefit of all New Zealanders be given a degree of absolute emphasis so as to exclude, in a branch of the law which has an affinity with the Treaty, Maori spiritual values.[2699]

This extract is important for two reasons: insofar as Aotearoa New Zealand is concerned, it is indicative of a flexible and supple approach whose echoes are clear in the willingness of the Crown to negotiate with the tribes, discussed in 7.5.5 hereafter. But it also serves as a forerunner to the final chapter, in that it underlines how far apart two countries can be in legal *mentalité* despite their geographical proximity and shared historical roots. I am referring here to the utilitarianism that Jennifer Clarke complains of in the Australian context, with reference to section 7 of the *Native Title Act*. Or, to compare apples with apples, consider the ruling in *Wik* that pastoral leases and Native title can coexist over the same land, with pastoral leases taking precedence in case of conflict. It is immediately striking in this context that in Aotearoa New Zealand all conversations revolve around the *Treaty of Waitangi*, whereas Australia is the sole jurisdiction studied that has no treaty-making history or culture whatsoever.

We will take this point up again in Chapter 8. Before proceeding to look into direct negotiations with the Crown, a third point rests to be made about *Haukina Development Trust*: it offers a good illustration of the willingness of the Courts of Aotearoa New Zealand to look at and even apply insofar as possible international instruments that have not been incorporated into its domestic legislation. *In casu*, the Court referred to two instances where international instruments were applied by the Courts of Aotearoa New Zealand, notwithstanding the fact that they had not been so incorporated. In respect of the first, the *International Convention On The Elimination Of All Forms Of Racial Discrimination of 1965*, New Zealand was a party by ratification; the second, the *Equal Pay Remuneration Convention 1951 of the International Labour Organization*, had not even been ratified by New

---

[2699] *Haukina Development Trust*, *supra* note 2696 at 78–79.

Zealand.[2700] The implication was clear: even on the argument that the *Treaty of Waitangi* constitutes International law, it has interpretative significance domestically.

7.5.5 Direct Negotiations with the Crown

The fact that the Crown is now willing to enter into direct settlement negotiations with Māori claimants who have not yet followed the Tribunal or court processes bears testimony to the success of the Tribunal to date, though such direct negotiations exclude a detailed public record of the claim in question.[2701]

Given the Crown's willingness to negotiate, direct negotiations with the Crown have become ever more popular.[2702] However, these do not necessarily exclude prior proceedings in the Waitangi Tribunal and/or the Courts, as the Desktop Study discussed in 7.6 below ("*Whanganui River Iwi and Whanganui River, Aotearoa New Zealand*") indicates – in fact, such proceedings may even form a vital part of the evidentiary phase. From this it should be clear that it is not a fast or a simple procedure.

There are five steps to such a negotiation process: (1) claim preparation; (2) pre-negotiations; (3) negotiations); (4) ratification and implementation; and (5) results.[2703] For ease of reference I illustrate the outcome of the process with reference to a desktop study, namely the Whanganui River Settlement.

[2700] *Haukina Development Trust*, *supra* note 2696 at 63–65.

[2701] See Magallanes, *supra* note 2515 at 541–542.

[2702] See e.g. Magallanes, *supra* note 2515 at 553–562 where she lists multiple examples.

[2703] See the detailed analysis by Magallanes, *supra* note 2515 at 548–557.

7.6 Illustration: Desktop Study 7 – Whanganui River Iwi and Whanganui River, Aotearoa New Zealand

7.6.1 Introducing the Desktop Study

In recently adopting the *Whanganui River Claims Settlement Act*,[2704] the New Zealand legislature brought closure to a legal battle lasting more than a century. Its true importance, however, lies not in what it resolved, but rather how it did so. This is because its chosen line of action creates a sharp division between the once united four common law strongholds –New Zealand, Australia, Canada and the United States–, at least insofar as their approach to Indigenous sacred sites is concerned. In sum, New Zealand sought to accommodate the Indigenous communities in question through a deep engagement with their values, customs and identity – as opposed to undertaking a potentially formalistic consent-seeking exercise.

7.6.2 Contemplating the Fact Set

The Whanganui River is New Zealand's longest navigable river and has since the nineteenth century been considered as an important resource for purposes of gravel extraction, coal mining, hydropower generation, and tourism activities.[2705] Its traditional custodians, the Whanganui River *Iwi*, were neither consulted, nor did they consent to these various uses.[2706] They were engaged in litigation with the Crown in one of the longest running legal battles in New Zealand history between 1938 and 1962 insofar as ownership of the river bed was concerned, which litigation resulted in

---

[2704] *Te Awa Tupua (Whanganui River Claims Settlement) Act*, No 7 of 2017 (20 March 2017) [*Whanganui River Claims Settlement Act*]. The *Act*'s commencement date is 21 March 2017 and its effective date ("the settlement date") is 30 days later: s 2 read with s 4.

[2705] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(17).

[2706] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(5–16).

several findings to the effect that as at 1840 such ownership vested in the *Iwi* under their customs and usages.[2707]

[2707] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(14)(c–d).

Diagram 1: Timeline – Whanganui River Dispute and Settlement

Year	*Event*
1840	Treaty of Waitangi (ownership of riverbed vested in Whanganui Iwi)
1877	Whanganui Iwi objects to Harbour Board Regulations (historic claims origin)
1880	Destruction of eel weirs (*pa tuna*) for navigation by steamers & prospectors
1882	Gravel extraction from River for road construction
1886–88	501 Whanganui Iwi members petition government to stop destruction of weirs
1938–62	Litigation between Whanganui Iwi & the Crown
1988	Whanganui River Maori Claims Board & Waitangi Tribunal claim lodged
1993	Waitangi Tribunal Interim Report
1999	Waitangi Tribunal Final Report
2003	Signature of Terms of Negotiation Document
2011	Signature of Record of Understanding
2012	Signature of Agreement (Whanganui Iwi & the Crown)
2014	2-Part Settlement Documentation
2016	Draft legislation (Bill)
2017~	*Whanganui River Claims Settlement Act*

7.6.3 The Litigation

After lodging a historic claim dating back to 1873 with the Whanganui River Maori Claims Board in 1988, the Whanganui Iwi petitioned the Waitangi Tribunal.[2708] The Tribunal delivered an Interim Report in 1993[2709] and a Final Report in 1999[2710] that gave rise to a three-step settlement process: first, the signing of a Record of Understanding in 2011,[2711] next, the conclusion of the actual Agreement in 2012;[2712] and finally, the signing of the 2-part Settlement Documentation in 2014.[2713] In order to give legislative effect to the terms of the agreement between the parties, the *Whanganui River Claims Settlement Act* was enacted in 2017,[2714] following an extensive process of consultation with all parties concerned.

7.6.4 Analysis

7.6.4.1 The Legal Mechanism

7.6.4.1.1 Juristic Personality

[2708] Aotearoa New Zealand, Waitangi Tribunal, *The Whanganui River Report*, WAI 167 (1999) [Waitangi Tribunal, WAI 167] at 4 § 1.3.5.

[2709] Aotearoa New Zealand, Waitangi Tribunal, *Interim Report and Recommendations*, WAI 167 (1993) [Waitangi Tribunal, *Interim Report*].

[2710] Waitangi Tribunal, WAI 167, *supra* note 2709.

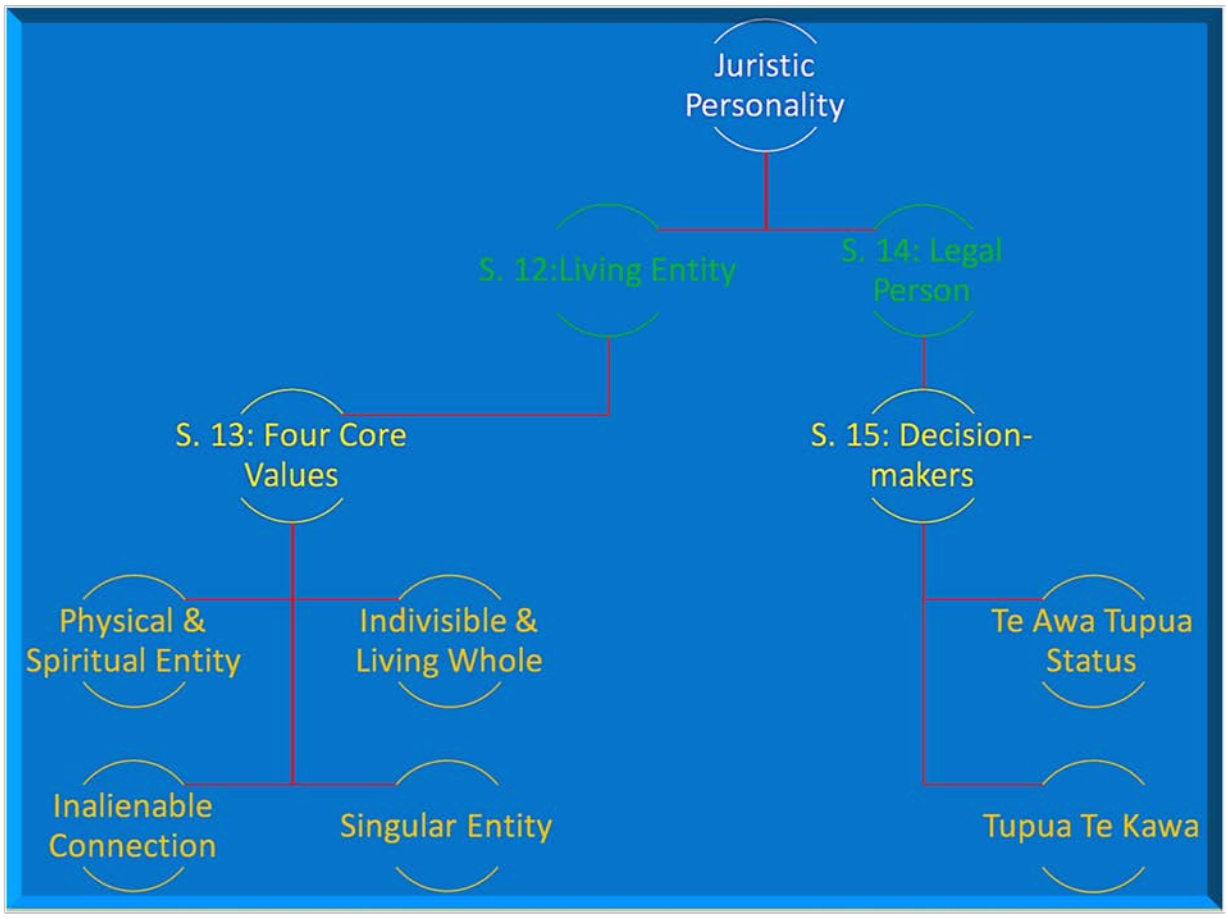
[2711] Aotearoa New Zealand, Whanganui Iwi and The Crown, *Record of Understanding in Relation to Whanganui River Settlement* (2011) [*Record of Understanding*].

[2712] Aotearoa New Zealand, Whanganui Iwi and The Crown, Tūtohu Whakatupua *Whanganui River Agreement* (2012) [*Whanganui River Agreement*].

[2713] Aotearoa New Zealand, Whanganui Iwi and The Crown, *Ruruku Whakatupua te Mana o Teana Tupua* (5 August 2014); Aotearoa New Zealand, Whanganui Iwi and The Crown, *Ruruku Whakatupua Te Mana o Te Iwi o Whanganui* (5 August 2014), Deed of Settlement [jointly: *Whanganui River Deed of Settlement*].

[2714] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 3(b) and (c). The *Act*'s other objective is to record the Crown's acknowledgement and apology to the Whanganui Iwi as per the 2014 *Ruruku Whakatupua – Te Mana o Te Iwi o Whanganui*, the document that accompanied the 2014 *Deed of Settlement* that the Crown signed with the Whanganui Iwi *ibid*, s 3(a).

Diagram 2: Hybrid Juristic Personality



At the heart of the legal structure created by the *Act*, lies *Te Awa Tupua* – Whanganui River as a juristic person.[2715] It has a hybrid nature, being recognized both as being a living entity[2716] and a corporate one.[2717] The two salient clauses are sections 12[2718] and 14.[2719] Section 12 contains a status provision that reads, "Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements", while section 14(1) stipulates, "Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person."

These two provisions are elaborated on and supported by sections 13 and 15, respectively. Section 13 lists four core values that are intrinsic to the essence of *Te Awa Tupua*, known as *Tupua te Kawa*. These emphasize the following aspects: (1) *Te Awa Tupua* is both a physical and spiritual entity;[2720] (2) it is an indivisible and living whole;[2721] (3) an inalienable connection exists between *Te Awa Tupua* and the *iwi and hapū* of the Whanganui River;[2722] and (4) *Te Awa Tupua* is a singular entity whose

---

[2715] See *Whanganui River Claims Settlement Act*, *supra* note 2704, Part 2: "Te Pā Auroa nā Te Awa Tupua – Te Awa Tupua Framework".

[2716] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 12.

[2717] See e.g. the deeming provision in section 17, in terms of which *Te Awa Tupua* is variously considered as an "institution", a "public body", a "public authority", a "registered collector" and a "body corporate" for the purposes of various named Acts: *Whanganui River Claims Settlement Act*, *supra* note 2704, s 17 (a)–(g).

[2718] "Te Awa Tupua recognition".

[2719] "Te Awa Tupua declared to be a legal person."

[2720] "Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River": *Whanganui River Claims Settlement Act*, *supra* note 2704, s 13(a), "*Ko Te Kawa Tuatahi*".

[2721] "Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements": *Whanganui River Claims Settlement Act*, *supra* note 2704, s 13(b), "*Ko Te Kawa Tuarua*".

[2722] "The iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and well-being": *Whanganui River Claims Settlement Act*, *supra* note 2704, s 13(c), "*Ko Te Kawa Tuatoru*".

members are to work collectively for the common purpose of the health and well-being of *Te Awa Tupua*.[2723]

It is in the provisions of section 15[2724] that the equal importance afforded by the legislator to the two components of *Te Awa Tupua*'s hybrid juristic personality is most clearly demonstrated: essentially the decision-makers under various Acts must, in the exercise of their powers and the performance of their duties and functions, recognize, as well as provide for *Te Awa Tupua*'s juristic personality and the four core values that are intrinsic to its essence as a living, indivisible entity with both physical and spiritual components (the *Tupua Te Kawa*).[2725] While the obligations embodied in section 15 do not prevent the exercise of discretion that such decision-makers may have,[2726] section 15(5)(b) authorizes the decision-makers in question to "consider the Te Awa Tupua status and Tupua Te Kawa as determining factors" in the execution of their functions.

7.6.4.1.2 Legal Structure

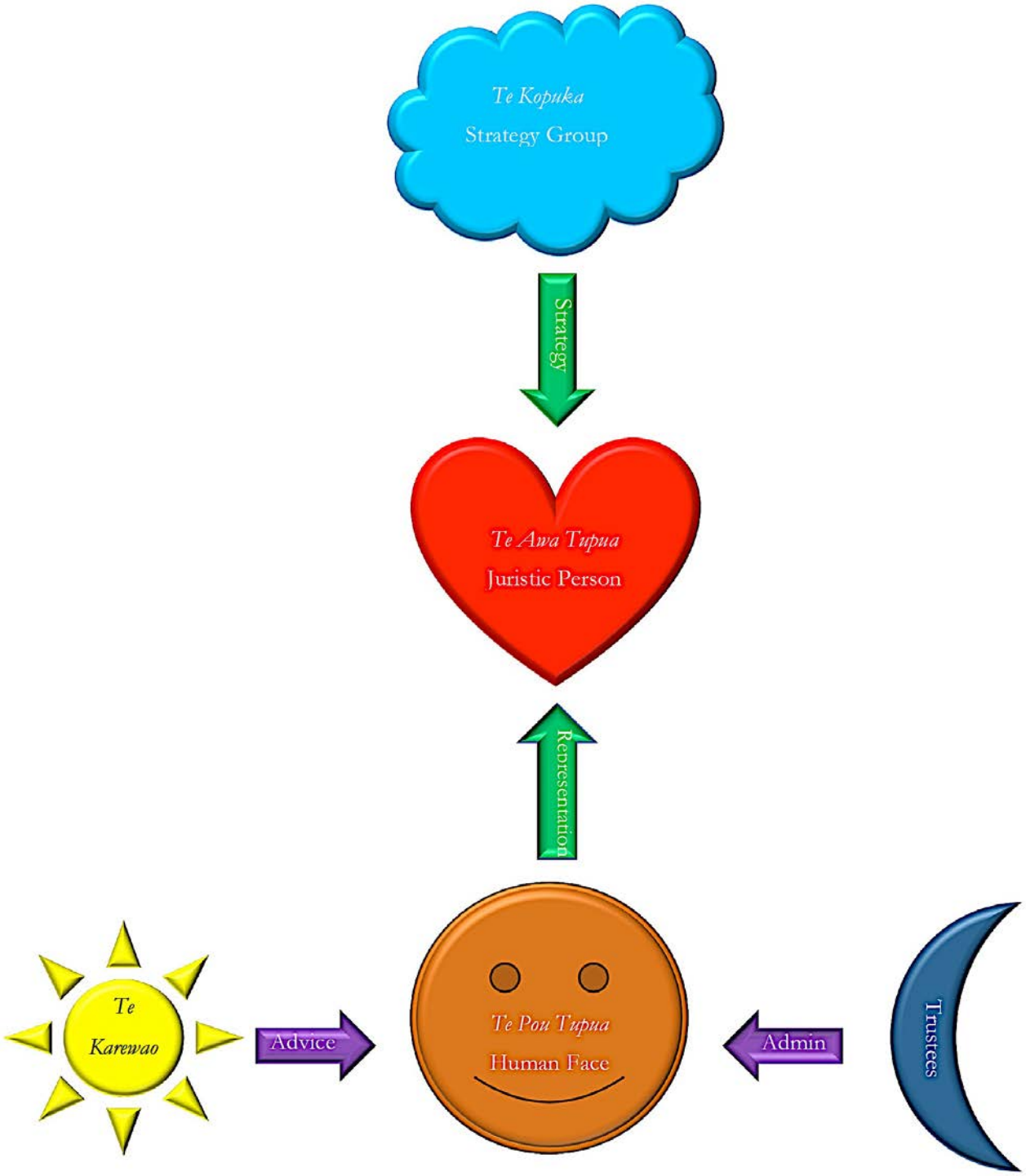
[2723] "Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively for the common purpose of the health and well-being of Te Awa Tupua": *Whanganui River Claims Settlement Act*, *supra* note 2704, s 13(d), "*Ko Te Kawa Tuawha*".

[2724] "Legal effect of declaration of Te Awa Tupua Status".

[2725] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 15(2)–(4).

[2726] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 15(5)(a).

Diagram 3: Legal Structure Created by the Whanganui River Claims Settlement Act



Te Awa Tupua, not having human form, is steered by a Strategy Group –*Te Kopuka*–[2727] and represented by a "human face"[2728] called *Te Pou Tupua.*[2729] The latter is formally advised and supported by an Advisory Body –*Te Karewao*–[2730] and receives administrative support from the Trustees of the Trust –*Ngā Tāngata Tiaki o Whanganui*–[2731] established by trust deed dated 4 August 2014.[2732] In order to appreciate how this structure will practically function, it is necessary to consider the composition of the various bodies, bearing in mind the function of each.[2733]

The main purpose of the Strategy Group, *Te Kopuka*, is to "act collaboratively to advance the health and well-being of Te Awa Tupua"[2734] and its main function is to develop and approve the strategic development plan known as *Te Heke Ngahuru.*[2735] As is the case for decision-makers under the provisions of section 15, *Te Kopuka*[2736] must pay particular attention to the twin aspects of *Te Awa Tupua*'s hybrid juristic personality in the performance of its functions, namely (1) its status as a legal person and (2) the 4 core values embodied by *Tupua Te Kawa.*[2737]

[2727] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 29. Also see *ibid*, Sched 4, Part 1 ("Te Kōpuka nā Te Awa Tupua and Te Heke Ngahuru ki Te Awa Tupua: Te Kōpuka").

[2728] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 18(2).

[2729] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 14(2). The manner in which *Te Pou Tupua* are to exercise or perform the rights, powers and duties of *Te Awa Tupua* is determined by two sources: this *Act*, as well as *Ruruku Whakatupua – Te Mana o Te Awa Tupua: ibid.* Also see *ibid*, Sched 3, Part 1 ("Administrative matters relating to Te Pou Tupua and Te Karewao: Te Pou Tupua").

[2730] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 27. Also see *ibid*, Sched 3, Part 2 ("Administrative matters relating to Te Pou Tupua and Te Karewao: Te Karewao").

[2731] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 22. The trust is in principle perpetual: see *ibid*, s 90 ("Rule against perpetuities does not apply").

[2732] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 7: "*Ngā Tāngata Tiaki o Whanganui*" and "Trustees".

[2733] For ease of reference, a graphical representation of the structure may be found in Annex 1.

[2734] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 29(3).

[2735] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 30(1). Other functions relate to the implementation and monitoring of *Te Heke Ngahuru* and to serve as a discussion forum for issues pertaining to the health and well-being of *Te Awa Tupua*: *ibid*, s 30(2).

[2736] The 2012 Interim Agreement refers to this as the "Whole of River Strategy": Wanganui Chronicle, "River Deal Binds Iwi, Crown" (3 September 2012) *The New Zealand Herald*, online: <www.nzherald.co.nz/wanganui-chronicle/news/article.cfm?c_id=1503426&objectid=11073832>.

[2737] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 30(3).

Te Heke Ngahuru's creation[2738] is pursuant to the 2014 *Deed of Settlement*,[2739] which focused on the environmental, social, cultural and economic health and wellbeing[2740] of the river, and stipulated that the river would become its own legal entity, collaboratively developed by a strategy group comprising representatives of persons and organizations with interests in the Whanganui River, including *iwi*, local and central government, commercial and recreational users, and environmental groups.[2741]

As per the provisions of the *Act*, *Te Kopuka*'s membership may not exceed 17[2742] and is constituted as follows: up to 5 members appointed by *iwi* with an interest in Whanganui River;[2743] up to 4 members appointed by the pertinent local authorities;[2744] 1 member each appointed by the trustees,[2745] the Director-General of Conservation,[2746] the New Zealand Fish and Game Council,[2747] and Genesis Energy Limited;[2748] and 1 member each representing environmental and conservation

---

[2738] On *Te Heke Ngahuru*'s contents and legal effect, see *Whanganui River Claims Settlement Act*, *supra* note 2704, ss 36 and 37. Also see *ibid*, Sched 4, Part 2 ("Te Kōpuka nā Te Awa Tupua and Te Heke Ngahuru ki Te Awa Tupua: Te Heke Ngahuru").

[2739] The Deed of Settlement as signed in 2014 comprises two documents: *Ruruku Whakatupua – Te Mana o Te Awa Tupua*, and *Ruruku Whakatupua – Te Mana o Te Iwi o Whanganui,* both signed on 5 August 2014: *Whanganui River Claims Settlement Act*, *supra* note 2704, s 7: "deed of settlement".

[2740] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 7: "health and well-being".

[2741] See Aotearoa New Zealand, "Ruruku Whakatupua: Whanganui River Deed of Settlement Between the Crown and Whanganui Iwi Summary" (5 August 2014) *Government of New Zealand*, online: <www.govt.nz/treaty-settlement-documents/whanganui-iwi/whanganui-iwi-whanganui-river-deed-of-settlement-summary-5-aug-2014/>.

[2742] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 32(1).

[2743] These include 8 *iwi*, one of which is the Whanganui River *iwi*: *Whanganui River Claims Settlement Act*, *supra* note 2704, s 7: "iwi with interests in the Whanganui River".

[2744] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 32(1)(c).

[2745] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 32(1)(a).

[2746] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 32(1)(d).

[2747] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 32(1)(e).

[2748] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 32(1)(f). See Wanganui Chronicle, *supra* note 2704 on the role of Genesis Energy Limited and its interests in Whanganui River.

interests, tourism interests, recreational interests, and the primary industries sector.[2749] The latter four members are appointed by the Manawatu-Wanganui Regional Council.[2750]

The "human face"[2751] of *Te Awa Tupua*, *Te Pou Tupua*, takes the form of two physical persons, one each nominated by the *iwi* and the Crown, and appointed jointly by both.[2752] *Te Pou Tupua* has full capacity[2753] and performs the regular functions that one would expect of the duly authorized representative body that represents a juristic person –to act and speak for *Te Awa Tupua*,[2754] to uphold its status and the *Tupua Te Kawa*,[2755] and to contract on its behalf–,[2756] but also some situation-specific ones. Important among the latter are the duty to take act in accordance with the main purpose of the Strategy Group, namely to "promote and protect the health and well-being of *Te Awa Tupua*";[2757] to administer *Te Korotete*,[2758] to maintain the *Te Awa Tupua* register;[2759] to fulfill landowner functions;[2760] and to "enter into (…) relationship documents".[2761] In the execution of its

---

[2749] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 32(1)(g)–(j).

[2750] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 32(2).

[2751] See *supra* note 2728.

[2752] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 20. In making the appointment, the nominators must have "regard to the ability of the 2 nominees jointly to fulfil the purpose and perform the functions of Te Pou Tupua": *ibid*, s 20(6)(b).

[2753] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 18(3).

[2754] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 19(1)(a).

[2755] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 19(1)(b).

[2756] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 19(1)(h): this is implied by "relationship documents", though the provision in question would appear to be more encompassing. Also see *ibid*, s 21(2) on the liabilities of *Te Awa Tupua*.

[2757] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 19(1)(c).

[2758] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 19(1)(e). *Te Koretete* is a AUD 30 million fund created in terms of the Settlement Agreement with the objective of supporting the "health and well-being" of Whanganui River: see Anne Salmond, "Tears of Rangi: Water, Power, and People in New Zealand" (2014) 4:3 HAU: Journal of Ethnographic Theory, 285 at 286.

[2759] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 19(1)(f). This Register documents natural resource consents relating to the use of water from the Whanganui River, or the effecting of discharges into the River: see *ibid*, Sched 6: Te Awa Tupua register of hearing commissioners, s 3(b).

[2760] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 19(1)(d).

[2761] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 19(1)(h).

functions *Te Pou Tupua* has two positive duties and three capacities. Its positive duties relate to (1) actions that are in harmony with the best interests of *Te Awa Tupua* and the four core values ensconced in the *Tupua Te Kawa*;[2762] and (2) measures calculated to recognize the inalienable connection between the pertinent *iwi* and *hapū* and *Te Awa Tupua*.[2763] The capacities relate to matters where *Tupua Te Awa* is concerned and pertain to public reporting;[2764] engagement with bodies, agencies and other decision-makers;[2765] and participation in statutory processes.[2766] As is usual with the representatives of juristic persons, *Te Pou Tupua* members do not incur personal liability for actions or omissions that relate to their representative capacity, provided that they act in good faith and that such conduct is *intra vires*.[2767]

Te Pou Tupua is supported in different ways by two bodies: the trustees provide it with administrative support,[2768] while an Advisory Body by the name of *Te Karewao* is responsible to advise and support it in the substantive sense.[2769] *Te Karewao* is made up of three persons: one each appointed by the trustees, the *iwi* (with the exclusion of Whanganui *iwi*) and the pertinent local authorities.[2770]

Having considered the legal mechanisms employed by the Act, we proceed to contemplate the role played by Māori cultural values, customs and identity in the selection of these mechanisms.

[2762] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 19(2)(a).

[2763] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 19(2)(b).

[2764] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 19(2)(c).

[2765] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 19(2)(d).

[2766] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 19(2)(e).

[2767] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 21(1).

[2768] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 22. Unless otherwise agreed, this includes support for purposes of administering the *Te Awa Tupua* Fund (*Te Koretete*): *ibid.*

[2769] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 27(1).

[2770] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 28(1). *Te Pou Tupua* may invite other persons to assist it, but such persons do not become part of *Te Karewao*: *ibid*, s 28(3)-(4).

7.6.4.2 Māori Cultural Values, Customs and Identity

The text of this Act is much richer than I can do justice to in the limited space at my disposal. Instead of embarking on an exhaustive exercise, I will content myself with pointing out five accommodative measures contained in the *Act*.

First, at the conceptual level, accommodations range from the unusually broad definitions of river 'bed'[2771] and 'Whanganui River'[2772] to the innovative form of hybrid juristic personality afforded to the River.[2773]

Second, and in conjunction with the first point: there is the key role that the 4 core Māori values – the *Tupua Te Kawa*– play in the structure of the Act. We have already touched on these.

Third, the Act serves as a measure of Crown redress to the Whanganui Iwi for various wrongs committed against the River, as well as for its failure to consult the Iwi or give credence to their grievances over the years,[2774] thereby failing to "recognize, respect, and protect the special relationship of the *iwi* and *hapū* of Whanganui with the Whanganui River."[2775] As such, the Act sets

---

[2771] Thus the river "bed" is defined in a broader manner than the parallel definition of "bed" in the Natural Resource Management Act of 1991: both refer to "the space of land that the waters of [the river] cover at its fullest flow without overtopping its banks", but the Whanganui river bed additionally comprises "the subsoil, the plants attached to the bed, the space occupied by the water, and the airspace above the water": *Resource Management Act 1991* (No 69 of 1991), s 2: "bed"; *Whanganui River Claims Settlement Act*, *supra* note 2704, s 7: "bed".

[2772] Apart from the body of water that constitutes the river itself within the Whanganui River catchment area as defined, it is deemed to comprise all tributaries, streams and other natural watercourses that flow into the River within such catchment area, as well as all lakes and wetlands that are connected with any of the aforementioned in the catchment area – whether continuously or intermittently: *Whanganui River Claims Settlement Act*, *supra* note 2704, s 7: "Whanganui River". The *Resource Management Act*'s definition also envisages natural watercourses, but additionally poses a "flow" requirement (whether continuously or intermittently), thus making for a narrower definition: *Resource Management Act 1991*, *supra* note 2704, s 2: "river".

[2773] Anne Salmond points out that there have been other global instances where rivers were treated as being living entities, such as a recent Ecuador judgment that required a provincial government to remedy damage to the Vicamba River on the basis of a provision in the Ecuadorian Constitution that recognizes *Pacha Mama* (mother nature) as a living being: Salmond, *supra* note 2704 at 286.

[2774] See *Whanganui River Claims Settlement Act*, *supra* note 2704, ss 69(5); 69(7).

[2775] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(8).

out a detailed list of acknowledgements[2776] and apologies[2777] by the Crown in Subpart 1 to Part 3. Among these acknowledgements are the fact that *Te Awa Tupua* is an indivisible and living whole;[2778] that it has both physical and metaphysical elements;[2779] the intrinsic connection between the River and the Whanganui *iwi* and *hapū*;[2780] the crucial role that the River plays as a "source of physical and spiritual sustenance" for the Whanganui *iwi* and *hapū*;[2781] and that

> to the Whanganui Iwi the enduring concept of Te Awa Tupua –the inseparability of the people and the River– underpins the responsibilities of the iwi and the hapū of Whanganui in relation to the care, protection, management, and use of the Whanganui River in accordance with the kawa and tikanga maintained by the descendants of Ruatipua, Paerangi, and Haunui-a-Paparangi.[2782]

Among the wrongs committed by the Crown are various measures taken without consulting the Whanganui *iwi* and *hapū*, or despite their opposition, such as taking over control and management of the River, as well as appropriating ownership of the River bed[2783] and of 6,700 acres of riparian land owned by Whanganui Iwi along the River;[2784] the establishment and operation of the Tongariro Power Scheme[2785] that diverted the headwaters of the Whanganui River in a manner which is inconsistent with the Whanganui *iwi* and *hapū*'s *tikanga* and thus has adversely affected the Whanganui Iwi's cultural and spiritual values;[2786] the extraction and sale of gravel and shingle from

---

[2776] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69 ("Acknowledgements").

[2777] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 70 ("Apology").

[2778] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(1).

[2779] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(1).

[2780] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(3).

[2781] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(4).

[2782] *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(2).

[2783] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(7)(b).

[2784] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(7)(c).

[2785] See *Whanganui River Claims Settlement Act*, *supra* note 2704, ss 69(5)(c); 69(15).

[2786] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(16).

the River bed;[2787] clearance of the River for navigation purposes[2788] – a measure that has involved the removal of food sources and objects sacred to the Whanganui Iwi (*pā tuna*[2789] and *utu piharau*,[2790] constituting *taonga*);[2791] the conviction of members of the Whanganui Iwi who took steps to protect the sacred objects (*taonga*) in question;[2792] and the consequent decline in customary fishing practices, which has led to a loss of *mātauranga*.[2793] Significantly, the Crown acknowledges that the aforesaid practices cumulatively hampered the exercise of the Whanganui *iwi* and *hapū*'s customary rights in relation to the River, which, in turn, diminished the expression of their *mana*.[2794] They also constituted a breach of the Treaty of Waitangi and its principles,[2795] and caused "significant prejudice" to the Whanganui *Iwi*.[2796]

Fourth, the Act serves to bring closure to the longstanding litigation between the Iwi and the Crown. To this end it both records the customary legal provision –full and final settlement of all historical claims–[2797] and a conciliatory provision in keeping with Māori values.[2798]

Fifth, it contains four important measures specifically intended to accommodate Māori values, customs and identity. The first is a detailed exposition of the relationship between the Whanganui Iwi and the Whanganui River as *Te Awa Tupua*;[2799] the second is to be found in the formal

---

[2787] See *Whanganui River Claims Settlement Act*, *supra* note 2704, ss 69(7)(a); 69(10).

[2788] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(7)(a).

[2789] Eel weirs: see *Whanganui River Claims Settlement Act*, *supra* note 2704, s 75(d), "authorised customary activity".

[2790] Lamprey weirs: see *Whanganui River Claims Settlement Act*, *supra* note 2704, s 75(d), "authorised customary activity".

[2791] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(9)(a-b).

[2792] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(9)(c).

[2793] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(9)(d).

[2794] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(13).

[2795] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(12).

[2796] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(11).

[2797] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 87 ("Settlement of historical claims final").

[2798] See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 69(18–19).

[2799] The relationship *in casu* is sacred ("a *taonga*") to the Whanganui Iwi, recognizing the River as *Te Awa Tupua* is an expression of their *tikanga* and *mātauranga*, and the Whanganui Iwi has custodial caretaker (*tāngata tiaki*) responsibilities

recognition for purposes of the *Resource Management Act 1991* of the trustees as having a distinct interest in *Te Awa Tupua* that goes beyond that of the general public;[2800] third, there are the Act's detailed provisions relating to authorized customary activities in and on the River;[2801] and finally, the *Act* substantially concludes with the Crown's acknowledgement of the Whanganui Iwi's statement on the significance of the river rapids –*Ngā Ripo o Whanganui*–[2802] as set out in Schedule 8 to the *Act*.[2803]

7.7 Drawing Conclusions

What this study of Aotearoa New Zealand has shown us, are the possibilities inherent in a flexible and pragmatic approach. Ten conclusions are apposite in this context.

First, the Whanganui River settlement case study has illustrated the extent to which the connection with their ancestors has present-day value to Māori *iwi*. This reminds us that their perception of time and history is not necessarily linear in the western sense. It would be wise to take that into account in matters that concern them.

Second, what might appear to Westerners to be the bearing of old grudges –for instance tales of how an ancestor was harmed– may be presently pertinent to Māori because of the twin fact that it is intrinsically irrelevant to them whether an event took place in the immediate or remote past, and their ongoing connection with the ancestors through *whakapapa* (genealogy). Such ancient gripes may therefore still constitute conflicts in need of resolution.

---

concerning *Te Awa Tupua*'s *mana* and *mouri*, as well as the *mātauranga* underpinning such *mana* and *mouri*: see *Whanganui River Claims Settlement Act*, *supra* note 2704, ss 71(1–2).

2800 See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 72.

2801 See *Whanganui River Claims Settlement Act*, *supra* note 2704, Part 3, Subpart 3 ("*Rangahau e Tāne, miroi e Tāne*– Authorised customary activities"). These include *inter alia* the transportation of human remains, tribal games, baptisms and cleansing ceremonies, fishing practices and regattas: *ibid*, s 75, "authorised customary activity". Also see *ibid*, Sched 7 ("Further provisions relating to authorised customary activities.")

2802 See *Whanganui River Claims Settlement Act*, *supra* note 2704, s 82.

2803 See *Whanganui River Claims Settlement Act*, *supra* note 2704, Sched 8 ("*Ngā Ripo o Te Awa o Whanganui*").

Third, potentially the most important lesson to take away from the perspective of the Indigenous inhabitants of the other jurisdictions is the extent to which identity politics has paid dividends in the context of Aotearoa New Zealand. We saw in this Chapter that despite internal diversity and dissention, a concerted "Māori Nation" building exercise since the 1970s has formed the background to their land loss-based self-determination aspirations. This, coupled with a good dose of pragmatism and flexibility on the part of the Māori tribes, has seen the Crown engage directly in settlement negotiations with various *iwi*, in a process that requires a certain measure of compromise from both parties. I postulate that identity politics has been functional, for the inherently reductive exercise that accompanies it has presented them with the stable, united front that has allowed jurists to make the abstractions required for purposes of legal certainty.

Fourth, the Māori's pragmatism and flexibility are illustrated by their non-insistence on the restitution of non-Crown land,[2804] and the creativity inherent in solutions such as the subsequent "gifting" to the people of Aotearoa New Zealand of a national park that has been awarded to them.[2805]

Sixth, this also speaks to the notion of compromise, which here appears to be the art of giving to the other party that which he desires most dearly without giving up that what is of cardinal importance to oneself. Thus settlements typically include a Crown apology to the ancestors, a transfer of land and the payment of a compensatory sum of sufficient magnitude to provide "an economic base for the tribe for their future financial security".[2806] At the same time, the Crown does

---

[2804] During the negotiating phase, the parties agree on what would be both fair and possible in the circumstances, and the claimants are furnished with a list of Crown-owned lands from which they may select: see Magallanes, *supra* note 2515 at 549–552.

[2805] For instance, as part of the resolution of the Ngai Tahu claim, Aotearoa New Zealand's highest mountain –part of a national park– was transferred to the Ngai Tahu. The Ngai Tahu subsequently gifted it to the Crown "on behalf of the people of New Zealand", which indicates that the transfer had been purely symbolic in nature: see Magallanes, *supra* note 2515 at 556 and the *Ngai Tahu Claims Settlements Act 1998*.

[2806] Magallanes, *supra* note 2515 at 551.

not have to enter into political headwaters by dispossessing third party land, or to restrict its natural resource interests.[2807]

Seventh, the notion of identity politics is an important one, for there are reconstruction/retribalization efforts underway in all three the other jurisdictions. The question is to what extent it is possible to play identity politics and not fossilize the community's culture (and possibly spirituality). The Māori seem to have largely managed this through a conjointly pursued cultural reconstruction drive –I am referring here to the measures taken to revitalize Māori as a language such as "language nests", the Māori television station, the language's official status, etc.

Eighth, the qualities of pragmatism, flexibility and willingness to compromise on some points might well be crucial to success, notably when combined with a strategy that does not seek to isolate the sacred site portion from the remainder of the claim. That way, compromise becomes possible on a non-essential matter. In this sense, it is striking that Māori sacred sites are not dealt with in isolation here– they form part of a broader claim,[2808] and the notion of Māori spirituality is not truly compartmentalized from Māori culture or Māori way of life.[2809] It is clearly not being equated to religion –by the courts or by Māori– and no attempts are made to rely on freedom of religion or other minorities' protection provisions. It is equally striking that there is a consensus that Māori culture is a dynamic one, and that they are not opposed to development,[2810] even though they may have a different underlying value structure.[2811]

[2807] See Magallanes, *supra* note 2515 at 551: natural resources are not normally available for inclusion in compensation packages.

[2808] See e.g. *Manukau*, *supra* note 2513; *Haukina Development Trust*, *supra* note 2696.

[2809] Thus, in *Haukina Development Trust*, *supra* note 2696, the High Court overturned a ruling of the Water Board that "some Maori concerns are cultural and spiritual; they go beyond the mere physical environment. We have concluded that there is nothing in the Act which will allow us to take those purely metaphysical concerns into account" (at 72), finding that "on a proper interpretation of section 24(4) Maori spiritual and cultural values cannot be excluded from consideration if the evidence establishes the existence of spiritual, cultural and traditional relationships with natural water held by a particular and significant group of Maori." (at 91).

[2810] See e.g. *Manukau*, *supra* note 2513, para 7.2 at 97.

[2811] See e.g. *Manukau*, *supra* note 2513, para 9.3.5 at 143–144.

Ninth, the importance of language to the Māori is honoured through the use of Māori terms in the *Whanganui River Claims Settlement Act* without seeking to translate or define them. Translation attempts, we have seen, can be dangerous, because of Māori language's abstract and conceptual nature, and because of embedded cultural differences. Similarly, not defining a Māori term used means not fossilizing or reifying it.

Tenth, the *Settlement Act* offers a clear illustration of the notion held by most tribes that *tino rangatiratanga* comes down to local control for local resources.

I would suggest that with the *Whanganui River Claims Settlement Act* Aotearoa New Zealand has opened up a new route. This is neither because their solution is perfect –it is cumbersome, complex, and complicated, to say the least– or because it is unique –other jurisdictions as far apart as Ecuador and India have extended rights of nature to rivers by treating them as living beings–, but rather, I would suggest, because it is bold and because it is brave.

It is bold by virtue of the priority given to Māori notions in the very structure of the Act; it is brave, since this employ of Indigenous notions sees it stepping outside of the circle of its common law peers.

Chapter 8: Creating Context-Sensitive Frameworks

> Continuer à creuser un puits à un certain endroit où il apparaît de plus en plus clairement qu'il n'y a pas d'eau n'est pas raisonnable. Même si c'est plus facile car toute l'infrastructure est déjà en place, le lieu défini, le travail entamé, etc. Il faut avoir le courage dans certaines conditions d'aller creuser ailleurs pour avoir une chance de tomber sur de l'eau – et ce choix n'est pas uniquement un choix intellectuel. Il est existentiel, vital.[2812]

8.1 Introduction

This work had as genesis conflicting worldviews, meanings lost in translation, and cultural clashes, said I in the Introduction. Having traced the contours of a number of these, how do we then proceed?

In the Introduction I stated that I had a twin objective with this thesis: (1) first, to concretely consider to what extent the interests of Indigenous peoples in their sacred sites are presently protected in four selected jurisdictions by means of black letter law; and (2) then, to explore how a more nuanced grasp of Indigenous values, customs and identity in conjunction with the norms of international law could be integrated with the provisions of such black letter law in a multifaceted, layered approach to construct an improved, context-sensitive framework for the protection of Indigenous sacred sites in each of the jurisdictions under consideration. By "context-sensitive framework" I referred to a framework aligned with the country's legal culture, Indigenous values, customs and identities found within the boundaries of that jurisdiction, and such international norms as may be potentially pertinent in that state.

These are the challenges I now return to face.

[2812] Eberhard, *Droits de l'homme*, *supra* note 195 at 15.

8.2 How the Thesis Structure Fits into the Research Objectives

Chapter 1 constructed the theoretical framework. It introduced the research question (1.1), explained that my original contribution to science is to be found in the fact that I approach the research problem from a simultaneously local and global angle (1.2.1) and clearly delineated the research boundaries, notably the fact that while I would be drawing on other disciplines such as legal anthropology, I would not be engaging in actual field work (1.2.2). Next, it introduced and clarified the sense of the three key concepts employed in this thesis: "natural resource development projects" (1.3.1), "Indigenous peoples (1.3.2), and "sacred sites" (1.3.3). It thus transpired that I had a broad understanding of both "natural resources" and "developments" as concepts; that there are different meanings attached to being Indigenous, depending on whether the identification is being done from a personal, State or an International law perspective; and that finding a single, comprehensive definition that circumscribes all sacred sites in all of their varieties without being embarassingly vague is a dizzying prospect due to their sheer range and scope. I also introduced the three main axes around which this thesis is constructed: legal anthropology/Indigenous theory (1.5.1), legal comparison between 4 domestic legal systems (1.5.2); and International law (1.5.3). In the process I unveiled three paradigms that constitute the lenses through which I apprehend the four domestic legal systems in question: empathy for alterity (1.5.2.2.1), the appreciation of similarity and difference (1.5.2.2.2), and the role of context and culture (1.5.2.2.3). I also elucidated the cultural approach that I would be taking to legal comparison (1.5.2.3.1); clarified that I would be undertaking genealogical comparison (1.5.2.3.2) because of my interest in differences between legal systems deriving from the same legal family; indicated that I would be doing micro comparison in a macro context (1.5.2.3.3) and that while my primary focus is the internal one of a jurist on the law, I take various external perspectives in following the cultural approach as outlined, and in the course of the legal comparison undertaken (1.5.2.3.4). I then defined and motivated the three criteria on which I based my choice of legal systems for comparison –legal family/tradition; constitutional culture; and relationship with and approach to Indigenous peoples– (1.5.2.4) and clarified what my intentions were and were not with the desktop studies employed (1.5.2.5). Finally, I made six preliminary points with relation to International law that would be of importance in the context of the thesis as a whole (1.5.3). Chapter 1 therefore did not speak to either of the two objectives directly, but laid the groundwork for addressing both of them.

Chapter 2's structural role is to provide the building blocks for the first part of the second objective, *i.e.* "*a more nuanced grasp of Indigenous values, customs and identity*". The Chapter unfolds in three parts. First, it identifies three key themes that form the *fil conducteur* of the thesis: (1) romanticization, reductionism and essentialization (2.2.1); (2) identity politics (2.2.2); and (3) authenticity and representation (2.2.3). Second, it considers the intimate relationship among three dimensions of the relationship between culture, religion and identity: (1) the importance of cultural continuity for Indigenous identity (2.3.1); (2) the link between Indigenous culture and religion (2.3.2); and (3) the identitary role of sacred sites in Indigenous culture and religion (2.3.3). Third, it explores Indigenous paradigms in the geographical areas that correspond to the legal jurisdictions under comparison: North America, Australia and New Zealand. Because of the arbitrary nature of the border between the United States and Canada (seen from an Indigenous perspective), no artificial distinction is made between the Indigenous peoples of these two jurisdictions. In this part, three main themes are explored: (1) Indigenous conceptions of time (2.4.1), (2) space (2.4.2) and (3) the sacred (2.4.3). Two aspects are considered in dealing with space: (1) the meaning of a sense of place for the communities in question (2.4.2.1), as well as (2) the link between land and religion for each of them (2.4.2.2). Insofar as Indigenous conceptions of the sacred are concerned, four facets are investigated: (1) issues of cultural cross-translation (2.4.3.1); (2) translation and universalization (2.4.3.2); (3) the role of ritual; and (4) secrecy about the sacred.

Chapter 3 provides the base material for the next portion of the second objective: "*in conjunction with the norms of international law*". In a sense, the issue of state relations with Indigenous peoples and natural resources comes full circle in this Chapter: we commenced by looking at colonialization and the doctrine of discovery as justified in International law terms (3.2.2), contemplated changing notions of state sovereignty (3.2.3.1), self-determination rights of Indigenous peoples (3.2.3.2) and the impact of the doctrine of permanent state sovereignty over natural resources (3.2.4.). Next, we paused to note the issue of individual and collective rights as complicating factor (3.3.1.2) before considering three aspects of international human rights law that are particularly pertinent to the debate at hand: (1) Indigenous rights (3.3.2), specifically in the form of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) (3.3.2.1.1); (2) two forms of cultural rights (3.3.2.2), namely the right to take part in cultural life (Art 27, ICCPR) (3.3.2.2.1) and cultural heritage rights as per the UNESCO instruments (3.3.2.2.2); and (3) the jurisprudence of international human rights

bodies such as the Inter-American Court of Human Rights, the European Court of Human Rights, and the African Court on Human and Peoples' Rights (3.3.3).

Chapters 4 thru 7(Canada, United States, Australia, New Zealand) then directly deal with objective 1 as formulated: "*to concretely consider to what extent the interests of Indigenous peoples in their sacred sites are presently protected in four selected jurisdictions by means of black letter law*". In each case some preliminary conclusions are drawn regarding the effectiveness of present protection mechanisms, for the response to the first objective forms the third element that needs to be integrated along with the elements in Chapters 2 and 3 "*in a multifaceted, layered approach to construct an improved, context-sensitive framework for the protection of Indigenous sacred sites in each of the jurisdictions under consideration*." That is the main purpose of this Chapter 8.

Chapters 4 thru 7 follow a similar structure, so as to facilitate comparison between these systems in Chapter 8. Each kicks off with a non-exhaustive timeline intended to contextualize the discussion that follows (4.2; 5.2; 6.2; 7.2). Next follows an outline of the system's legal *mentalité* (4.3; 5.3; 6.3; 7.3) contemplated from the three angles that were identified in Chapter 1 as the bases for their selection: (1) legal family/legal tradition; (2) constitutional culture; and (3) approach to and relationship with Indigenous peoples. I then summarize the findings of Chapter 3 regarding such jurisdiction's approach to International law (4.4; 5.4; 6.4; 7.4). This brings me to the legal crux of the Chapter at hand: its legal response to Indigenous sacred sites in the pursuit of natural resource development projects (4.5; 5.5; 6.5; 7.5). Here I contemplate the mechanism(s) that appear to me to be the most appropriate for sacred site protection purposes. I do not pretend to deal with every possible mechanism: I do not have space for that. In the case of New Zealand, I even forsake a discussion of the regular heritage protection mechanism in favour of a much more promising legal avenue that seems to be the preferred route of late. These are strategic choices made while keeping an eye on the ultimate goal – meeting objective 2 as detailed in Chapter 8.

8.3 Addressing the Thesis Objectives

8.3.1 Objective 1

The first objective was "to concretely consider to what extent the interests of Indigenous peoples in their sacred sites are presently protected in four selected jurisdictions by means of black letter law". This is how it played out in the four domestic law chapters:

8.3.1.1 Canada

The Canadian chapter (Chapter 4) gave rise to fourteen main conclusions:

First, Indigenous sacred sites may ground forms of worship for which no physical structures are needed or that require the practice to be carried out at a different location, lest the site be desecrated. This concretizes in two ways in Western courts: (1) in the absence of structures to protect, courts are less likely to consider a sacred site as constituting a 'serious' religious space worthy of intervention; and (2) faced with religious freedom-based claims from Indigenous groups, the courts are less likely to translate these into valid demands for maintaining sometimes extensive third party spaces in a pristine space for the purposes of religious practice that is not even perceivable.

Second, the *Ktunaxa Nation* case study demonstrates the dangers of pleading sacred site cases on a freedom of religion basis in Canada as opposed to a section 35 Aboriginal right. It raises the question whether a sacred site issue –where the parties in principle have an absolutist position- can really be argued as a Charter right, when the Charter is premised on the notion of balancing of interests and compromise. While the Supreme Court has yet to rule in this matter, it may turn out to be quite problematic.

Third, in the facts of *Ktunaxa Nation* we see another difficulty that often complicates sacred sites disputes: overlapping claims staked by different Indigenous Nations. How will this be addressed satisfactorily if the parties each have an absolute position, one *pro* and the other *contra* development?

Fourth, *Ktunaxa Nation* illustrates a new international trend, also recently seen at Standing Rock, *viz* where environmental and other activists join forces with Indigenous activists against a development

on the basis that stopping it is in their mutual interest. *Ktunaxa Nation* was particularly interesting in that it united parties from opposite sides of the spectrum, such as environmental activists and trappers in the same cause.

Fifth, *Ktunaxa Nation* provides an example of how strongly natural resource development projects speak to governments: although 79% of the Invermere population had voted against the development in a local referendum, the provincial government simply went ahead – to the extent of incorporating a phantom council – Jumbo Glacier, population zero, with its own mayor, provincial budget, and voting powers.

Sixth, it is doubtful whether the Canadian legal framework is at presently equipped to give a fully nuanced consideration to the protection of Indigenous sacred sites. In the *Ktunaxa Nation* Supreme Court hearing, Justice Brown pointed out the analytical difficulties involved in dealing with a freedom of religion claim that really is tied to an Aboriginal claim in land use. This forms a jarring contrast with the more holistic Indigenous view that sees land and spirituality as being essentially intertwined.

Seventh, in Canada, sacred site protection claims -whether under section 2 (a) or section 35- are liable to encounter the core issue that there must be compromise in a system that does not rank human right claims in an order of preference (section 2(a)) and that considers compromise as being key to consultation (section 35).

Eighth, there are fundamental differences between Indigenous and Western notions of sacred sites. Three things bear pointing out: (1) Indigenous notions of their 'sacred sites' may not be easily translatable to Westerners, in that the terms 'sacred sites' is either too narrow or too generic. It makes no provision for a gradation in terms of various degrees of sacredness, when we know that all Indigenous sacred sites are not considered to be sacred to the same degree. It is completely inadequate to portray the notion of sacred geographies, as discussed in Part I. (2) To most Westerners, sacred sites are mostly relationally sacred, whereas Indigenous peoples mostly consider their sites to be intrinsically sacred. This means that Western churches can be consecrated and deconsecrated, while Indigenous sacred sites cannot be so relocated because they are of necessity tied to the landscape. (3) Westerners mainly associate the notion of sacred sites with structures

erected on land, while Indigenous peoples mostly refer to the landscape itself. It is therefore dangerous to use church analogies in the course of sacred sites litigation.

Ninth, the *Site C* case study demonstrates the problems that are bound to arise in sacred site endeavours when it comes to the infringement of Aboriginal or treaty rights: in both instances the duty to consult is triggered. The objective of this duty being reconciliation, parties are required to negotiate in good faith and in a spirit of compromise. Here, the Indigenous parties were criticized as being inflexible for failing to negotiate even though it was clear that the State had a complete inability to accommodate their concerns. The question must necessarily be posed whether this amounts to equal negotiation and compromise.

Tenth, sacred sites do not invite compromise. They are an absolute, meaning that they bring about veto positions. These are not reconcilable with the duty to consult and accommodate as understood in Canadian jurisprudence and thus section 35(1) does not at present offer any concrete form of protection to Indigenous sacred sites. Should the Canadian State make good on the federal Government's undertaking to fully implement UNDRIP as per the recommendations of the Truth and Reconciliation Committee, the FPIC requirement may substantially change the rules of the game.

Eleventh, the discussion of the *Site C* case study points to fundamental tensions in Canada's relationship with and treatment of the Indigenous peoples who reside within its borders. If they are expected to negotiate about what they regard as their rights and they do not find themselves in a substantively equal bargaining position in terms of bargaining power or final say, is it really to be expected that these underlying tensions will dissipate and vanish?

Twelfth, it is clear that insofar as sacred sites are concerned, negotiation is axiomatically problematic – which renders the whole consultation and accommodation route very difficult as a potential mechanism for dealing with the protection of Indigenous sacred sites. The notions of compromise and flexibility that are inherent to the *Canadian Charter*'s rights protections also render section 2(a) problematic as balancing is an integral part of the limitation exercise.

Thirteenth, I am therefore not convinced that either section 2(a) (freedom of religion) or section 35(1) (aboriginal and treaty rights) offers a sound mechanism for effecting Indigenous sacred site

protection in Canadian law in its present guise. There simply are too many problems of cultural cross-translation when it comes to the way in which the law and the courts conceive of Indigenous sacred sites, and, well-intentioned as it may be, Canadian Aboriginal law all too often still reflects reductionist and essentialized views.

Fourteenth, from the discussion of the *Ktunaxa Nation* and *Site C* desktop studies, two things are clear: first, that the Canadian Courts and the Indigenous community in question have not to date found a mutually agreed cultural paradigm from which to approach the protection of Indigenous sacred sites, and second, that, to date, the Canadian courts have given little consideration to foreign and international law when dealing with sacred site cases.

8.3.1.2 United States

Fourteen main conclusions have equally been drawn in the US chapter (Chapter 5):

First, only federally recognized tribes enjoy federal protection of their sovereignty, religion and culture. As the *Winnemem Wintu* case study has illustrated, Native American tribes who do not enjoy such federal recognition find themselves in a legislative no-man's-land where they are not considered to be an interested party for federal consultation purposes; they cannot avail themselves of the protections of religious federal legislation such as AIRFA, the RFRA , RLIUPA and Executive Order 13007; of the cultural protections offered by NAGPRA, ARPA and NHPA, or of the environmental protections of NEPA; and they do not have standing to take administrative decisions that affect their sacred sites on review under APA. They are entirely dependent on the goodwill of the National Parks Authority to grant them use permits to undertake their ceremonies where their sacred sites fall in national parks. Strictly speaking, their chiefs and spiritual leaders are not entitled to possess golden eagle feathers – since they are not a federally recognized Indian tribe, they cannot really apply for the requisite permit. The fact that Caleen Sisk, spiritual leader to the Winnemem Wintu was granted such an eagle feather permit, points to the unequal application of the BGEPA.

Second, neither can Native American tribes –whether recognized or not– rely on the freedom of religion guarantee in the first Amendment to the US Constitution as the law now stands, due to the

damaging precedent in *Lyng* that effectively ranks the federal government's property rights higher than the religious rights of Native Americans to the protection of their sacred sites.

Third, building on Kuppe's argumentation[2813], the US Courts' treatment of First Amendment claims is indicative of a strong cultural bias in that there is a strong underlying Judeo-Christian undercurrent: (1) There is a strict division between religion and culture that is in conformance with the church/state divide in Western thought, but that fails to capture the holistic nature of Indigenous spirituality; (2)Western religious traditions have a commemorative nature, versus the Indigenous belief that nature and all of its parts fulfil a harmonizing, balancing role; (3) The worst earthly consequence of the breach of a Western religion is that it constitutes a transgression, whereas non-conformance with the prescriptions of Indigenous spiritual tenets may encompass physical danger to human and other beings due to the disturbance of balance and harmony; (4) Western religions embrace the notion of proselytism of a revelatory event, which is the *raison d'être* of the Establishment Clause – Indigenous spirituality does not proselytise but focusses on communal involvement and the renewal of relationships with sacred sites, meaning that it is inappropriate to raise Establishment challenges to religious accommodations that are afforded to Native Americans; (5) Western religions are not location-bound and can be practised anywhere, while Indigenous religions depend on particular spatial and socio-cultural contexts; (6)There is an inherent conflict between the Judeo-Christian notion of religion as a revelatory event of which word is to be spread versus the intensely personal and sacred aspects of Indigenous spirituality that frequently prevent detailed disclosures in respect of sacred sites.

Fourth, an overview of the Native American sacred site jurisprudence has demonstrated a marked reluctance on the part of the US courts to deviate from the dictates of the legislature – or even to take a proactive role in defining Native American rights. For instance, although the *Tribe List Act* clearly foresees the possibility that a court may declare a given tribe to constitute a federally

[2813] See above at 5.5.4.1.1 ("Freedom of Religion: First Amendment").

recognized tribe, the courts have consistently deferred to the authority of legislature and Congress in this regard.

Fifth, American Indian law dictates the lives of Native American people in great detail. A Native American person can only be "Indian" for purposes of the various pertinent laws if he/she belongs to a "federally recognized tribe", and "Indian country" determines both a federally recognized tribe's area of tribal jurisdiction and its tribal territory. All of this is very much at odds with the notion of land and spirituality being interrelated – the impact of which is worrisome when one considers the identitary effect of sacred sites for Native American people.

Sixth, the *Oak Flat* case study has demonstrated two structural issues with Indigenous sacred site protection under US law: (1) there is no protection forthcoming when the sacred site is located on third party private land; and (2) it is possible to manipulate the US legislation in such a way as to turn a previously protected federal site into private property with the authority to exploit even in the face of vociferous opposition, provided that the political will to do so is there.

Seventh, the US legislative framework is extremely detailed and it is structured such that a sacred site protection effort would have to be framed in one of four categories: (1) sites that are imbued with sacredness by reason of spiritual beliefs or ceremonial practices; (2) sites where cultural keystone species or sacred plants or medicinal herbs that are key to spiritual or cultural ceremonies are found; (3) historically important sites; or (4) graves and graveyards. Which category it falls into, will determine the legislative provisions that govern it.

Eighth, a survey of the US jurisprudence indicates that Native American sacred sites have been impacted a great deal by tourism activities, natural resource development projects, or a combination of the two. Tourism cases often concern the management of state parks –*Crow* dealt with Bear Butte State Park; *Bear Lodge* dealt with a voluntary climbing ban of Devil's Tower; *Wilson* was concerned with the manufacture of snow from waste water on the San Francisco Peaks in Arizona; *Access Fund* comprised a rock climbing ban on Cave Rock–; natural resource developments can take the form of infrastructure projects –*Lyng* in respect of the G-O Road in the "High Country"– or mining activities –*Havasupai*, regarding the proposed location of the Grand Canyon Uranium Mine in the Kaibab National Forest; *Cholla* regarding the mining of Woodruff Butte–; the joint versions often involve reservoir building and flooding activities in the context of big dam construction –the

Winnemem Wintu case study involves Shasta "Lake"; *Badoni* dealt with "Lake" Powell and the Rainbow Bridge National Monument; *Sequoyah Valley* comprised the Tellico Dam. As was demonstrated in the discussion of these cases above, the majority of them by far tend to go against the Native American tribes concerned.

Ninth, jurisprudence demonstrates that where Native American tribes are not willing to make detailed and specific disclosures relating to sacred sites concerns –and we have seen that secrecy is an issue with the sacred– they are blamed for being 'uncooperative' and they are denied the protections of the legislation that they seek to rely on, be it in the domain of *Executive Order 13007* employed in conjunction with the FLPMA, or NEPA.

Tenth, sometimes all Native American spirituality is conflated into one, for instance in *Havasupai*,[2814] where the Court consulted experts on "American Indians in general" to learn more about specific Hopi and Havasupai sacred sites in circumstances where the tribes themselves were tight-lipped due to secrecy requirements.

Eleventh, sacred site protections in the context of the US heritage legislation assume that these are places ("properties") associated with dead white males who are historically deemed to be important.

Twelfth, sacred sites that have a demonstrable historical dimension –such as massacre sites– are better protected under the Section 106 process of the NHPA than under legislation aimed at offering religious protections. In fact, it would be important to downplay religious dimensions of the site, so as to avoid Establishment challenges. However, a listing on the Register of Historical Places does not safeguard the site against development – it merely invokes a section 106 consultation process, meaning that the tribe will have an input, but that a formal and final decision will be made by the Keeper of the National Register in the event that the parties cannot come to agreement.

[2814] *Havasupai*, *supra* note 2056: see the discussion above at 5.5.4.2.1 ("*National Environmental Act* [NEPA]").

Thirteenth, the Standing Rock case study has demonstrated the sophisticated machinery at work in the US legislative context, together with the power of a negative precedent – in this case *Lyng*.

Fourteenth, in sum, the US federal statutory framework reveals a sophisticated legal regime that makes very little provision for cultural paradigms which diverge from its dominant underlying Judeo-Christian ethos. As the analysis of US jurisprudence has demonstrated, it is a system that has proven particularly unpliable insofar as Native American paradigmatic differences are concerned. Although the potential protective provisions are legion, their cumulative effect is not one of comprehensive sacred site protection, but rather the creation of legislative *lacunae* that simply fail to provide Native Americans with any other real option than to go along with the developmental interests of mainstream society.

8.3.1.3 Australia

In the context of Australia, four main conclusions were drawn (Chapter 6):

First, that where there is a disconnect between the law and the Indigenous communities that it purports to serve it can hardly have remarkable results, good intentions notwithstanding. It matters not whether this is due to issues that arise around translation, cultural fossilization, essentialization and reductionism or ethnocentrism.

Second, it is difficult to see a state being concerned about the identitary consequences of the destruction of Indigenous sacred sites in the absence of a strong human rights culture.

Third, though the limited scope of this thesis has not permitted for exploration of this theme, the reification of the sacred in the context of identity politics has taken on substantial dimensions in the Australian Indigenous land rights debate.

Fourth, the scope of this thesis having been limited to traditionalist Indigenous communities, there are some obvious discordances between their conceptions of the sacred –very broadly speaking– and the legal solutions on offer for the protection of Indigenous sacred sites in Australia. Four major concerns are evident:

(1) The importance of maintaining secrecy and possibly restricting information to certain (groups of) people that appears important in so many Indigenous Australian cultures, where the community in question is confronted with having to make extensive disclosures as a matter of law, either to meet an evidential burden if seeking to establish a land claim, or to comply with the registration requirements imposed by the heritage legislation of the Commonwealth and the various states. We need look no further than the Hindmarsh Island Bridge fiasco to appreciate the dangers inherent even in guarantees of protected disclosures.

(2) That, at least to traditionalist Indigenous peoples, spirituality and land are intertwined. Attempting to force Indigenous conceptions of land into a Western property paradigm that is economically-informed creates cultural mistranslations and is unfair: how can we measure whether they meet the Western criteria for property holding when it is informed by a philosophy that is foreign to their traditional way of life?

(3) The fragmentation inherent in the notion of property as a bundle of rights is problematic. This is what permits pastoralists to remain on Indigenous lands; this is what enables the State to strip them of the lands' mineral estate. If the core idea of a sacred site is that it should remain intact and undisturbed –I am not here referring to ritual maintenance by mandated custodians– it means that native title as such actually offers very little in the way of sacred site protection to the traditional owners.

(4) Similarly, given that Australia continues to use its state sovereignty as shield against pressure from international bodies such as the United Nations that it comply with its human rights obligations, and given that it continues to treat UNDRIP as an aspirational document, it means that this country lags far behind the United States and Australia in the FPIC debate. Not only is there no informed consent in the Northern Territory –home to 25% of Australia's Indigenous population– there is not even a mandatory consultation requirement when it comes to natural resource developments that may affect unregistered Indigenous sacred sites. And insofar as registered sacred sites are concerned, the Authority is requested not from the community in

question but from a statutory authority that might be pro-development[2815] and whose decisions are subject to revision by the Minister. This paints a potentially grim picture.

In sum, Australia has *Mabo* and the *Sacred Sites Act* – in its original incarnation it was one of the first pieces of *sui generis* sacred site legislation in the world. But on closer inspection it presently appears to be in need of inspiration.

8.3.1.4 Aotearoa New Zealand

What this study of Aotearoa New Zealand has shown us, are the possibilities inherent in a flexible and pragmatic approach. Nine conclusions are apposite in this context (Chapter 7):

First, the Whanganui River settlement case study has illustrated the extent to which the connection with their ancestors has present-day value to Māori *iwi*. This reminds us that their perception of time and history is not necessarily linear in the Western sense. It would be wise to take that into account in matters that concern them.

Second, what might appear to Westerners to be the bearing of old grudges –for instance tales of how an ancestor was harmed– may be presently pertinent to Māori because of the twin fact that it is intrinsically irrelevant to them whether an event took place in the immediate or remote past, and their ongoing connection with the ancestors through *whakapapa* (genealogy). Such ancient gripes may therefore still constitute conflicts in need of resolution.

Third, potentially the most important lesson to take away from the perspective of the Indigenous inhabitants of the other jurisdictions is the extent to which identity politics has paid dividends in the context of Aotearoa New Zealand. We saw in this Chapter that despite internal diversity and dissention, a concerted "Māori Nation" building exercise since the 1970s has formed the background to their land loss-based self-determination aspirations. This, coupled with a good dose of pragmatism and flexibility on the part of the Māori tribes, has seen the Crown engage directly in

[2815] Here I am simply invoking a political possibility, not casting asperities on the AAPA, whose present CEO is the respected international jurist Benedict Scambary.

settlement negotiations with various *iwi*, in a process that requires a certain measure of compromise from both parties. I postulate that identity politics has been functional, for the inherently reductive exercise that accompanies it has presented them with the stable, united front that has allowed jurists to make the abstractions required for purposes of legal certainty.

Fourth, the Māori's pragmatism and flexibility are illustrated by their non-insistence on the restitution of non-Crown land,[2816] and the creativity inherent in solutions such as the subsequent "gifting" to the people of Aotearoa New Zealand of a national park that has been awarded to them.[2817]

Fifth, this also speaks to the notion of compromise, which here appears to be the art of giving to the other party that which he desires most dearly without giving up that what is of cardinal importance to oneself. Thus settlements typically include a Crown apology to the ancestors, a transfer of land and the payment of a compensatory sum of sufficient magnitude to provide "an economic base for the tribe for their future financial security".[2818] At the same time, the Crown does not have to enter into political headwaters by dispossessing third party land, or to restrict its natural resource interests.[2819]

Sixth, the notion of identity politics is an important one, for there are reconstruction/retribalization efforts underway in all three the other jurisdictions. The question is to what extent it is possible to play identity politics and not fossilize the community's culture (and possibly spirituality). The Māori seem to have largely managed this through a conjointly pursued cultural reconstruction drive –I am

---

[2816] During the negotiating phase, the parties agree on what would be both fair and possible in the circumstances, and the claimants are furnished with a list of Crown-owned lands from which they may select: see Magallanes, *supra* note 2515 at 549–552.

[2817] For instance, as part of the resolution of the Ngai Tahu claim, Aotearoa New Zealand's highest mountain –part of a national park– was transferred to the Ngai Tahu. The Ngai Tahu subsequently gifted it to the Crown "on behalf of the people of New Zealand", which indicates that the transfer had been purely symbolic in nature: see Magallanes, *supra* note 2515 at 556 and the *Ngai Tahu Claims Settlements Act 1998*.

[2818] Magallanes, *supra* note 2515 at 551.

[2819] See Magallanes, *supra* note 2515 at 551: natural resources are not normally available for inclusion in compensation packages.

referring here to the measures taken to revitalize Māori as a language such as "language nests", the Māori television station, the language's official status, etc.

Seventh, the qualities of pragmatism, flexibility and willingness to compromise on some points might well be crucial to success, notably when combined with a strategy that does not seek to isolate the sacred site portion from the remainder of the claim. That way, compromise becomes possible on a non-essential matter. In this sense, it is striking that Māori sacred sites are not dealt with in isolation here– they form part of a broader claim,[2820] and the notion of Māori spirituality is not truly compartmentalized from Māori culture or Māori way of life.[2821] It is clearly not being equated to religion –by the courts or by Māori– and no attempts are made to rely on freedom of religion or other minorities' protection provisions. It is equally striking that there is a consensus that Māori culture is a dynamic one, and that they are not opposed to development,[2822] even though they may have a different underlying value structure.[2823]

Eighth, the importance of language to the Māori is honoured through the use of Māori terms in the *Whanganui River Claims Settlement Act* without seeking to translate or define them. Translation attempts, we have seen, can be dangerous, because of Māori language's abstract and conceptual nature, and because of embedded cultural differences. Similarly, not defining a Māori term used means not fossilizing or reifying it.

Ninth, the *Settlement Act* offers a clear illustration of the notion held by most tribes that *tino rangatiratanga* comes down to local control for local resources.

[2820] See e.g. *Manukau*, *supra* note 2513; *Haukina Development Trust*, *supra* note 2696.

[2821] Thus, in *Haukina Development Trust*, *supra* note 2696, the High Court overturned a ruling of the Water Board that "some Maori concerns are cultural and spiritual; they go beyond the mere physical environment. We have concluded that there is nothing in the Act which will allow us to take those purely metaphysical concerns into account" (at 72), finding that "on a proper interpretation of section 24(4) Maori spiritual and cultural values cannot be excluded from consideration if the evidence establishes the existence of spiritual, cultural and traditional relationships with natural water held by a particular and significant group of Maori." (at 91).

[2822] See e.g. *Manukau*, *supra* note 2513, para 7.2 at 97.

[2823] See e.g. *Manukau*, *supra* note 2513, para 9.3.5 at 143–144.

I would suggest that with the *Whanganui River Claims Settlement Act* Aotearoa New Zealand has opened up a new route. This is neither because their solution is perfect –it is cumbersome, complex, and complicated, to say the least– or because it is unique –other jurisdictions as far apart as Ecuador and India have extended rights of nature to rivers by treating them as living beings–, but rather, I would suggest, because it is bold and because it is brave.

It is bold by virtue of the priority given to Māori notions in the very structure of the Act; it is brave, since this employ of Indigenous notions sees it stepping outside of the circle of its common law peers.

8.3.2 Objective 2

The second objective was "to explore how a more nuanced grasp of Indigenous values, customs and identity in conjunction with the norms of international law could be integrated with the provisions of such black letter law in a multifaceted, layered approach to construct an improved, context-sensitive framework for the protection of Indigenous sacred sites in each of the jurisdictions under consideration."

In addressing this, the heart of the thesis, I both propose an ideal solution and make a number of pragmatic suggestions pertaining to each of the jurisdictions studied.

8.3.2.1 The Ideal Solution

> And we were both hopeful pessimists. That is, we wrote knowing that none of the stories we told would change the world. But we wrote in the hope that they would. [2824]

8.3.2.1.1 Introduction

Throughout much of the writing up of this research I was fairly certain that the internal differences between various facets of the four jurisdictions studied meant that any framework(s) proposed must necessarily be individual due to their specificity. Here, their legal culture, constitutional culture, relationship with and approach to Indigenous peoples, and their relationship with international law offer useful demonstrations of the extent of their differences despite their similarities in terms of history and legal families. It came as no small surprise to me, then, to find an ideal solution germinating in my mind.

This solution comes subject to a number of *caveats*. First, while I consider that the legal mechanism at its core is perfectly implementable in the legal systems of all four jurisdictions, it is dependent on a substantial measure of political will (in the sense of *volonté*), for there is legislation at the heart of it. Second, I do not pretend to have all the answers. I do not know, for instance, how one would safeguard it against a culturally destructive political successor with a development-at-all-costs agenda. Herein, I guess, lies the strength and the weakness of the doctrine of parliamentary sovereignty – whose ambit is very far removed from the core business of this thesis. Third, this solution is offered in the tightly constrained context of the research limitations as detailed in 1.2.2 above ("Research Boundaries"): I am neither a political scientist nor an anthropologist; I do not claim to present the Indigenous perspective; the focus of my study has been traditionalist Indigenous communities as I needed to limit its scope – I do not take a position in the Indigenous conservation/development debate as I believe that is, quite bluntly put, none of my business.

[2824] King, "Porcupines", *supra* note 420 at 92.

8.3.2.1.2 Why A Single Solution?

The solution that I advocate is inspired by the *Whanganui River* case study that I discussed in the context of Aotearoa New Zealand (Chapter 7), i.e. the notion of a sacred site being afforded its own legal personality. I wish to emphasize that I am motivating it on legal-anthropological rather than on strictly legal grounds. In other words, my argument is not that the legal systems of the four jurisdictions are quite similar and that therefore transplantation of the Aotearoa New Zealand solution is a good idea. In fact, I consider them to be quite dissimilar in terms of legal culture, constitutional culture, relationship with and approach to International peoples, and relationship with International law – these constituting the four criteria on which I based my selection of systems for legal comparison. I said in 1.5.2.2.2 above ("Similarity and Difference") that my approach differs from the "functions and purposes" of comparative law as delineated by De Cruz in one specific sense: it expressly does not form part of systematic efforts to unify and harmonize the law. I stand by that.

Instead, my argument goes as follows: when it comes to traditionalist Indigenous peoples and their sacred sites, the relationship between culture, religion and identity manifests in three key ways that we have seen as unifying themes across all four these jurisdictions when following the tracks of this research: (1) the importance of cultural continuity for Indigenous identity; (2) the interrelationship between Indigenous culture and religion, and (3) the identitary role of sacred sites. More specifically, we have investigated Indigenous conceptions of time, space and the sacred and found striking similarities *not necessarily in how the conceptions themselves correspond internally but in how they differ from the Western ones – that are very static and similar in nature*. Thus a consistent theme has been property (Western legal systems) versus spirituality/culture (Indigenous systems). We have seen how Indigenous notions of history differ from Western ones in all of these jurisdictions – and how that plays out in the courts. We have seen in every jurisdiction the damaging structural consequences that physical *displacement* of Indigenous peoples has brought on a societal level. We have seen in all of these jurisdictions that issues of cultural cross-translation arise around sacred sites; that there are problems of translation and universalization at play; that ritual plays a crucial role, and the consequences when ceremonial places disappear; and also that issues arise around secrecy about the sacred. But one system has managed a different result when it comes to the effective protection of Indigenous sacred sites – Aotearoa New Zealand. The question is why.

8.3.2.1.3 What is Wrong with All the Other Approaches?

The legal approaches followed by Canada, the United States and Australia mostly followed one of three broad classes: religious rights, cultural heritage rights and property rights. All three of these are problematic.

Endeavouring to treat such sites from a religious rights angle amounts to cultural mistranslation because it then conceives of them in the sense that Western religion would –as structures as opposed to landscapes; as relationally sacred places as opposed to intrinsically sacred ones; etc– and it tends to categorize such sites into artificial boxes as being either sacred or not, which creates havoc when viewed from the Indigenous cosmological perspective that conceives of degrees of sacredness. In addition, it is a poor angle from a legal strategy point of view, as experience has demonstrated in both Canada and the United States that property rights trump religious ones in these cases.

To treat them as cultural heritage –as Australia does, and to some degree also the US and Canada with its duty to consult– raises a different set of problems, namely that of cultural fossilization, as well as reductive and essentialized thinking. Also, the tendency then is to want to prohibit interaction with such sites in the name of 'preservation', whereas such interaction lies at the basis of what keeps a sacred site 'alive' – as believed, for instance, by traditionalist Australian Indigenous persons.

To treat them as forms of property –aboriginal title, native title, customary title– raises the issue of individual and collective rights in the context of natural resource development projects: it is all fair and well to give the community title, but what about the disputes that ensue *inter*-community when there is money on the table? There also are other problems inherent to aboriginal title in its various forms: the notion of a bundle of rights that can be splintered, with aboriginal title inevitably accounting for the weakest rights; the possibility of extinguishment of aboriginal title; the fact that it mostly only affords a right to be consulted on a potential development, without any real say in the matter.

8.3.2.1.4 Why Does Aotearoa New Zealand Have Different Results?

Ten main differences were identified between the Māori and the Indigenous inhabitants of the other three jurisdictions in the context of 2.4.3 above ("Indigenous Conceptions of the Sacred"): (1) their settlement of Aotearoa New Zealand took place at a much later stage and it is known that the territory was inhabited at the time; (2) they share a common language, even if there are/were dialects; (3) they share a common mythology and Polynesian ancestry, although tribal mythology has evolved in different directions since; (4) in the extent to which they embraced literacy and educational opportunities for their children;[2825] (5) regarding their relative openness to Christianity and the consequent large-scale conversion; (6) in the resultant impact that sacred sites for them are a matter of customs, traditions and culture, rather than one of religion; (7) they make up a relatively large percentage of the modern-day population; (8) they have made great strides with the promotion and protection of their language on an institutional level; (9) they have political representation in Parliament; and (10) they have the very influential Waitangi Tribunal, which has helped them to obtain large-scale financial settlements.

Probably the most important point to be borne in mind with regards to the Māori is that there have been active re-tribalization efforts since the 1970s, meaning that identity politics are an important part of the equation. The practical effect hereof is that while internal diversity does exist, this tends to be minimized in the interests of Māori unity. It makes for a certain amount of stereotyping, but at the same time it provides a degree of certainty and predictability that is appreciable from a legal perspective.

[2825] Educational attitudes appear to remain divergent, this not being restricted to a unidirectional sense. Thus a recent Australian-New Zealand study on modern day boarding school experiences of Indigenous students had mostly negative findings in respect of the two Aboriginal (Australian) colleges, while the Māori college "deeply respected these cultural processes, sending multiple students to represent the school *whānau to tangihanga* (sorry business) and keeping culture at the core of all processes, learning and extracurricular activities within the boarding school (to ensure the relatedness of the Māori boarding students remained strong and secure, enabling and empowering students to succeed while physically away from their *whānau* (family) and communities, even with a school staff who are not all Indigenous.)": Jessa Rogers, "Photoyarn: Aboriginal and Māori Girls' Researching Contemporary Boarding School Experiences" (2017) 1 Australian Aboriginal Studies 1 at 10.

8.3.2.1.5 The Solution Proposed

I propose a statutory form of legal personality – a hybrid between corporate and human legal personality that explicitly acknowledges the sacred site in question as a "living entity" because this is perfectly in harmony with the Indigenous conceptions of the Indigenous persons studied in all four of the jurisdictions. So far, it therefore coincides with the *Whanganui River* solution.

Where I differ from the approach followed by Aotearoa New Zealand is in terms of its complexity, cumbersomeness and intricacy. These are the mechanics of the system that I envisage:

1. Because all four of these are (predominantly) common law systems that subscribe to the doctrine of parliamentary sovereignty –even if in tempered form– and the doctrine of the separation of powers, I propose a solution that is rooted in legislation rather than in judicial interpretation. In addition, since Canada is a bijural jurisdiction with Quebec following a civil law system for its private law, and private law falling within the provincial domain,[2826] it is clear that a judicial interpretation solution would be near impossible to implement in this province, unless the *Civil Code* were to be amended.

2. However, because of the finely-honed doctrine of precedent and the nature of balancing exercises that are so often engaged in by the courts of these jurisdictions, I consider that judges are in a much better position to make equilibrated decisions when it comes to weighing conflicting interests such as those typically awakened by natural development projects proposed in the context of Indigenous sacred sites.

3. There is an additional reason for reserving decision-making powers in the hands of the courts: the neutrality of the judiciary as opposed to the fact that the government usually is implicated to a varying degree in natural resource development projects. As pointed out earlier in the context of this thesis, such involvement could be direct –in the form of taxes collected or royalty

[2826] *Constitution Act*, 1867, 30 & 31 Vict, c 3, s 92.

payments made– or it could be subtler –such as political goodwill gained due to economic growth, job creation, etc.

4. I thus propose a legislative provision that is largely overseen and implemented by the courts instead of a government official.

5. In terms hereof, Indigenous communities must have the option of applying to have their sacred sites recognized for juristic personality purposes, with the application following the pattern of an injunction. By that I mean that –

    5.1. An Indigenous community approaches the court, requesting that a given site be recognized as a living entity and vested with legal personality.

    5.2. If the Court is satisfied that the applicant community has acquitted itself of its *prima facie* evidentiary burden –for purposes of which the hearing may proceed *in camera* and with court records being sealed in order to protect secret-sacred dimensions of the site in question– it grants a preliminary order that has the effect of temporarily staying any and all natural resource development projects in that area until the return date, which typically should be no more than 30 days later, so as to avoid undue prejudice to developers by keeping them in a situation of uncertainty.

    5.3. On the return date both parties have the opportunity to make formal submissions to the court, again *in camera* and under seal if required. The judge then has the option to either –

        5.3.1. dismiss the application and lift the preliminary injunction, in which case the development projects may proceed; or

        5.3.2. allow the application and confirm the injunction.

5.4. In the latter scenario (injunction confirmed), the court makes an order holding that the sacred site is a 'living entity' and appoints a representative[2827] for it. The identity of the representative should be left to the discretion of the court, though I suggest on a *prima facie* basis that the community's spiritual (as opposed to political) leader be vested with this authority. I prefer the spiritual leader as he/she is less likely to be swayed by external considerations such as money and tribal politics –although there naturally are no such guarantees– and *qua* spiritual leader he/she has both the requisite knowledge of all sacred aspects related to the site and the capacity to decide what may be divulged if the interests of the site demand it.[2828]

5.5. I do not like the Aotearoa New Zealand option where there are two curators, one appointed by the community and one by the state, as that, to me, implies the possibility of a stalemate. I believe a set of criteria needs to be developed to guide the court in its decision as to whether it should grant this legal personality as applied for, that these should be stipulated in the empowering legislation, and that the representative should then be trusted to act subject to normal fiduciary duties such as those that curators have. I do not deem this to be foolproof, but I do think that it is workable insofar as solutions go.

6. The practical consequence for natural resource developments would be a more extensive duty to consult in the case of such sacred sites with legal personality: the developers would have to obtain the representative's free and prior informed consent as per UNDRIP in order to proceed with the development. This means that the veto issue (FPIC) would not arise in respect of the whole of the community's territory –where the normal duty to consult would continue to apply–

[2827] In the *Whanganui River* context, the nomenclature of this representative was one of the sticking points, the Whanganui *Iwi* being adamant that it could not be a 'curator', since that implies a situation of dependence. That notion was anathema to them because the Whanganui River is considered to be their ancestor, i.e. they are in a position of dependence, rather than the other way around.

[2828] E.g. in the *Ktunaxa Nation* case study one of the strongest points of criticism against the Ktunaxa Nation's belated disclosure of the site's sacred dimension was the fact that they took the decision to disclose within a matter of nine months in the development at Kootenay Falls, whereas this took nine years. Their counsel, when quizzed by Justice Moldaver, was unable to provide a satisfactory explanation. See *supra* at note 1484.

but that there would be a veto insofar as the sacred site is concerned *if* it is exercised by the representative acting on behalf of and in the interests of the sacred site.

7. In the latter instance I consider it a good idea to vest the decision in the spiritual leader rather than the community because he/she has more knowledge of the issues at stake and of what may and may not be disclosed in the process. While the possibility of abuse of power or of undue influence exists, it would be unreasonable to discard the solution solely on this basis. Any issues with the representative's exercise of his/ duties should be properly addressed within the context of the breach of his/her fiduciary duties.

8. Under no circumstances would the granting of legal personality to sacred sites lead to their compilation in some kind of heritage register or database or in tourist access to them. This both violates sacredness requirements and may lead to the desecration of the site itself, notably as discussed in the Australian and US contexts.

8.3.2.2 Some Pragmatic Proposals

8.3.2.2.1 Canada

1. When undertaking litigation in Canadian courts, I strongly urge counsel to stay away from religion-based claims and religious analogies. As has been illustrated on several instances, this does more harm than good. This is the first lesson of *Ktunaxa Nation.*

2. I would suggest a litigation approach that proceeds at three angles:

    2.1. Use cultural rights arguments to bolster duty to consult obligations in a given context. In other words, explore in terms that the Court can understand *but that do not lead to cultural mistranslation, romanticization, universalization, stereotyping or essentialization.* I suggest that this be accomplished by exploring conceptions of time, space and the sacred *of the Indigenous community involved*, ideally with the aid of both Indigenous community members and anthropologists as that serves simultaneously to clarify, to corroborate and possibly even to validate the points that are being made. Most of all, it is crucial that the Counsel employed truly understands all of these conceptions in the given context, for in the end it falls to him/her to bridge the legal world of the courtroom with the cultural-spiritual world

of the Indigenous community in question. This is the second lesson to be learnt from *Ktunaxa Nation.*

2.2. Argue the applicability and enforceability of both International instruments –notably *UNDRIP*– and customary International law fundamentals such as human dignity. This is a rich angle that I have not explored in great detail for the simple reason that my primary focus was on domestic law and I feared turning the entire thesis into an International law argument if I started dealing with the detail that this involves.

2.3. Argue the relevance and persuasive value of comparative law, notably by linking systems on other contextual bases than simply the legal families to which they belong.

3. No compromise-positions are problematic in both the context of *Charter* claims and duty to consult-cases. We saw the former in *Ktunaxa Nation* and the latter in *Site C Dam.* Counsel therefore needs to expect questioning in this line and to be very well prepared to answer. This may well require a detailed cultural explanation of time, space and the sacred, as outlined in 2.1 above.

4. The importance of natural resource development projects in a country such as Canada is a force than can possibly only be countered effectively by generating sufficient international political pressure that the situation becomes internally untenable for the government. For instance, if *Site C Dam* ultimately comes to a demise it will not be because of any victory that was gained in the courts, but rather due to sustained political campaigns by human rights pressure groups such as Amnesty International, which ultimately turned it into a political hot potato and an electoral platform for the NDP in British Columbia, leading to the fall of the Liberal Party government that had so aggressively pursued the development. Thus sacred site problems may involve the courts, but are often determined on a different battle ground. In the absence of dedicated sacred sites legislation such as that outlined in 8.2.2.1 above ("The Ideal Solution"), it is difficult to see how this will change in a system that subscribes to the doctrine of parliamentary sovereignty (even if in tempered version).

8.3.2.2.2 United States

1. Religious freedom-based claims are a particularly bad idea in the United States, in view of the precedent in *Lyng*, as was illustrated with the *Standing Rock* case study.

2. As in Canada, church analogies are counterproductive – it is likely even more harmful to use these in the US context, given the Anti-Establishment Clause of the First Amendment and the marked Judeo-Christian cultural bias that has marked the US religious freedom jurisprudence.

3. Since courts are likely to defer to the legislature, creative jurisprudential interpretation is not to be expected – even from sympathetic courts.

4. US legislation is a sophisticated framework that can be manipulated in accordance with political will, as has been demonstrated by both *Standing Rock* and *Oak Flat*.

5. US public law, and American Indian law specifically, contains many internal hurdles that block effective remedies on technical grounds – for instance, as demonstrated in *Winnemem Wintu*, that a tribe is not federally recognized and therefore does not have legal standing, meaning no participation in consultation; as demonstrated in *Oak Flat*, that a protected sacred site can become unprotected private property on political whim and in the face of sustained opposition; and as demonstrated in *Standing Rock* that tribes are excluded from big project development consultations that ultimately impact them through multiple technical regulatory intricacies.

6. It is important to 'categorize' a sacred site correctly, so as to determine the legislation that (potentially) governs it, *viz* – as (1) sites that are imbued with sacredness by reason of spiritual beliefs or ceremonial practices; (2) sites where cultural keystone species or sacred plants or medicinal herbs that are key to spiritual or cultural ceremonies are found; (3) historically important sites; or (4) graves and graveyards.

7. Sacred sites that have a demonstrable historical dimension –such as massacre sites– are better protected under the Section 106 process of the NHPA than under legislation aimed at offering religious protections.

8. In the absence of the political will to address the structural issues raised above, and given the pronounced reluctance of American courts to apply International law and consider comparative

law, the position of Indigenous sacred sites does not seem particularly hopeful to me, at least in the short term.

8.3.2.2.3 Australia

1. Given the disconnect between the law and Aboriginal communities in Australia; the absence of a strong human rights culture –notably insofar as Aboriginal rights are concerned; the reification of the sacred in the context of identity politics; and the discordances between Aboriginal conceptions of the sacred and legal solutions on offer for the protection of Aboriginal sacred sites in Australia, the most effective sacred site protection solutions in Australia have taken the form of international political pressure rather than being strictly legal in nature. One striking example is the continued protection of Kakadu National Park in the Northern Territory and the resultant prohibition against uranium mining at the Jabiluka site, which was accomplished through a concerted international campaign that involved the international press and the UNESCO World Heritage mechanism.

2. As the *McArthur River Mine* case study has demonstrated, in the absence of a Bill of Rights to temper the effect of the doctrine of parliamentary sovereignty, Australian governments at both the state and federal level have wielded this doctrine in a particularly cynical manner to the detriment of Aboriginal peoples.

3. I fail to see much benefit in the various heritage protection regimes with their registration requirements: these all require a violation of secret-sacred codes to a lesser or greater degree without providing a strong counter-benefit such as FPIC. Even though an Authority is requested for project developments that involve registered sacred sites, such Authority is extended not by the pertinent community but rather by a statutory body that might well be pro-development – while the Minister has the power to revise its decisions. This presents little concrete protection to an Aboriginal community who find themselves in a precarious regulatory context.

4. Native title as such is not really helpful, due to the watering down of the *Native Title Act 1993* by the *Native Title Amendment Act 1998* following on *Wik*. As detailed in the context of Canada,

the notion of property as a bundle of rights involves a fragmentation of rights with the weakest ones going to Aboriginal communities.

8.3.2.2.4 Aotearoa New Zealand

1. Although heritage legislation exists as a possible route to sacred site protection in Aotearoa New Zealand, the *Whanganui River Settlement* offers a much more exciting route. This can be ascribed to several factors: (1) it takes into consideration the present-day value of connections with ancestors for Māori; (2) it settles 'old grudges' (Western perspective) concerning Māori ancestors that translate into 'fresh wounds' for the Māori (Māori perspective) in a tactful and tasteful manner; (3) it is an excellent example of the unifying force of identity politics at work in that it caters directly to their land loss-based self-determination aspirations; (4) it is illustrative of pragmatism and flexibility on the part of the Māori and of their creativity; (5) it speaks to the notion of compromise in that it contains both a Crown apology to the ancestors and a Māori waiver of further claims against the Crown; (6) it does not deal with the sacred site aspect in isolation – this forms part of the broader claim, thereby not compartmentalizing Māori spirituality from their way of life; (7) it makes no attempt to equate Māori spirituality to religion, thereby not creating a difficult position for Christianized Māori who still adhere to their traditional culture; (8) it uses Māori terms in the enabling legislation without seeking to define or translate (and thus reify or fossilize) these; (9) it illustrates the commonly-held Māori belief in *tino rangatiratanga* as comprising local control for local resources; and (10) the way in which it employs Māori values as the four core values that are intrinsic to the legal entity's (*Te Awa Tupua*'s) essence as a living, indivisible entity with both physical and spiritual components (the *Tupua Te Kawa*).

2. There is space for improvement, notably in terms of (1) the convoluted and cumbersome structures and processes put in place by the Act, notably the various bodies (*Te Kopuka*; *Te Pou Tupua*; *Te Karewao*; and *Ngā Tāngata Tiaki o Whanganui*); (2) the fact that the "human face" (*Te Pou Tupua*) comprises two members – which implies the possibility of a deadlock; the unwieldy size of the strategy group (*Te Kopuka*), which may comprise up to 17 members; and the technical requirements governing the specifics of their appointment; and (3) the fact that it ultimately is

not the various bodies who decide on the developmental fate of *Te Awa Tupua* during consultation proceedings, but the Minister and his/her officials.

3. For present purposes, the most valuable part of the *Whanganui River Settlement* is to be found in the role that is played by Māori cultural values, customs and identity in the Act, because it is in this context that it can best serve as inspiration for other legal systems. *In other words, I am arguing that it is not so much the actual legal content of the Act that is important –in the sense of the mechanisms that are created, or the conditions on which they operate– but the way in which the Aotearoa New Zealand legislator has addressed the issue by giving expression to Māori cultural values, customs and identity through the use of Western legal structures and concepts.*

8.4 General Guidelines Abstracted

1. Generally speaking, in Western courts it may be more appropriate to approach Indigenous sacred sites from an angle of cultural –rather than religious– rights. That would avoid a sacred/secular debate in the context of a secular state.

2. It would also avoid conflation of Indigenous spirituality with organized Western religion: I am notably thinking of aspects such as prosletization (running afoul of 'Establishment' type clauses, such as those in the United States and Australian Constitutions).

3. It would help avoid instances of cross-cultural translation, such as the use of church-similes and/or metaphors for sacred sites.

4. However, it is important that the cultural angle pled not be a fossilized, reductive version.[2829] Indigenous cultures can and do change – in the same way, Indigenous spirituality is dynamic too.

[2829] *Contra Van der Peet*, *supra* note 175.

5. The Aotearoa New Zealand experience –notably my Aotearoa New Zealand case study– has demonstrated the importance for both parties to be pragmatic, flexible and willing to compromise on non-essential matters.

6. Appropriate rules of evidence are necessary to cater for Indigenous sacred site matters, notably to assist the Court in seizing history from the Indigenous perspective, around the use of symbols to prove both history and conceptual matters, and in how the parties may put forward to the Court notions of a metaphysical nature.

7. An increased use of International law as extrinsic interpretative guide and source of domestic reform is proposed. I am referring here to both unincorporated International law instruments and norms of customary International law.

8. An increased role for comparative law is suggested, at least within the same legal family.

9. One should beware the dangers of cross-cultural translation.

10. It is crucial to emphasize the importance of cultural continuity for Indigenous identity, the interrelationship between Indigenous culture and religion, and the identitary role of sacred sites in Indigenous culture and religion, notably in the context of displacement and cultural disintegration in the four jurisdictions studied, as well as the role of traumas such as the Residential Schools in Canada, the Stolen Generation in Australia, and the manifestation of these structural problems in poor socio-economic denominators across all four jurisdictions.

11. It is important to demystify Indigenous culture and spirituality in such a manner that the Court understands the mechanics of it specific to the sacred site dispute before it. The Indigenous community need not disclose secret-sacred aspects in violation of their beliefs, but it is important that the Court comprehends that community's notions of time, space, and the sacred.

12. It is crucial that the process before the Court be dedramatizes and depersonalized in the same manner as the Waitangi Tribunal process has achieved.

13. Since law does not operate in a vacuum, the importance of factors such as international pressure and glocalization should not be discounted.[2830]

14. UNESCO's 'Associative Cultural Landscapes' mechanism constitutes a very interesting option that merits further study, possibly in conjunction with UNDRIP.[2831]

8.5 Conclusion

This Chapter aimed to address the two main objectives that were stated in the Introduction to the thesis, namely (1) first, to concretely consider to what extent the interests of Indigenous peoples in their sacred sites are presently protected in four selected jurisdictions by means of black letter law; and (2) then, to explore how a more nuanced grasp of Indigenous values, customs and identity in conjunction with the norms of international law could be integrated with the provisions of such black letter law in a multifaceted, layered approach to construct an improved, context-sensitive framework for the protection of Indigenous sacred sites in each of the jurisdictions under consideration.

The Chapter comprises three parts. First, I reviewed the thesis structure and summarized its main themes and angles (8.2). Next, I addressed the two thesis objectives (8.3). In the context of the second objective (8.3.2) I provided both an ideal solution (8.3.2.1) and some pragmatic proposals (8.2.2.2). I wrapped up the Chapter by abstracting 14 general guidelines for the protection of Indigenous sacred sites in the context of natural resource development projects.

[2830] See e.g. Tindall, "Kakadu", *supra* note 43 on the National Park / Jabiluka Uranium Mine matter.

[2831] The Kakadu National Park is listed as a World Heritage Site, but in the "natural" category only. See *ibid.*

Conclusion

> En l'occurrence, l'introspection à laquelle je me suis livré dans ce texte me mène à une conclusion somme toute assez simple eu regard au rapport du droit et des juristes au monde. Elle tient dans la conviction qu'il est plus que jamais impérieux de sortir la saisi du phénomène « droit » de l'opposition manichiéenne entre l'empirique et le normatif. En invitant les juristes, notamment ceux qui s'attachent à la doctrine doctrinante, à s'ouvrir à des savoirs externes, je veux souligner le fait que le droit représente, pour la plupart des justiciables, avant tout une expérience vécue notamment sous les modes de la prescription et de l'instrumentalisation/appropriation.[2832]
>
> ***
>
> Take it. It's yours. Do with it what you will. Tell it to your children. Turn it into a play. Forget it. But don't say in the years to come that you would have lived your life differently if only you had heard this story.
>
> You've heard it now.[2833]

In the Introduction to this thesis I posed a number of questions. To them I now revert.

First, I spoke about conflicting worldviews in the context of Indigenous sacred sites and natural resource developments, and *asked what happens when the law itself replicates one of the conflicting worldviews, when it represents the thinking of the dominant culture and its actors contemplate a minority culture through the dominant culture's conceptual lens*. This, I submit is what we have seen at play in the legislation and jurisprudence of all four of the jurisdictions historically, and what we still see in the context of

---

[2832] Gaudreault-DesBiens, "Libres propos", *supra* note 306 at 175.

[2833] Thomas King, "What Is It About Us That You Don't Like?" in King, *Stories*, *supra* note 387, 124 at 151.

Canada, the United States and Australia. Aotearoa New Zealand has taken some key steps on the road to addressing this.

My second question was *whether the minority is fated to sacrifice its worldview on the altar of legal certainty*. In sum, the experience of Aotearoa New Zealand demonstrates that this is not a necessary conclusion, though a more utilitarian minded jurisdiction such as Australia might harbour such expectations. At the same time, it should be noted that the Aotearoa New Zealand process has required flexibility and pragmatism, whereas Indigenous approaches in the other three jurisdictions have typically been absolutist in nature. Finally, I refer to the essentializing role of identity politics in the contexts of Aotearoa New Zealand – which has undoubtedly reinforced a sentiment of legal certainty.

In the third instance, I posed the question *whether the ambit of the law –as understood by the dominant culture– is sufficiently broad that its positive expression may be reshaped in a fashion sufficiently familiar to the majority, yet conceptually more responsive to the minority's understanding of the world*. This, I submit, is the feat that has been accomplished with the *Whanganui River Settlement Act*, quite irrespective of any criticisms that may be lobbied against it.

Fourth, I wanted to know *whether it is possible to translate minority worldviews into terms cognizable to courts without encountering cultural prejudice*. I believe this is the case, and I refer here to the framework that I have developed with relation to Indigenous conceptions of time, space and the sacred.

In the fifth instance, *the question arises if legislators, in drafting instruments that accommodate minority interests, simply transpose dominant values in the provisions that they enact*. While this frequently is the unfortunate result of cross-cultural translation, the Aotearoa New Zealand case study has demonstrated that this is not self-evident.

The sixth question was *whether such provisions are truly of benefit to minorities with divergent worldviews*. This is a question that falls outside the boundaries of the research as defined, but that would make for a fascinating future study. This logically also postpones an answer to the last question, namely, *if that were not the case, how could they be adjusted to better serve minorities without alienating members of the dominant society?*

This is a complex field of study, one which calls for nuance and delicacy. In many instances I have but tugged at the emerging threads that will enable us to embroider a richer tapestry going forward. This constitutes, therefore, a beginning rather than an ending.

*****

Bibliography

LEGISLATION

LEGISLATION: AOTEROA/NEW ZEALAND

STATUTES

Environment Act (1986).

Environment Protection Authority Act (2010).

Foreshore and Seabed Act 2004 (NZ), 2004/93.

Heritage New Zealand Pouhere Taonga *Act* (2014).

Loan Act 1863 (NZ).

*Marine and Coastal Area (*Takutai Moana*) Act 2001* (NZ) 2001/3 [MACA].

Ngai Tahu Claims Settlements Act 1998.

New Zealand Settlements Act 1863 (NZ).

Resource Management Act 1991 (NZ) 69/1991.

Rūnanga Iwi Act 1990 (NZ) 125/1990.

Rūnanga Iwi Repeal Act 1991 (NZ) 34/1991.

Suppression of Rebellion Act 1863 (NZ).

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (NZ) 7 /2017 [*Whanganui River Claims Settlement Act*].

Te Urewa Act, 2014 (NZ), 2014/51.

Treaty of Waitangi Act 1975 (NZ) 114/1975.

Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (NZ) 1992/121.

Waikato Raupatu Claims Settlement Act 1995.

CONSTITUTIONAL STATUTES

Constitution Act 1986 (NZ) 114/1986.

Human Rights Act 1993 (NZ) 82/1993.

New Zealand Bill of Rights Act 1990 (NZ), 1990/109.

Treaty of Waitangi 1840 (NZ).

LEGISLATION: AUSTRALIA

STATUTES

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).

Aboriginal and Torres Strait Islander Commission Act 1989 (Cth).

Aboriginal Cultural Heritage Act 2003 (Qld).

Aboriginal Heritage Act 1972 (WA).

Aboriginal Heritage Act 1988 (SA).

Aboriginal Heritage Act 2006 (Vic).

Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth).

Aboriginal Land Act 1991 (Qld).

Aboriginal Land Rights Act 1983 (NSW) (ALRA).

Aboriginal Lands Act 1995 (Tas).

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

Aboriginal Land Rights (Northern Territory) Amendment Act 2006 (Cth).

Aboriginal Land Rights (Northern Territory) Regulations 2007 (Cth).

Aboriginal Lands Trust Act 1966 (SA).

Aboriginal Relics Act 1975 (Tas).

Aboriginal Sacred Sites Act 1989 (NT).

Aborigines Act 1889 (WA).

Australian Colonies Act, 1861.

Australian Heritage Council Act 2003 (Cth).

Environmental Assessment Act 1982 (NT).

Environmental Management and Pollution Control Act 1994 (Tas).

Environment Protection Act 1970 (Vic).

Environment Protection Act 1986 (WA).

Environment Protection Act 1993 (SA).

Environmental Protection Act 1994 (Qld).

Environmental Protection Act 1997(ACT).

Environmental Protection and Biodiversity Conservation Act 1999 (Cth) [EPBC].

Heritage Act 1977 (NSW).

Heritage Act 1994 (Vic).

Heritage Act 2004 (ACT).

Heritage Conservation Act 1991 (NT).

Heritage Objects Act 1991 (ACT).

Land Acquisition Act 1981 (Cth).

Maralinga Tjarutja Land Rights Act 1984 (SA).

McArthur River Project Agreement Ratification Act.

McArthur River Project Amendment (Ratification of Mining Authorities) Act 2007 (NT).

Minimum Connection Material Requirements for Consent Determinations.

Mining Management Act 2001 (NT).

National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996 (NSW).

Native Title Act 1993 (Cth).

Native Title Amendment Act 1998 (Cth).

Northern Territory Aboriginal Sacred Sites Act (As in force at 28 August 2013).

Northern Territory Aboriginal Sacred Sites Regulations (SL No 14, 2004), as amended by the *Northern Territory Aboriginal Sacred Sites Amendment Regulations 2011* (SL No 31, 2011).

Northern Territory Heritage Act 2002 (Cth).

Pitjantjatjara Lands Act 1981 (SA).

Protection of Movable Cultural Heritage Act 1986 (Cth).

Protection of the Environment Operations Act 1997 (NSW).

Racial Discrimination Act 1975 (Cth).

Torres Strait Islander Land Act 1991 (Qld).

Torres Strait Islander Cultural Heritage Act 2003 (Qld).

Traditional Owner Settlement Act 2010 (Vic) (TOSA).

CONSTITUTIONAL STATUTES

Australian Human Rights Commission Act 1986 (Cth).

Commonwealth of Australia Constitution Act 1900 (Cth).

Environment Protection and Biodiversity Conservation Act 1999 (Cth)[*Australian Environmental Protection Act*].

REGULATIONS

Northern Territory Aboriginal Sacred Sites Regulations (As in force at 8 November 2013).

LEGISLATION: CANADA

STATUTES

British Columbia Environmental Assessment Act (2002).

British Columbia Heritage Conservation Act (1996).

Canadian Environmental Assessment Act RSC 2012, c 19, s 52.

Cree-Naskapi (of Quebec) Act RSC 1984 c-18.

Criminal Code RSC 1985, c C-45.

Historic Sites and Monuments Act (1953).

Indian Act (1876).

Specific Claims Resolution Act RSC 2003 c 23.

Tripartite Treaty Process: British Columbia (1993).

CONSTITUTIONAL STATUTES

British North America Act of 1867.

Canada Act, 1982, s 35: Aboriginal & Treaty Rights.

Canadian Bill of Rights, SC 1960, c 44.

Canadian Human Rights Act, RSC 1985, c H-6.

Charter of Rights and Freedoms (1982): s 2(a).

Charter of Rights and Freedoms (1982) s 27.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

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

BILLS

Bill C-31, an *Act to Amend the Indian Act*. Bill C-31 (passed June 28, 1985): Department of Indian Affairs and Northern Development, "The Impacts of the 1985 Amendments to the *Indian Act* (Bill C-31)", Information Sheet (Ontario: September 1995).

LEGISLATION: UNITED STATES

STATUTES

Act of June 30, 1919, § 27, 41 Stat 3 (codified at 43 USC § 150).

Act of July 5, 1862, § 1, 12 Stat 512 (codified at 25 USC § 72).

Administrative Procedure Act, Pub L No 89-554 § 1, 80 Stat 378, 5 USC § 551 (1966) [APA].

Alaska Native Claims Settlement Act (43 USC 1602).

American Indian Agricultural Resources Management Act, Pub L No 103-77, 107 Stat 2011, 25 USC 3701 (1993) [AIARMA].

American Indian Religious Freedom Act of 1978, as amended ("AIRFA") [Public Law No. 95-341, 92 Stat. 469 (11 Aug 1978) codified at 42 USC § 1996.

Appropriations Act of March 3, 1871, § 1, 16 Stat 544 (codified at 25 USC § 71) [*Appropriations Act*].

Archaeological Resources Protection Act of 1979, as amended [Public Law 96-95; 16 U.S.C. § 470aa-mm] [ARPA].

Bald and Golden Eagle Protection Act, 16 USC 688–688d.

Burke Act, c 2348, 34 Stat 182, 25 USC 349 (1906).

California Wilderness Act of 1984, Pub L No 98-425, 98 Stat 1619 (1984).

Carl Levin and Howard P "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub L No 113-291, 128 Stat 3292 [*National Defense Authorization Act of 2015*].

Clean Water Act (CWA), 33 USC § 1251 *et seq* (1972) [CWA].

Convention on Cultural Property Implementation Act, Pub L 97-446, title III, Jan 12 1983, 96 Stat 2350, 19 USC 2601.

Endangered Species Act of 1973, Pub L No 93-205, 87 Stat 884, 16 USC 1531 (1973) [ESA].

Executive Order 13007, 61 Fed Reg 26771 (24 May 1996) — Indian Sacred Sites.

Federal Oil and Gas Royalty Management Act of 1982, Pub L No 97-451, 96 Stat 2447, 30 USC 1701 (1983) [FOGRMA].

Federal Land Policy and Management Act of 1976 [FLPMA], Pub L 94-579, 90 Stat 2743 (1976).

Federally Recognized Indian Tribe List Act of 1994, Pub L No 103-454, tit I, 108 Stat 4971, 25 USC §§ 479a, 479a-1 (1994) [*Tribe List Act*].

Flood Control Act, 35 USC § 701 *et seq.*

General Land Law Revision Act of 1891, commonly called the *Creative Act* of 1891.

Government Organization and Employees: Administrative Procedure, Pub L 89-554 §1, Sep 6 1966, 80 Stat 378, 5 USC §§ 500-559.

Government Organization and Employees: Judicial Review, Pub L 89-554 §1, Sep 6 1966, 80 Stat 378, 5 USC §§ 701-706.

Historic Sites Act of 1935.

House Concurrent Resolution 108 ("the Termination Act").

Indian Child Welfare Act, 25 USC § 1901 *et seq.*

Indian Claims Commission Act of 1946 (ICCA), c 959, s 2, 60 Stat 1049, 1050 (Aug 13, 1946).

Indian Country Statute, 25 June 1942, c 645, 62 Stat 757 (1942).

Indian General Allotment Act ("Dawes Act"), c 119, 24 Stat 388 (1987) [*Dawes Act*].

Indian Health Care Improvement Act of 1976, 25 USC § 1601 *et seq*.

Indian Long-Term Leasing Act, c 615, 69 Stat 539, 25 USC 415 (1955) [*Section 415*].

Indian Mineral and Development Act of 1982, Pub L No 97-382, 96 Stat 1938, 25 USC § 2101 (1982) [IMDA].

Indian Mineral Leasing Act of 1938, 52 Stat 347, 25 USC § 396 (1938) [IMLA].

Indian Reorganization Act ("Wheeler-Howard Act"), 48 Stat 934, 25 USC § 461 (1934) [IRA].

Indian Removal Act, 4 Stat 411 (1830).

Indian Child Welfare Act of 1978 (ICWA). 25 USC §§ 1901–1931.

Indian Health Care Improvement Act of 1976, 25 USC § 1601 *et seq*.

Indian General Allotment Act of 1887 ["*Dawes Act*"], Feb 8 1887, C 119, 24 Stat 388.

Indian Self-Determination and Education Assistance Act, 25 USC §§ 450 et seq [ISDEA].

Indian Tribal Energy Development and Self-Determination Act of 2005, Pub L No 109-58, tit V, 119 Stat 763, 42 USC 3501 (20050 [ITEDSA].

Indian Tucker Act.

Maine Indian Claims Settlement Act of October 10, 1980, codified at: 25 USC § 1724 — Maine Indian Claims Settlement and Land Acquisition Funds in the United States Treasury.

Major Crimes Act, Act of 3 March, 1885, § 8, 23 Stat 385 (1885).

National Defense Authorization Act of 2015.

National Environmental Policy Act, Pub L No 91-190, 83 Stat 852, 42 USC 4321 (1970) [NEPA].

National Historic Preservation Act, 54 USC §300101 et seq [NHPA].

National Indian Forest Resources Management Act, Pub L No 101-630, tit III, 204 Stat 4532, 25 USC § 3101 (1990) [NIFRMA].

National Park System and Related Programs: Establishment and General Administration, Pub L 113-287, § 3, Dec 19 2014, 128 Stat 3254, 54 USC § 100101 *et seq.*

National Park System and Related Programs: Historic Preservation: Pub L 113-287, § 3, Dec 19 2014, 128 Stat 3254, 54 USC § 300101 *et seq.*

National Park System and Related Programs: Outdoor Recreation Programs, Pub L 113-287, § 3, Dec 19 2014, 128 Stat 3254, 54 USC § 200101 *et seq.*

Native American Graves Protection and Repatriation Act (1990), 18 USC § 1170, 25 USC §§ 3001-3013 [NAGPRA].

Nonintercourse Act, c 161, § 161, 4 Stat 730, 25 USC 177 (1834).

Preservation of Historical and Archaeological Data: Pub L 113-287, § 3, Dec 19 2014, 128 Stat 3254, 54 USC § 312501 *et seq.*

Pub L No 91-550 (1970).

Pub L 113-287, 128 Stat 3272 (19 December 2014).

Public Lands: Federal Land Policy and Management 43 USC C 35 § 1701-1787.

Religious Freedom Restoration Act (2000), 42 USC §§ 2000bb1–2000bb4 [RFRA].

Religious Land Use and Institutionalized Persons Act of 2000, 42 USC § 2000cc, *et seq* [RLUIPA].

Rivers and Harbors Act (RHA), 33 USC § 408.

Sale of Timber on Allotted and Unallotted Indian Land, 25 USC §§ 406–407.

Southeast Arizona Land Exchange and Conservation Act.

Submarginal Lands of United States Held in Trust for Specific Indian Tribes, 25 USC c 14 § 459.

Surface Mining Control and Reclamation Act of 1977, Pub L No 95-87, 91 Stat 445, 30 USC 1201 (1977)[SMCRA].

Taylor Grazing Act, c 865, 48 Stat 1269, 43 USC 315 (1934).

Trade and Intercourse Act: Act of July 22, 1790, 1 Stat 137.

Treaty with the Delawares, 1778, 7 Stat 13.

Treaty with the Six Nations, 1784, 7 Stat 15 (Treaty at Fort Stanwix).

U.S. Indian Reorganization Act (IRA) 48 Stat 984 (1934) *("Wheeler-Howard Act")*, 25 USC § 472.

CONSTITUTIONAL STATUTES

Fifth Amendment: Due Process and Just Compensation provisions (*US Constitution*).

First Amendment (1791) to the *United States Constitution* (1787): Free Exercise Clause (avoiding restrictions imposed by Establishment Clause).

Indian Commerce Clause (*US Constitution* Art I, § 8, cl 3).

United States Constitution (1787).

BILLS

US, Bill, HR 2811, *Save Oak Flat*, 114th Cong.

US, Bill, S 2242, *Save Oak Flat*, 114th Cong.

US Bill HR 687, *Southeast Arizona Land Exchange and Conservation Act of 2013*, 113th Cong.

REGULATIONS

25 CFR vol 1 § 83, "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe" (2012) [*Federal Recognition Regulations*].

Code of Federal Regulations, Title 25: Indians 25 CFR.

Native American Graves Protection and Repatriation Regulations 40 CFR 10.

National Park Service, National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (1990).

Reissuance of Nationwide Permits (NWP 12), 77 Fed Reg 10, 184, 10, 271 (12 February 2012).

Tender Implementation Regulations as issued under the *Indian Reorganization Act ("Wheeler-Howard Act"),* 48 Stat 934, 25 USC § 461 (1934) [*IRA*].

GOVERNMENT GAZETTES

National Park Service, National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (1990).

JURISPRUDENCE

JURISPRUDENCE: AOTEROA/NEW ZEALAND

Attorney-General v Ngati Apa [2003] 3 NZLR 643 (CA) [*Ngati Apa*].

Governor of Pitcairn and Associated Islands v Sutton [1995] 1 NZLR 426; 104 ILR 508.

Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] AC 308 (PC).

Hosking & Hosking v Runting and Pacific Magazines NZ Ltd [2004] NZCA 34.

Huakina Development Trust v Waikato Valley Authority 2 NZLR 188 (1987).

Marine Steel Ltd v Government of the Marshall Islands [1981] 2 NZLR 1; 64 ILR 539.

New Zealand Maori Council v Attorney General, 1 NZLR 641 (1987).

Nireaha Tamaki v Baker (1901).

Rajan v Minister of Immigration [1996] 2 NZLR 543,551.

Te Runanganui o Te Ika Whenua Inc Society v Attorney-General [1994] 2 NZLR 20 [*Te Runanganui*].

Te Weehi v Regional Fisheries Officer, 1986] 1 NZLR 680 (HC) [*Te Weehi*].

Wallis v Solicitor-General (1902–1903).

Wellington District Legal Services v Tangiora [1998] 1 NZLR 129, 137; 115 ILR 655, 663.

Wi Parata v Bishop of Wellington and the Attorney-General (1877) 3 NZ Jur (NS) SC 72 [*Wi Parata*].

JURISPRUDENCE: AUSTRALIA

Ahmed Ali Al-Kateb v Godwin [2004] HCA 37.

Coe v Commonwealth, (1979) 24 ALR 118.

Commonwealth v Tasmania ("Tasmanian Dam case") [1983] HCA 21; (1983) 158 CLR 1.

Gibbs v Capewell [1995] FCA 25.

First Nation of Nacho Nyak Dun v Yukon (Government of), 2014 YKSC 69, 2014 [*Nacho Nyak Dun*].

Griffiths v Minister of Lands, Planning and Environment [2008] HCA 20.

Lansen & Ors v McArthur River Mining Pty Ltd [2007] NTSC 28 (30 April 2007) Angel J.

Lansen v Minister for Environment and Heritage (2008) 174 FCR 14.

Mabo v Queensland (No 2) [1992] HCA 23, 175 CLR 1 [*Mabo*].

McArthur River Mining Pty Ltd v Lansen & Ors [2007] NTCA 5 (18 July 2007) Martin CJ.

Milirrpum v Nabalco Pty Ltd, 17 FLR 141 (NT Sup Ct 1971), [1972-73 ALR] 65, WL 117366 (the Gove Peninsula Case) Blackburn J [*Milirrpum*].

Minister for Immigration and Ethnic Affairs v Teah (1995) 18 CLR 273; (1995) 128 ALR 353.

Re Lansen and Minister for Environment and Heritage (2008) 102 ALD 558.

Wik Peoples v Queensland ("Pastoral Leases case") [1996] NZHCA 40; (1996) 187 NZCLR 1 [*Wik*].

JURISPRUDENCE: CANADA

Attorney-General for Canada v Attorney-General for Ontario [1937] AC 326; 8 AD 41.

Barker v Teamsters Union, [1986] DLQ 447 (CCRT).

Beckman v Little Salmon/Carmacks First Nation, [2010] SCC 53.

Calder v Attorney-General of British Columbia, [1973] SCR 313 [*Calder*].

Chartrand v British Columbia (Forests, Lands and Natural Resource Operations), 2015 BCCA 345.

Chippewas of the Thames First Nation v Enbridge Pipelines Inc, [2017] SCC 41 (26 July 2017) Karakatsanis and Brown JJ [*Chippewas of the Thames*].

Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12 Abella J [*Daniels*].

Delgamuukw v British Columbia [1997] 3 SCR 1010 [*Delgamuukw*].

Dorval (Ville de) v Provost, (1996) 29 MPLR (2d) 131 (CA Que).

Edwards Books and Art v The Queen, [1986] 2 SCR 713, [*Edwards Books*].

First Nation of Nacho Nyak Dun v Yukon (Government of), 2014 YKSC 69, 2014.

Grassy Narrows First Nation v Ontario (Natural Resources), 2014 SCC 48 [*Grassy Narrows*].

Guerin v The Crown, [1984] 2 SCR 335.

Haida Nation v British Columbia (Minister of Forests), [2004] 2 SCR 511 [*Haida Nation*].

Ktunaxa Nation v British Columbia (Minister of Forests, Lands and Natural Resource Operations) 2014 BCSC 568, Sewel J.

Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations), 2015 BCCA 352, Goepel J.

Ktunaxa Nation Council v British Columbia (Minister of Forests, Lands and Natural Resource Operations), DCC File No 36664 (1 December 2016.

Ktunaxa Nation Council v British Columbia (Minister of Forests, Lands and Natural Resource Operations), SCC File No 36664 (1 December 2016) (Factum of the Intervener, Te'mexw Treaty Association).

Ktunaxa Nation Council v British Columbia (Minister of Forests, Lands and Natural Resource Operations), SCC File No 36664 (1 December 2016) (Factum of the Interveners, West Moberly First Nations and Prophet River First Nation).

Manitoba Métis Federation Inc v Canada (Attorney General), [2013] 1 SCR 623 [*Manitoba Métis Federation*].

Mikisew First Nation v Canada (Minister of Heritage), [2005] SCR 388.

Mugesera v Canada (Minister of Citizenship and Immigration) [2005] 2 SCR 100, para 82; 132 ILR, 295–296.

Prophet River First Nation v British Columbia (Environment), 2015 BCSC 1682 Sewell J; *Prophet River First Nation v Canada (Attorney General)*, 2015 FC 1030 Manson J.

Prophet River First Nation v British Columbia (Environment), 2017 BCCA 58 Lowrie J [*Prophet River* BCCA].

Prophet River First Nation v Canada (Attorney General), 2015 FC 1030.

Prophet River First Nation v Canada (Attorney General), 2017 FCA 15 Boivin JA [*Prophet River* FCA].

Prophet River First Nation v Canada (Attorney General) Court File A-435-15 (9 March 2016) (Written Representations of the Proposed Intervener Amnesty International); Open letter from Amnesty International to Justin Trudeau and Christy Clark (18 November 2015) Ref TG AMR 20/2902/2015.

R v Big M Drug Mart Ltd, [1985] 1 SCR 295 [*Big M*].

R v Munyaneza, [2009] QJ No 4913; ILDC 1339 (CA 2009).

R v Sioui, 1990 CanLII 103.

R v Sparrow, [1990] 1 SCR 1075.

R v Syliboy, [1929] 1 DLR 307 (Nova Scotia County Court, 10 September 1928) Patterson Acting Co Ct J.

R v Van der Peet [1996] 2 SCR 507 Lamer CJ [*Van der Peet*].

Re Funk and Manitoba Labour Board, (1976) 66 DLR (3d) 35 (CA Man).

Reference as to whether "Indians" in s 91(24) of the BNA Act includes Eskimo inhabitants of the Province of Quebec, [1939] SCR 104 [*Re Eskimo*].

Reference re Exemption of US Forces from Canadian Criminal Law [1943] 4 DLR 11.

Reference re Manitoba Language Rights, [1985] 1 SCR 721.

Reference re Powers to Levy Rates on Foreign Legations and High Commissioner's Residences [1943] SCR 208.

Rio Tinto Alcan Inc v Carrier Sekani Tribal Council, [2010] SCC 43 McLachlin CJ [*Rio Tinto*].

Simon v The Queen, [1985] 2 SCR 387.

St Catharines Milling and Lumber Co v The Queen, (1885), 10 OR 196, affirmed (1886), 13 OAR 148, affirmed (1887), 13 SCR 557, affirmed (1888), 13 App Cas 46.

Syndicat Northcrest v Amselem, [2004] 2 SCR 551 [*Amselem*].

Taku River Tlingit First Nation v British Columbia (Project Assessment Director), [2004] SCC 74.

Tlowitsis Nation and Mumtagila Nation v MacMillan Bloedel [1991] 2 CNLR 164 (BCSC), leave to appeal refused (1990), [1991] 4 WWR 83 (BCCA) MacKinnon J [*Tlowitsis Nation*].

Tlowitsis Nation and Mumtagila Nation v MacMillan Bloedel [1990] CanLII 2335 (BC CA), [1991] 4 WWR 83, 53 BCLR (2d) 69, [1990] BCJ No 2746 (QL) Legg J.

Tsilhqot'in Nation v British Columbia, [2014] 2 SCR 257 [*Tsilhqot'in*].

Zylberberg v Director of Education of Sudbury Board of Education, (1989) 52 DLR (4th) 577 (CA Ont).

JURISPRUDENCE: UNITED STATES

Access Fund v US Department of Agriculture, 499 F3d 1036 (9th Cir 2007) McKeown J [*Access Fund*].

Alaska v Native Village of Venetie, 522 US 520 (1998).

Badoni v Higginson, 455 F Supp 641 (D Utah 1977) Anderson CJ [*Badoni*].

Bear Lodge Multiple Use Association v Babbitt, 2 F Supp 2d 1448 (D Wyo 1998), aff'd, 175 F3d 814 (10th Cir 1999) [*Bear Lodge*].

Beard v Greene, 140 L Ed 2 d 529, 537 (1998); 118 ILR 22.

Bonnichsen v United States, 217 F Supp 2d 1116 (D Or 2002), aff'd and remanded, 367 F.3d 864 (9th Cir 2004)

Burwell v Hobby Lobby Stores, Inc, 134 S Ct 25751, 2671 (2014) [*Hobby Lobby*].

Carcieri v Salazar, 555 US 379, 387 (2009) Thomas J.

Cherokee Nation v Georgia, 30 US (5 Pet) 1, 8 L Ed 25 (1831) [*Cherokee Nation*].

Cholla Ready Mix, Inc v Civish, 382 F3d 969 (9th Cir 2004) Fletcher J [*Cholla*].

City of Boernes v Flores, 521 US 507 (1997).

Colorado River Water Conservation District v United States, 424 US 800 (1976) [*Colorado River*].

Confederated Bands of Ute Indians v United States, 330 US 169 (1947).

County of Oneida v Oneida Indian Nation, 470 U.S. 266 (1985).

Crow v Gullet, 541 F Supp 785 (DSD 1982) Bogue CJ[*Crow*].

CTIA-Wireless Ass'n v FCC, 466 F3d 105, 106-07 (DC Cir 2006).

Davis v Latschar, 202 F3d 359, 370 (DC Cir 2000).

Delaware Tribal Bus. Comm. v. Weeks, 430 US 73, 85 (1977).

Employment Division, Department of Human Resources of Oregon v Smith, 494 US 872, 110 S Ct 1595, 108 L Ed 2d 876 (1990).

Ex Parte Kan-Gi-Shun-Ca [Otherwise Known as Crow-Dog], 109 US 556, 3 S Ct 396, 27 L Ed 1030 (1893) [*Crow-Dog*].

Grace Methodist Church v City of Cheyenne, 451 F 3d 643, 662 (10th Cir 2006).

Gros Ventre Tribe v United States, 469 F 3d 801 (9th Cir 2006) [*Gros Ventre*].

Guam v Guerrero, 290 F3d 1210 (9th Cir 2002).

Havasupai Tribe v United States, 752 F Supp 1471 (D Ariz 1990) Strand J, aff'd sub nom, *Havasupai Tribe v Robertson*, 943 F2d 32 (9th Cir 1991) [*Havasupai*].

Holt v Hobbs, –US–, 135 S Ct 853, 862, 190 L Ed 2d 747 (2015).

Holy Land Found for Relief & Development v Ashcroft, 333 F3d 156 (DC Cir 2003).

Hoonah Indian Association v Morrison, 170 F3d 1223, 1239-1232 (9th Cir 1999).

Hynes v Grimes Packing Co, 337 US 86, 101 (1949).

In re Young, 141 F3d 854 (8th Cir 1998).

Johnson v M'Intosh 21 US (8 Wheat) 543, 5 L Ed 681 (1823).

Joint Tribal Council of the Passamaquoddy Tribe v Morton, 388 F Supp 649 (D Me 1975) aff'd, 528 F2d 370 (1st Cir 1975).

Karuk Tribes v Ammon, 209 F 3d 1366, 1374 (Fed Cir 2000), aff'g *Karuk Tribe v United States*, 41 Fed Cl 468 (1998).

Lone Wolf v Hitchcock, 187 US 553, 23 S Ct 216, 47 L Ed 299 (1903) White J [*Lone Wolf*].

Lyng v Northwest Indian Cemetery Protective Association, 485 US 439, 108 S Ct 1319, 99 L Ed 534 (1988).

Manybeads v United States, 730 F Supp 1515 (D Ariz 1989) Carroll J[*Manybeads*].

Marbury v Madison, 5 US 137 (1803).

McMillan Park Comm v Nat'l Capital Planning Comm'n, F2d 1283, 1288 (DC Cir 1992).

Menominee Tribe of Indians v United States, 391 US 404, 88 S Ct 1705, 20 L Ed 2d 697 (1968).

Mitchel v United States, 34 US 711 (1835) [*Mitchel*].

Morton v Mancari, 417 US 535 (1974) [*Morton v Mancari*].

Natural Arch and Bridge Society v Alston, 209 F Supp 2d 1207, 1212 (D Utah 2002), *aff'd*, 98 Fed Appx 711 (10th Cir 2004).

Navajo Nation v United States Forest Service, 535 F 3d 1058 (9th Cir 2008) (*en banc*) [Bea J].

Northwest Indian Cemetery Protective Association v Peterson, 795 F2d 688 (1986) Canby J [*Peterson*].

Oglala Sioux Tribe v US Army Corps of Engineers, No 17–267 (DDC, filed 11 February, 2017).

Oklahoma Tax Commission v Citizen Band of Potawatomi Indian Tribe, 498 US 505, 511 (1991) [*Potawatomi Indian Tribe*].

Peyote Way Church of God, Inc. V Thornburgh, 922 F 2d 1210, 1281 (5th Cir 1991).

Pueblo of Sandia v United States, 50 F 3d 856 (10th Cir 1995).

Pyramid Lake Paiute Tribe v Morton, 354 F Supp 252 (DDC 1972) [*Pyramid Lake*].

Sequoyah Valley v Tennessee Valley Authority, 620 F2d 1159 (6th Cir), cert denied, 449 US 953 (1980) [*Sequoyah Valley*].

Sherbert v Verner, 374 US 398 (1963) [*Sherbert*].

Shoshone Tribe v United States, 299 US 476 (1937).

Sierra Club v US Army Corps of Eng'rs, 803 F3d 31, 38-40 (DC Cir 2015).

Sierra Club, Inc v Bostick, 787 F3d 1043, 1056 (10th Cir 2015).

Sioux Tribe v United States, 316 US 317, 325 (1942).

Snoqualmie Indian Tribe v Fed Energy Regulatory Comm'n, 545, F 3d 1207, 1214–15 (9th Cir 2008).

South Carolina v Catawba Indian Tribe, 476 US 498, 506 (1986) Stevens J.

Standing Rock Sioux Tribe v US Army Corps of Engineers, F Supp 3d (2016), 2016 WL 4734356 (DDC, 9 Sept 2016), Boasberg J [*Standing Rock I*].

Standing Rock Sioux Tribe v US Army Corps of Engineers, F Supp 3d (2017) (DDC, 7 March 2017), 2017 WL 908538, Boasberg J [*Standing Rock II*].

Te-Moak Tribe of Western Shoshone Indians of Nevada v US Department of the Interior, 565 Fed Appx 665 (9th Cir, 2014) [*Te-Moak Tribe*].

Tee-Hit-Ton Indians v United States, 348 US 272 (1955) [*Tee-Hit-Ton*].

United States v Adair, 723 F2d 1394 (9th Cir 1983) [*Adair*].

United States v Algoma Lumber Co, 305 US 415 (1939) [*Algoma Lumber*].

United States v Gonzales, 520 US 1,4 (1997).

United States v Hardman, 297 F3d 1116, 1132 (10th Cir 2002).

United States v Kagama, 118 US 375, 65 S Ct 1109, 30 L Ed 228 (1886).

United States v Lara, 541 US 193, 200 (2004) [*US v Lara*].

United States v Means, 858 F2d 404 (8th Cir 1988) [*Means*].

United States v Mitchell, 463 US 206, 103 S Ct 2961, 77 L Ed 2d 580 (1983) [*Mitchell II*].

United States v Navajo Nation, 537 US 488 (2003) [*Navajo Nation*].

United States v Sandoval, 231 US 28, 46 (1913).

United States v Shoshone Tribe, 304 US 111 (1938).

United States v Sioux Nation, 448 US 337, 413 (1980) [Blackmun J].

United States v Winans, 198 US 371, 25 S Ct 662, 49 L Ed 1089 (1905).

United States v Wilgus, 638 F3d 1274 (10th Cir 2011).

Wilson v Block, 708 F2d 735 (DC Cir 1983) Lumbard J [*Wilson*].

Winnemem Wintu Tribe v US Department of Interior, 725 FSupp 2d 1119, 1134 (ED Cal 2010).

Winter v Nat Res Def Advisory Council, Inc, 555 US 7, 22, 129 S Ct 365, 172 L Ed 2d 249 (2008).

Winters v United States, 207 US 564 (1908).

Wisconsin v Yoder, 406 US 205 (1972) [*Yoder*].

Worcester v Georgia, 31 US 515 (1832) [*Worcester*].

Wyoming Saw Mills, Inc v United States Forest Service, 179 F Supp 2d 1279 (2001), aff'd, 383 F 3d 1241 (10th Cir 2004).

Yankton Sioux Tribe v US Army Corps of Engineers, No 16–1796, 2016 WL 4706774 (DDC, filed 8 September 2016).

JURISPRUDENCE: FOREIGN

COLOMBIA

Corte Constitucional de Columbia (C.C.) (Columbian Constitutional Court), Sentencia T-380/93, 13 Sept 1999, 8 (Colomb.)

ECUADOR

Criminal Division of the Provincial Court of Loja in Proceeding No 11121-2011-0010, March 30, 2011

Third Civil Court of Loja, Case No 11121-2011-0010.

INDIA

Miglani v State of Uttarakhand, Writ Petition (PIL) No 140 of 2015 (India, High Court of Uttarakhand at Nainital, 30 March 2017) Sharma J.

Salim v State of Uttarakhand, Writ Petition (PIL) No 126 of 2014 (India, High Court of Uttarakhand at Nainital, 20 March 2017) Sharma J.

SOUTH AFRICA

Alexcor v Richtersveld Community (CCT 19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC).

Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11 Mogoeng CJ.

Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly (CCT 16/12) [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) (9 October 2012) Mogoeng CJ.

S v Makwanyane 1995 (3) All SA 391 (CC).

UNITED KINGDOM

Assange v The Swedish Prosecution Authority [2012] UKSC 22.

Attorney-General of New Zealand v Ortitz & Others [1982] 3 All ER 432 (HC &CA): [1983] 2 All ER 931 (HL).

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374.

Ex Parte Pinochet (No 3) [2000] 1 AC 147, 276; 119 ILR 135, 230, Lord Millett.

In re Claim by Herbert Wragg & Co Ltd [1956] Ch 323, Upjohn J.

In re Southern Rhodesia [1919] AC 211.

Lonrho Exports v ECGD [1996] 4 All ER 673; 108 ILR, 596.

Maclaine Watson v Department of Trade and Industry [1989] 3 All ER 523; 81 ILR 671, Lord Oliver.

Oppenheimer v Cattermole [1976] AC 249; 72 ILR 446, Lord Cross.

Regina (European Roma Rights Centre) v Immigration Officer at Prague Airport and Another [2004] UKHL 55, Lord Bingham; 131 ILR 652.

Rustomjee v R (1876) 2 QBD 69.

Sandline v Papua New Guinea 117 ILR 552.

GOVERNMENT DOCUMENTS

GOVERNMENT DOCUMENTS: AOTEROA/NEW ZEALAND

WAITANGI TRIBUNAL

Aotearoa New Zealand. Waitangi Tribunal, *Finding of the Waitangi Tribunal on the Kaituna Claim* (WAI-4) (30 November 1984) [*Kaituna Report*].

Aotearoa New Zealand. Waitangi Tribunal, *Findings and Recommendations of the Waitangi Tribunal on an Application by Alia Taylor in Relation to Fishing Grounds on the Waitara District*, WAI-6 (1983).

Aotearoa New Zealand. Waitangi Tribunal, *Interim Report and Recommendations*, WAI 167 (1993) [Waitangi Tribunal, *Interim Report*].

Aotearoa New Zealand. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, WAI-8, (1985).

Aotearoa New Zealand. Waitangi Tribunal, *The Ngai Tahu Report 1991*.

Aotearoa New Zealand. Waitangi Tribunal, *The Ngāti Awa Raupata Report*, WAI 46 (1999) [Waitangi Tribunal, *Ngāti Awa Raupata Report*].

Aotearoa New Zealand. Waitangi Tribunal, *The Whanganui River Report*, WAI 167 (1999) [Waitangi Tribunal, *Whanganui River Report*].

Aotearoa New Zealand. Waitangi Tribunal, *Te Roroa Report* (1992) [Waitangi Tribunal, *Te Roroa Report*].

NON-PARLIAMENTARY PAPERS

"About Maori Television", online: *Maori Television* <http://www.maoritelevision.com/about/about-maori-television>.

"Māori Culture", (2014), *New Zealand Tourism Board,* online: <www.newzealand.com/travel/en/media/features/maori-culture/maori-culture_aotearoa-maori-culture_feature.cfm> .

"Natural Resources", online: Ministry of Business, Innovation & Employment Hīkina Whakatutuki <www.mbie.govt.nz/info-services/sectors-industries/natural-resources> .

"Waitangi Tribunal Te Rōpū Wakamana I Te Tiriti O Waitangi", (2014), *Ministry of Justice Tahū o te Ture*, online: <www.justice.govt.nz/tribunals/waitangi-tribunal>.

Agreement re Whanganui River Claims. "Tūtohu Whakatupua", Whanganui Iwi and the Crown (30 August 2012) (agreement made in "settlement of the historical Treaty of Waitangi claims of the Whanganui Iwi in respect of the Whanganui River.").

Whanganui River Deed of Settlement, "Ruruku Whakatupua — Te Mana O Te Iwi O Whanganui" (05 August 2014).

Whanganui River Deed of Settlement, "Ruruku Whakatupua — Te Mana O Te Awa Tupua" (05 August 2014), Treaty Settlement Documents, "Whanganui River Deed of Settlement Between the Crown and Whanganui Iwi", online: (05 August 2014), Government of New Zealand < https://www.govt.nz/dmsdocument/2731.pdf>.

Ministry for Culture and Heritage. "Treaty FAQs", (2014), *New Zealand History Nga korero a ipurangi o Aotearoa*, online: <http://www.nzhistory.net.nz/politics/treaty/treaty-faqs>.

Ministry of Justice *Tahū o te Ture*. "Human Rights Review Tribunal", (2014), online: <www.justice.govt.nz/tribunals/human-rights-review-tribunal>.

Aotearoa New Zealand. "Ruruku Whakatupua: Whanganui River Deed of Settlement Between the Crown and Whanganui Iwi Summary" (5 August 2014) *Government of New Zealand*, online: <www.govt.nz/treaty-settlement-documents/whanganui-iwi/whanganui-iwi-whanganui-river-deed-of-settlement-summary-5-aug-2014/>.

New Zealand Human Rights Commission Te Kahuri Tika Tangata. "United Nations Declaration on the Rights of Indigenous Peoples", online: *Hum Rights Treaty Wait* <http://www.hrc.co.nz/human-rights-and-the-treaty-of-waitangi/united-nations-declaration-on-the-rights-of-Indigenous-peoples/>.

New Zealand Human Rights Commission Te Kahuri Tika Tangata. "UNDRIP and the Treaty", online: *Hum Rights Treaty Wait* <http://www.hrc.co.nz/human-rights-and-the-treaty-of-waitangi/undrip-and-the-treaty/>.

Statistics New Zealand Tatauronga Aortearoa. "National Population Estimates: At 30 June 2014", (14 August 2014), online: <http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/NationalPopulationEstimates_HOTPAt30Jun14.aspx>.

GOVERNMENT DOCUMENTS: AUSTRALIA

PARLIAMENTARY PAPERS

Northern Territory Second Reading Speeches. "Appropriation (2013-2014) Bill 2014 Second Reading Speech", online: (1 January 2013), Austlii <http://www.austlii.edu.au/cgi-

bin/sinodisp/au/legis/nt/bill_srs/a20132014b2013186/srs.html?stem=0&synonyms=0&query=McArthur%20River%20Mining>.

Northern Territory Second Reading Speeches. "McArthur River Project Amendment (Ratification of Mining Authorities Bill 2007 Second Reading Speech", online: <www.austlii.edu.au/au/legis/nt/bill_srs/mrpaomab2007678/>.

NON-PARLIAMENTARY PAPERS

"About the Commission". (2014), *Australian Human Rights Commission*, online: <www.humanrights.gov.au/about-commission-0>.

"Legal Status and Heritage Place Lists: World Heritage List", *Australian Government Department of the Environment and Energy*, online: < www.environment.gov.au/heritage/publications/australian-heritage-database/legal-status>.

Aboriginal Areas Protection Authority (AAPA). *Annual Report for the Aboriginal Areas Protection Authority for the Financial Period 1 July 2015 to 30 June 2016* (Darwin, NT: AAPA, 2016).

Australia, Aboriginal and Torres Strait Islander Commission (ATSIC). *As a Matter of Fact: Answering the Myths and Misconceptions About Indigenous Australians*, 2nd ed (Canberra: Commonwealth of Australia, 1999) [ATSIC, *As a Matter of Fact*].

Australia, Human Rights and Equal Opportunity Commission. *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney: Commonwealth of Australia, 1997).

Australia, Parliament of Australia. "Australia's Uranium" by Greg Baker, Statistics and Mapping Section, Research Paper No 6, 2009–10, ISSN 1834-9854 (Canberra: Parliament of Australia, 2009).

Australia, Parliament of Australia. "Indigenous Religions in Secular Australia" by Marian Maddox, Consultant, Social Policy Group, Research Paper 11 1999–2000 (14 December 1999) online: < http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP11 >.

Australian Bureau of Statistics. "Estimates of Aboriginal and Torres Strait Australians, June 2011", (30 August 2013), online: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>.

Australian Heritage Database. "Aboriginal Embassy Site, King George Tce, Parkes, ACT, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DAboriginal%2520Embassy%2520Site%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=18843>.

Australian Heritage Database. "Budj Bim National Heritage Landscape – Mt Eccles Lake Condah Area, Mt Eccles Rd, Macarthur, VIC, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DBudj%2520Bim%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=105673>.

Australian Heritage Database. "Crocodile Head Area, Lighthouse Rd, Currarong, NSW, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: < http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DCrocodile%2520Head%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1

dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=105322>].

Australian Heritage Database. "Cubbitch Barta National Estate Area, Old Illwara Rd, Holsworthy, NSW, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DCubbitch%2520Barta%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=105405>.

Australian Heritage Database. "Dampier Archipelago (including Burrup Peninsula), Karratha Dampier Rd, Dampier, WA, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DDampier%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=105727>.

Australian Heritage Database. "Jervis Bay Territory, Jervis Bay Rd, Jervis Bay, ACT, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DJervis%2520Bay%2520Territory%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=105394>.

Australian Heritage Database. "Kakadu National Park, Arnhem Hwy, Darwin NT, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: < http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DKakadu%2520National%2520Park%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don

%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=105041>.

Australian Heritage Database. "Koonalda Cave, Old Eyre Hwy, Cook, SA, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DKoonalda%2520Cave%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=106022>.

Australian Heritage Database. "Ngarrabullgan, Mount Mulligan Rd, Dimbulah, QLD, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DNgarrabullgan%2520%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=106025>.

Australian Heritage Database. "Wet Tropics World Heritage Area (Indigenous Values), Cairns, QLD, Australia" (28 August 2017) *Australian Government Department of the Environment and Energy*, online: < http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=place_name%3DWet%2520Tropics%2520World%2520Heritage%2520Area%2520%2528Indigenous%2520Values%2529%3Bkeyword_PD%3Don%3Bkeyword_SS%3Don%3Bkeyword_PH%3Don%3Blatitude_1dir%3DS%3Blongitude_1dir%3DE%3Blongitude_2dir%3DE%3Blatitude_2dir%3DS%3Bin_region%3Dpart;place_id=106008>.

Australian Human Rights Commission. "Questions and answers on the UN Declaration on the Rights of Indigenous Peoples", (2 April 2009), online: <https://www.humanrights.gov.au/publications/questions-and-answers-un-declaration-rights-Indigenous-peoples-2009>.

Bishop, James et al. "The Resources Boom and the Australian Economy: A Sectorial Analysis", (2013), Bulletin (March Quarter 2013), online: Reserve Bank of Australia <www.rba.gov.au/publications/bulletin/2013/mar/5.html> .

Committee for Geographical Names in Australasia. "Guidelines for the Recording and Use of Aboriginal and Torres Strait Islander Placenames" in Luise Hercus, Flavia Hodges & Jane Simpson, eds, *The Land is a Map: Placenames of Indigenous Origin in Australia*, 2nd ed (Canberra, ACT: ANU E Press, 2009) 277.

Final Report of the Royal Commission Into Aboriginal Deaths in Custody, Vol 1–5 (April 1991) *Indigenous Law Resources*, online: <www.austlii.edu.au/au/other/IndigLRes/rciadic/>.

Human Rights and Equal Opportunity Commission. *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney: Commonwealth of Australia, 1997).

Inmulugulu, Jenny. "Chairman's Report", *Annual Report for the Aboriginal Areas Protection Authority for the Financial Period 1 July 2015 to 30 June 2016* (Darwin, NT: Aboriginal Areas Protection Authority, 2016).

Mathews, Jane. *Commonwealth Hindmarsh Island Report* (27 June 1996).

Saunders, Cheryl. *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the Significant Aboriginal Area in the Vicinity of Goolwa and Hindmarsh (Kumarangh) Island* (Adelaide: South Australian Government Printer, 1994).

Scambary, Benedict. "Chief Executive Officer's Report", *Annual Report for the Aboriginal Areas Protection Authority for the Financial Period 1 July 2015 to 30 June 2016* (Darwin, NT: Aboriginal Areas Protection Authority, 2016).

Stevens, Iris. *Report of the Hindmarsh Island Bridge Royal Commission* (Adelaide: Hindmarsh Island Bridge Royal Commission, 1995).

GOVERNMENT DOCUMENTS: CANADA

PARLIAMENTARY PAPERS

Minister of the Environment. "Decision Statement issued under Section 54 of the Canadian Environmental Assessment Act, 2012", (2014), *Minister of the Environment Ref No 63928*, online: <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=98458>.

NON-PARLIAMENTARY PAPERS

"Docket: 36664", *Supreme Court of Canada*, online: <www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=36664>.

"First Nations", (2015-04-07), *Indigenous and Northern Affairs Canada*, online: < www.aadnc-aandc.gc.ca/eng/1100100013791/1100100013795 >.

"Summary: 36664", *Supreme Court of Canada*, online: <www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=36664>.

"Inuit", (2015-06-26), *Indigenous and Northern Affairs Canada*, online: < www.aadnc-aandc.gc.ca/eng/1100100014187/1100100014191 >.

"Métis and Non-Status Indians", (2012-08-31), *Indigenous and Northern Affairs Canada,* online: < www.aadnc-aandc.gc.ca/eng/1100100014271/1100100014275>.

Canada, House of Commons. *Indian Self-Government in Canada: Report of the Special Committee*, Keith Penner, Chairman: Special Committee on Indian Self-Government (October 1983) available online: <caid.ca/PennerRep1983.pdf> [the *Penner Report*].

Canada, Indian Affairs and Northern Development. "The Impacts of the 1985 Amendments to the *Indian Act* (Bill C-35)", Information Sheet (Ontario: September 1995).

Canada, Indian Affairs and Northern Development. *Statement on Indian Policy of the Government of Canada* (Ottawa: Indian Affairs and Northern Development, 1969), available online: <nctr.ca/assets/reports/Historical%20Reports/1969%20The%20White%20Paper.pdf> [*the White Paper*].

Canada, Indian Affairs Branch Ottawa. *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies: Part 1*, by HB Hawthorn, ed (Ottawa: Information Canada, 1966), available online: <www.collectionscanada.gc.ca/webarchives/20071120104036/http://www.ainc-inac.gc.ca/pr/pub/srvy/sci_e.html> [*The Hawthorn Report*].

Canada, Indian Affairs Branch Ottawa. *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies: Part 2*, by HB Hawthorn, ed (Ottawa: Information Canada, 1967), available online: <www.collectionscanada.gc.ca/webarchives/20071126042509/http://www.ainc-inac.gc.ca/pr/pub/srvy/sci3_e.pdf> [*The Hawthorn Report*].

Canada, Indian Chiefs of Alberta (ICA). *Citizens Plus* (June 1970) published in (2011) 1:2 *Aboriginal Policy Studies* 188, available online: <ejournals.library.ualberta.ca/index.php/aps/article/view/11690/8926> [*the Red Paper*].

Canada, Ministry of Aboriginal Relations. "Reconciliation with First Nations in B.C.", by John Rustad, (30 December 2014), online: *Minist Aborig Relations Reconcil* <http://www2.news.gov.bc.ca/news_releases_2013-2017/2014ARR0045-001963.htm>.

Canada, Ministry of Environment. "Prosperity Mine environmental assessment certificate extended", (2015), *BC Newsroom*, online: <http://www.newsroom.gov.bc.ca/2015/01/prosperity-mine-environmental-assessment-certificate-extended.html>.

Canada, Ministry of the Attorney General Ontario. "Respecting and Protecting the Sacred: Report for the Ipperwash Inquiry" (31 October 2006), by Darlene Johnston, online: <

www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Johnston_Respecting-and-Protecting-the-Sacred.pdf >.

Canada, Natural Resources. "Key Facts and Figures on the Natural Resources Sector", (25 January 2016), online: Government of Canada < http://www.nrcan.gc.ca/publications/key-facts/16013#a5> .

Canada, Royal Commission on Aboriginal Peoples. *Highlights from the Report of the Royal Commission on Aboriginal Peoples: People to People, Nation to Nation* (Ottawa: Communication Group, 1996), available online: <www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637> [*RCAP Highlights*].

Canada, Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples, Vol 1: Looking Forward, Looking Back* (1996) (Ottawa: Communication Group, 1996), available online at <qspace.library.queensu.ca/handle/1974/6874> [*RCAP*].

Canada, Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, vol 1–5 (Ottawa: Communication Group, 1996), available online at <qspace.library.queensu.ca/handle/1974/6874> [*RCAP*].

Canada, Statistics. *Aboriginal Peoples in Canada: First Nations People, Métis and Inuit. National Household Survey, 2011* (2013).

Canada, Truth and Reconciliation Commission (TRC). *Canada's Residential Schools*, vol 1–6 (2015), online at: <nctr.ca/reports.php>.

Canada, Truth and Reconciliation Commission (TRC). *The Survivors Speak* (2015), online at: <nctr.ca/reports.php>.

Canada, Truth and Reconciliation Commission (TRC). *What We Have Learned: Principles of Truth and Reconciliation* (2015), online at: <nctr.ca/reports.php>.

Canada, Truth and Reconciliation Commission (TRC). *Truth and Reconciliation Commission of Canada: Calls to Action* (2015), online at: <nctr.ca/reports.php>.

Canada, Truth and Reconciliation Commission (TRC). *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), online at: <nctr.ca/reports.php>.

Government of Canada. *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011).

Government of Canada. "Canada Endorses The United Nations Declaration On The Rights Of Indigenous Peoples", (12 November 2010), online: <http://www.aadnc-aandc.gc.ca/eng/1292354321165/1292354361417>.

Government of Canada. "Update Paper: United Nations Declaration on the Rights of Indigenous Peoples", (10 January 2008), online: *Aborig Aff North Dev Canada* <http://www.aadnc-aandc.gc.ca/eng/1100100014161/1100100014162>.

Standing Senate Committee on Human Rights. *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights* (Report: May 2003), available online at: <https://sencanada.ca/content/sen/committee/372/huma/rep/rep04may03-e.htm>.

GOVERNMENT DOCUMENTS: UNITED STATES

NON-PARLIAMENTARY PAPERS

Central Intelligence Agency (CIA). "South Asia: Bhutan", (2014), *World Factbook*, online: <https://www.cia.gov/library/publications/the-world-factbook/geos/bt.html>.

United States, Congressional Research Service (CRS). *International Law and Agreements: Their Effect upon US Law* by Michael John Garcia, Legislative Attorney, CRS Report No 7-5700 RL32528 (18 February 2015) [CRS, *International Law*].

United States Department of Agriculture (USDA). "Tonto National Forest: History and Development", *United States Department of Agriculture (USDA) Forest Service*, online: < https://www.fs.usda.gov/detail/tonto/home/?cid=fsbdev3_018924>.

US Department of State. "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples. Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples", (2010), online: <http://www.state.gov/s/tribalconsultation/declaration/>.

US Library of Congress. "Bhutan: Ethnic Groups", (1991), *Country Studies Bhutan*, online: <http://countrystudies.us/bhutan/19.htm>.

AGREEMENTS

Aotearoa New Zealand, Whanganui Iwi & The Crown. *Record of Understanding in Relation to Whanganui River Settlement* (2011) [*Record of Understanding*].

Aotearoa New Zealand, Whanganui Iwi & The Crown. *Ruruku Whakatupua te Mana o Teana Tupua* (5 August 2014); Aotearoa New Zealand, Whanganui Iwi and The Crown, *Ruruku Whakatupua Te Mana o Te Iwi o Whanganui* (5 August 2014), Deed of Settlement [jointly: *Whanganui River Deed of Settlement*].

Aotearoa New Zealand, Whanganui Iwi & The Crown. *Tūtohu Whakatupua Whanganui River Agreement* (2012) [*Whanganui River Agreement*].

Canada. *Haida Gwai Strategic Land Use Agreement* (2007).

Canada. *James Bay and Northern Quebec Agreement* (1975).

Canada. *La Convention de la Baie James et du Nord québécois* (1976).

Canada. *Manitoba Northern Flood Agreement* (1970).

Canada. *Northeastern Quebec Agreement* (1978).

Canada. *Northern Flood Implementation Agreement* (1996).

INTERNATIONAL MATERIALS

INTERNATIONAL DOCUMENTS: TREATIES & CONVENTIONS

American Convention on Human Rights (1969) (adopted 22 November 1969, entered into force 1978).

American Declaration on the Rights and Duties of Man (Bogotá, Columbia, 1948).

Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO) Convention No 107 of 1957.

Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 15511 (entered into force 17 December 1975) [*World Heritage Convention*].

Convention for the Safeguarding of the Intangible Cultural Heritage (2003).

Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

Declaration on Cultural Diversity, UNESCO (adopted 2 November 2001) (2001).

Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR, UN Doc A/RES/61/295, (2007).

Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, UNGA Res 47/135 (18 December 1992).

ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, C169 (entered into force 5 September 1991) [*ILO 169*].

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (1966) [ICCPR].

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (1966) [ICESR].

International Convention on the Elimination of All Forms of Racial Discrimination, 1965, 660 UNTS 195.

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (8 January 1987) (1987).

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (26 January 1997) (1997).

Operational Guidelines for the Implementation of the World Heritage Convention, WHC 08/01, UNESCOR, 2008.

Optional Protocol to the International Covenant on Civil and Political Rights (1966) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 302.

Rio Declaration on Environment and Development (14 June 1992) (1992) 31 ILM 874 (1992).

Royal Proclamation of 1763.

Treaty of Paris, Great Britain, France and Spain, 10 February 1763.

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980).

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, 25 ILM 543 (not yet in force).

Vienna Declaration and Program of Action, (adopted 25 June 1993) (VDPA) (1993).

Universal Declaration of Human Rights, (adopted 10 December 1948) UNGA Res 217A (III) [UDHR].

INTERNATIONAL DOCUMENTS: UN AND OTHER DOCUMENTS

Achievement of the goal and objectives of the Second International Decade of the World's Indigenous People. Report of the Secretary-General, UNGAOR, 2014, UN Doc A/69/271.

Advisory Opinion of the African Commission on Human and Peoples' Rights on The United Nations Declaration on the Rights of Indigenous Peoples, adopted by the African Commission on Human and Peoples' Rights at its 41st Ordinary Session held in May 2007 in Accra, Ghana.

Commission on Human Rights. *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Res 2005/53 (19 April 2005 signature date).

Committee on Economic Social and Cultural Rights (CESCR). *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art, Para 1a of the Covenant on Economic, Social and Cultural Rights) (21 December 2009) UN Doc E/C.12/GC/21[1]* (2009).

Human Rights Council. *Report of the Special Rapporteur on the rights of Indigenous peoples, James Anaya. Addendum. The situation of Indigenous peoples in Canada* (2014).

Recommendation on Safeguarding of Traditional Culture and Folklore, UNESCO (15 November 1989) (1989).

Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1986/7/Add.4

UNGA Res 41/128, *Declaration on the Right to Development* (4 December 1986) 41 UNGAOR, Supp No 53 at 186, UN Doc A/41/53.

UNGA Res 626 (VII), *Right to Exploit Freely Natural Wealth and Resources* (21 December of 1952,) [UNGA 626].

UNGA Res 523 (VI), *Integrated Economic Development and Commercial Agreements* (12 January 1952) 6 UNGAOR, Supp No 20 at 20, UN Doc A/2119 [UNGA 523].

UNGA Res 1314 (XIII), *Recommendations Concerning International Respect for the Rights of Peoples and Nations to Self-Determination* (12 December 1958) 13 UNGAOR, Supp No 18 at 27, UN Doc A/4090 [UNGA 1314].

UNGA Res 1803 (XVII), *Permanent Sovereignty Over Natural Resources*, 14 December 1962, 17 UNGAOR, Supp No 17 at 15, UN Doc A/5217, Art 1, para 4 [UNGA 1803].

UNGA Res 3201 (S-VI) (1 May 1974) UN Doc A/Res/S-6/3201 [UNGA 3201].

UNGA Res 3202 (S-VI) (1 May 1974) UN Doc A/Res/S-6/3202 [UNGA 3202].

UNGA Res 3281 (XXIX) (12 December 1974) UN Doc A/Res/29/3281 [UNGA 3281].

United Nations Educational Scientific and Cultural Organisation. *Operational Guidelines for the Implementation of the World Heritage Convention* (2008).

CASES

African Court on Human and Peoples' Rights in African Commission on Human and Peoples' Rights v Republic of Kenya, Application No 006/2012 (26 May 2017) [*Ogiek Case*].

Beneficiaries of the Late Norbert Zongo et al v Burkina Faso, The (African Court on Human and Peoples Rights: Judgment on Merits) 28 March 2014.

Case of the Mayagna Community (SUMO) Awas Tingni Community v Nicaragua (Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001), 2001 [*Awas Tingni*].

Case of the Plan de Sánchez Massacre v Guatemala. Reparations, IACtHR (Ser. C) No. 116 (19 Nov 2004), 2004.

Case of the Plan de Yakye Axa Indigenous Community v Paraguay, Judgment, IACtHR (Ser. C) No. 125 (17 Jun 2005), 2005.

Grand Chief Michael Mitchell (Canada), Inter-American Commission on Human Rights, Admissability Report Petition No. 790/09 (2003).

Hopu and Bessert v France, Merits, Communication No 549/1993, UN Doc CCPR/C/60/549/1993/Rev.1, IHRL 2148 (UNHRC 1997), 29 July 1997, Human Rights Committee [UNHRC].

Hul'qumi'num Treaty Group (Canada), Inter-American Commission on Human Rights, Admissability Report Petition No. 592-07 (2009).

Island of Palmas Case (The Netherlands v United States) 2 RIAA 829 (1928), Huber, Sole Arbitrator.

Lohé Issa Konaté v Burkina Faso (African Court on Human and Peoples Rights: Judgment on Merits) 5 December 2014.

Sandra Lovelace v Canada, UNHRC Communication No R6/24, UN Doc Supp No 40 (A/36/40), 1981, 166 [*Lovelace*].

Western Sahara Opinion ICJ Rep 1975 12, International Court of Justice.

WEBSITES

"Declaration on the Rights of Indigenous Peoples", online: <www2.ohchr.org/English/issues/Indigenous/declaration.htm>.

"Signatories and Ratifications", *Inter-American Commission on Human Rights*, online: <www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm>.

"Status as at: 23-06-2017 05:01:19 EDT", (23 June 2017), *United Nations Treaty Collection*, online: <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en>.

"Status of Ratification Interactive Dashboard: International Covenant on Economic, Social and Cultural Rights" (8 June 2017), *United Nations Office of the High Commissioner of Human Rights (OHCHR)*, online: <indicators.ohchr.org>.

"Status of Ratification Interactive Dashboard: International Convention on the Elimination of All Forms of Racial Discrimination" (8 June 2017), *United Nations Office of the High Commissioner of Human Rights (OHCHR)*, online: <indicators.ohchr.org>.

"Status of Ratification Interactive Dashboard: Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (8 June 2017), *United Nations Office of the High Commissioner of Human Rights (OHCHR)*, online: <indicators.ohchr.org>.

"Status of Ratification Interactive Dashboard: Optional Protocol to the International Covenant on Civil and Political Rights" (8 June 2017), *United Nations Office of the High Commissioner of Human Rights (OHCHR)*, online: <indicators.ohchr.org>.

Legal Instruments. "Convention for the Safeguarding of the Intangible Cultural Heritage. Paris, 17 October 2003", *UNESCO*, online: <www.unesco.org/eri/la/convention.asp?KO=17116&language=E&order=alpha>.

Legal Instruments. "Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Paris, 20 October 2005", *UNESCO*, online: <www.unesco.org/eri/la/convention.asp?order=alpha&language=E&KO=31038>.

Organization of American States [OAS]. "What is the IACHR", online: <http://www.oas.org/en/iachr/mandate/what.asp> [OAS, "IACHR"].

UNESCO. "States Parties Ratification Status" (31 January 2017), *World Heritage Convention*, online: <whc.unesco.org/en/statesparties/>.

United Nations Permanent Forum on Indigenous Issues. "Indigenous Peoples at the United Nations", online: <http://undesadspd.org/IndigenousPeoples.aspx> .

United Nations Permanent Forum on Indigenous Issues. "International Day of the World's Indigenous Peoples 2014", online: <http://undesadspd.org/IndigenousPeoples/InternationalDay/2014.aspx> .

United Nations Forum on Indigenous Issues. "Factsheet: Who are Indigenous Peoples?", online: <http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> [UNPFII, "Factsheet"].

SECONDARY SOURCES

PERIODICALS

Adamson, Joni. "Indigenous Literatures, Multinaturalism, and Avatar: The Emergence of Indigenous Cosmopolitics" (2012) 24:1 American Literary History 143.

Alcantara, Christopher & Zac Spicer. "Learning from the Kelowna Accord" (July–August 2015) Policy Options 95.

Barrie, GN. "The Quest for Indigenous Land Rights Intensifies: *Mabo (No 2)*, *Delgamuukw*, *Richtersveld* and now *the Endorois of Kenya*" (2011) 26 SA Publiekreg/SA Public Law 497 [Barrie, "The Quest"].

Barrie, GN. "The *Richtersveld* and *Mabo (no 2)* Cases: Resurrecting the *Lex Loci* of British Imperial Law" [2011]:4 J South African Law 730 [Barrie, "British Imperial Law"].

Barrie, GN. "The United Nations Declaration on the Rights of Indigenous People: Implications for Land Rights and Self-Determination" [2013]:2 J South African Law 292 [Barrie, "UNDRIP"].

Battersby, Sara Kate. "The Duty to Consult: What Aotearoa New Zealand Can Learn from Canada" (2013) 4 Te Tai Haruru Journal of Maori and Indigenous Issues 2.

Beck, Marcus W, Andrea H Claassen & Peter J Hundt. "Environmental and Livelihood Impacts of Dams: Common Lessons Across Development Gradients that Challenge Sustainability" (2012) 10:1 International Journal of River Basin Management 73.

Berndt, Ronald M. "The Gove Dispute: The Question of Australian Aboriginal Land and the Preservation of Sacred Sites" (1964) 1:2 Anthropological Forum: A Journal of Social Anthropology and Comparative Sociology 258.

Bluemel, Erik B. "Separating Instrumental from Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule-Making" (2005) 30 American Indian Law Review 55.

Bodine, John J. "Blue Lake: A Struggle for Indian Rights", (1973) 1 American Indian Law Review 23.

Borrows, John. "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 American Indian Law Review 37.

Borrows, John & Leonard I Rotman. "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alberta L Rev 9.

Brady, Joel. "'Land is Itself a Sacred, Living Being': Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of *Bear Lodge*" (1999) 24 American Indian Law Review 153.

Brady, Veronica. "Sacred Ground: An Exploration" (2005) 29:86 Journal of Australian Studies 91.

Brooks, Samuel D. "Note: Native Americans' Fruitless Search for First Amendment Protection of Their Sacred Religious Sites", (1990) 24 Val U L Rev 521.

Burnett, Michael A. "The Dilemma of Commercial Fishing Rights of Indigenous Peoples: A Comparative Study of the Common Law Nations" (1996) 19 Suffolk Transnat'l L Rev 389.

Charowsky, Zena. "The Aboriginal Law Duty to Consult: An Introduction for Administrative Tribunals" (2011) 74 Sask L Rev 213.

Clarke, Philip. "Response to 'Secret Women's Business: The Hindmarsh Island Affair'" (1996) 20:50–51 Journal of Australian Studies 141.

Clow, Richmond L. "A New Look at Indian Land Suits: The Sioux Nation's Black Hills Claim as a Case for Tribal Symbolism", (1983) 28:102 Part 1 Plains Anthropologist 315.

Collins, Camala. "No More Religious Protection: The Impact of Lyng v Northwest Indian Cemetery Protection Association" (1990) 38 Washington University J Urban & Contemporary L 369.

Collins, Richard B. "Sacred Sites and Religious Freedom on Government Land", (2003) 5:2 University of Pennsylvania Journal of Constitutional Law 240.

Coyle, Michael. "From Consultation to Consent: Squaring the Circle?" (2016) 67 U N B LJ 235.

Cragun, Boone. "A Snowbowl *Déja Vu*: The Battle Between Native American Tribes and the Arizona Snowbowl Continues" (2005) 30 American Indian Law Review 165.

Dallman, Suzanne et al. "Political Ecology of Emotion and Sacred Space: The Winnemem Wintu Struggles with California Water Policy", (2013) 6 Emotion, Space and Society 33 [Dallman et al, "Political Ecology"].

Dussault, René. "L'avenir passe par la reconnaissance, le partage et le respect: Entrevue avec Andrée Lajoie" (2002) 17 Canadian Journal of Law and Society 9.

Dussias, Allison M. "Ghost Dance and Holy Ghost: The Echoes of 19th Century Christianization Policy in 20th Century Native American Free Exercise Cases", (1997) 49 Stanford L Rev 773.

Dussias, Allison M. "Room for a (Sacred) View? American Indian Tribes Confront Visual Desecration Caused By Wind Energy Projects" (2014) American Indian Law Review 333.

Edwards, Joshua A. "Yellow Snow on Sacred Sites: A Failed Application of the Religious Freedom Restoration Act" (2009) 34 American Indian Law Review 151.

Eisenberg, Avigail. "Indigenous Cultural Rights and Identity Politics in Canada" (2013) 18 Review of Constitutional Studies 89.

Elkin, "Elements of Australian Aboriginal Philosophy" (1969) 40 Oceania at 93, cited by Charlesworth, "Introduction", at 10.

Ellis, Ngarino. "Pan-Pacific Connections — Tracing the Past Across the Waves" (2012) 44 Journal of the Hamburg Museum of Ethnology, Special Edition, *House Rauru: Masterpiece of the Māori* 65.

Erdos, David. "Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill of Rights Act (1990)" (2007) 5:2 I•CON 343.

Eskridge, Jr, William N. "Gadamer/Statutory Interpretation" (1990) 90 Colum L Rev 609.

Flavell, Te Ururoa. "'Being Māori Today' — Māori Identity and Influence on New Zealand Society" (2012) 44 Journal of the Hamburg Museum of Ethnology, Special Edition, *House Rauru: Masterpiece of the Māori* 437.

Fletcher, Matthew LM. "Tribal Membership and Indian Nationhood" (2012-2013) 37 American Indian Law Review 1.

Fonda, Marc V. "Are They Like Us, Yet? Some Thoughts on Why Religious Freedom Remains Elusive for Aboriginals in North America" (2011) 2:4 The International Indigenous Policy Journal 1.

Frideres, James. "Aboriginal Identity in the Canadian Context" (2008) 28:2 Can J Native Stud 313 at 324.

Ganz, Beth. "Indigenous Peoples and Land Tenure: An Issue of Human Rights and Environmental Protection" (1996) 9 Geo Int'l Envtl L Rev 173.

Garrett, Bradley L. "Drowned Memories: The Submerged Places of the Winnemem Wintu" (2010) 6:2 Archaeologies 346.

Gaudreault-DesBiens, Jean-François. "Pour une théorie déontique-axiomatique de la décision en contexte fédéral, ou quelques jalons pour une philosophie politico-juridique du fédéralisme" (2016) 16 Jus Politicum 135.

Gaudreault-DesBiens, Jean-François. "The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives about Law, Democracy and Identity" (1999) 23 Vermont Law Review 793.

Genia, Erin M. "The Landscape and Language of Indigenous Cultural Rights" (2012) 44 Arizona Student Law Journal 653.

Gentelet, Karine, Doris Farget & Christopher Campbell-Duruflé. "Le Canada et la *Déclaration des Nations Unies sur les droits des peoples autochtones*: valeur et pertinence" (2010) 23:1 Nouvelles pratiques sociales 130.

Gibson, Johanna. "The UDHR and the Group: Individual and Community Rights to Culture" (2008) 30 Hamline Journal of Public Law and Policy 285.

Ginn, GAC. "Holy Ground and Mortal Promises: The Campaigns for the Mothers' Memorial, Toowoomba" (2010) 34:3 Journal of Australian Studies 331.

Graben, Sari. "Rationalizing Risks to Cultural Loss in Resource Development" (2013) 26 Canadian Journal of Law and Jurisprudence 83 [Graben, "Rationalizing Risks"].

Graben, Sari. "Resourceful Impacts: Harm and Valuation of the Sacred" (2014) 64 University of Toronto Law Journal 64 [Graben, "Resourceful Impacts"].

Graben, Sari & Abbey Sinclair. "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board" (2015) 65 U Toronto LJ 382.

Graber, Christoph B. "Aboriginal Self-Determination vs Propertization of Traditional Culture: The Case of the Sacred Wanjina Sites" (2009) 13 Australian Indigenous Law Review 18.

Grosswald Curren, Vivian. "Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives" (1998) 46:4 Am J Comp Law 657.

Hartney, Michael. "Some Confusions Concerning Collective Rights" (1991) 4 Canadian Journal of Law and Jurisprudence 293.

Hemming, Steve. "'Not the Slightest Shred of Evidence': A Reply to Philip Clarke's Response to 'Secret Women's Business'" (1997) 21 Journal of Australian Studies 130.

Hill, Braden. "Searching for Certainty in Purity: Indigenous Fundamentalism" (2014) 20:1 Nationalism and Ethnic Politics 10.

Hooker, Ann M. "American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts Between Religious Use and Multiple Use at El Malpais National Monument" (1994) 19 American Indian Law Review 133.

Hudson, Charles. "Cherokee Concept of Natural Balance" (1970) 3:4 The Indian Historian 51.

Isa, Felipe Gómez. "Cultural Diversity, Legal Pluralism, and Human Rights from an Indigenous Perspective: The Approach by the Colombian Constitutional Court and the Inter-American Court of Human Rights" (2014) 36:4 Human Rights Quarterly 722.

Isaac, Thomas & Anthony Knox. "The Crown's Duty to Consult Aboriginal People" (2003) 41:1 Alberta Law Review 49.

Jacobs, Lesley A. "Bridging the Gap Between Individual and Collective Rights with the Idea of Integrity" (1991) 4 Canadian Journal of Law and Jurisprudence 375.

Jovanovic, Miodrag A. "Recognizing Minority Identities Through Collective Rights" (2005) 27:2 Hum Rights Q 62.

Keller, Mary L. "Indigenous Studies and 'the Sacred'" (2014) 38:1 Am Indian Q 82.

Kelsen, Hans. "Qu'est-ce que la théorie pure du droit?" (1992) 22 Dr et soc 551.

Kingsbury, Benedict. "'Indigenous Peoples'" in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 American Journal of International Law 414.

Kymlicka, Will. "Liberal Individualism and Liberal Neutrality" (1989) 99 *Ethics* 883.

Kymlicka, Will. "The Internationalization of Minority Rights" (2008) 6:1 International Journal of Constitutional Law 1.

Landau, David. "Constitution-Making Gone Wrong" (2013) 64 Ala Law Rev 923.

Lawson, Stephanie. "The Politics of Indigenous Identity: An Introductory Commentary" (2014) 20:1 Nationalism and Ethnic Politics 1.

Legrand, Pierre. "How to Compare Now" (1996) 16 Legal Studies 232 [Legrand, "How to Compare"].

Loesch, Martin C. "The First Americans and the 'Free' Exercise of Religion" (1993) 18 American Indian Law Review 313.

Lucas, Rod. "The Failure of Anthropology", (1996) 20:48 Journal of Australian Studies 40.

Lane, Marcus B et al. "Sacred Land, Mineral Wealth, and Biodiversity at Coronation Hill, Northern Australia: Indigenous Knowledge and SIA" (2003) 21:2 Impact Assessment and Project Appraisal 89.

Ludvig, Szonja. "The Tribes Must Regulate: Jurisdictional, Environmental, and Religious Considerations of Hydraulic Fracturing on Tribal Lands" (2013) Brigham Young University Law Review 727.

Macklem, Patrick. "Minority Rights in International Law" (2008) 6:3–4 International Journal of Constitutional Law 531.

McDonald, Michael. "Should Communities Have Rights? Reflections on Liberal Individualism" (1991) 4 Can JL & Jur 217.

Macintosh, Andrew, Heather Roberts & Amy Constable. "An Empirical Evaluation of Environmental Citizen Suits Under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)" (2017) 39 Sydney L Rev 85.

McNally, Michael D. "From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion" (2015) 30:1 Journal of Law and Religion 36.

Mireku, Obeng. "Culture and the South African Constitution: An Overview" (1999) 14:2 SA Publiekreg/SA Public Law 439.

Mokgoro, Yvonne. "The Protection of Cultural Identity in the Constitution and the Creation of National Unity in South Africa: A Contradiction in Terms?" (1999) 52 SMU Law Rev 1549.

Morin, Michel. "Les insuffisances d'une analyse purement historique des droits des peuples autochtones" (2003) 57:2 Revue d'histoire de l'Amérique française 237.

Morin, Michel. "Propriétés et territoires autochtones en Nouvelle-France" (2013) 43:2–3 Recherches amérindiennes au Québec 59 [Propriétés et térritoires].

Morin, Michel. "Propriétés et territoires autochtones en Nouvelle-France: ii—La gestion des districts de chasse (2014) 44:1 Recherches amérindiennes au Québec 129 [Gestion de chasse].

Morris, James D K & Jacinta Ruru. "Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?" (2010) 14:2 Aust Indig Law Rev 49.

Nabokov, Peter. "Unto These Mountains: Toward the Study of Sacred Geography" 10 *New Scholar* 479 [Nabokov, "Unto These Mountains"].

Otis, Ghislain. "Revendications foncières, 'autochtonité' et liberté de religion au Canada" (1999) 40 C de D 741 at 762–768 [Otis, "Revendications foncières"].

Özsu, Umut. "'In the Interest of Mankind as a Whole"' Mohammed Bedjaoui's New International Economic Order" (2015) 6:1 Humanity 129 [Özsu, "Mankind"].

Özsu, Umut. "Rendering Sovereignty Permanent? The Multiple Legacies of the New International Economic Order" 2016 European Yearbook of International Economic Law (forthcoming) [Özsu, "Sovereignty"].

Papillon, Martin & Thierry Rodon. "Proponent-Indigenous Agreements and the Implementation of the Right to Free, Prior, and Informed Consent in Canada" (2016) Environmental Assessment Review, online: <dx.doi.org/10.1016/j.eiar.2016.06.009>.

Parlow, Anita. "Cry, Sacred Ground: Big Mountain, USA" (1988) 14 American Indian Law Review 301.

Pestieau, Joseph. "Minority Rights: Caught Between Individual Rights and Peoples' Rights" (1991) 4 Can J Law Jurisprud 361.

Pinter, Jeff. "In Cases Involving Sites of Religious Significance, Plaintiffs Will Fall in the Gap of Judicial Deference that Exists Between the Religion Clauses of the First Amendment" (2005) 29 American Indian Law Review 289.

Price, Kirsten. "Shifting Sands: A New Approach to Ownership of the Foreshore and Seabed", Australasian Legal Business Magazine 9:9 (9 September 2011) 8.

Pope, J Worden. "The North American Indian — The Disappearance of the Race [:] A Popular Fallacy" (Nov 1896) 16 The Arena 945.

Racusin, Philip D. "Looking at the Constitution Through World-Colored Glasses: The Supreme Court's Use of Transnational Law in Constitutional Adjudication" (2006) 28:3 Houston Journal of International Law 913.

Ray, Sthitapragyan & Shashi Saini. "Development and Displacement: The Case of an Opencast Coal Mining Project in Orissa" (2011) 60:1 Sociological Bulletin 45.

Reidel, Laura. "What are Cultural Rights? Protecting Groups with Individual Rights" (2010) 9 J Hum Rights 65.

Reitz, John C. "How to Do Comparative Law" (1998) 46:4 Am J Comp L 617.

Ripani, Michael N. "Native American Free Exercise Rights in Sacred Lands: Buried Once Again" (1990) 15 American Indian Law Review 323.

Rogers, Jessa. "Photoyarn: Aboriginal and Māori Girls' Researching Contemporary Boarding School Experiences" (2017) 1 Australian Aboriginal Studies 1.

Rosser, Ezra. "Ahistorical Indians and Reservation Resources" (2010) 40 Environmental Law 437 [Rosser, "Ahistorical Indians"].

Rosser, Ezra. "This Land is My Land, This Land is Your Land: Markets and Institutions for Economic Development on Native American Land" (2005) 47 Arizona Law Review 245.

Royster, Judith V. "The Legacy of Allotment" (1995) 27 Arizona Students Law J 1.

Salmond, Anne. "Tears of Rangi: Water, Power, and People in New Zealand" (2014) 4:3 HAU: Journal of Ethnographic Theory, 285.

Sands, Kathleen. "Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases" (2012) 36 American Indian Law Review 253.

Shepherd, Harold. "Implementing the Human Right to Water in the Colorado River Basin" (2010) 47 Willamette Law Review 425.

Tapahe, Luralene D. "After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshippers" (1994) 24 New Mexico LR 331.

Tehan, Maureen. "A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act" (2003) 27 Melbourne U L Rev 523.

Toanui, Rawiri. "Māori Origins in Creation, and Navigation" (2012) 44 Journal of the Hamburg Museum of Ethnology, Special Edition, *House Rauru: Masterpiece of the Māori* 45 [Toanui, "Māori Origins"].

Toanui, Rawiri. "Migratory Canoe Traditions" (2012) 44 Journal of the Hamburg Museum of Ethnology, Special Edition, *House Rauru: Masterpiece of the Māori* 75 [Toanui, "Canoe"].

Van Krieken, Robert. "From *Milirrpum* to *Mabo*: The High Court, *Terra Nullius* and Moral Entrepreneurship" (2000) 23:1 University of New South Wales LJ 63.

Van Krieken, Robert. "Kumarank (Hindmarsh Island) and the Politics of Natural Justice under Settler-Colonialism" (2011) 26:1 Law & Social Inquiry 125.

Vogel, Howard J. "The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict Over Native American Sacred Sites on Public Land" (2000) 41 Santa Clara Law Review 757.

Weiner, James F. "Culture in a Sealed Envelope: The Concealment of Australian Aboriginal Heritage and Tradition in the Hindmarsh Island Bridge Affair" (1999) 5:2 The Journal of the Royal Anthropological Institute 193.

Wiessner, Siegfried. "The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges" (2011) 22 Eur J Int L 121 [Wiessner, "Cultural Rights"].

Zellmer, Sandra B. "Sustaining Geographies of Hope: Cultural Resources on Public Lands" (2002) 73 University of Colorado Law Review 413.

BOOKS

Halsbury's Laws of Canada, Aboriginal 2016 (Canada: LexisNexis, 2016) [*Halsbury's Aboriginal*], HAB-1.

Ames, Michael M. *Cannibal Tours and Glass Boxes — The Anthropology of Museums*, 2nd ed (Vancouver: UBC Press, 1992).

Anderson, Robert T et al. *American Indian Law: Cases and Commentary*, 3rd ed (St Paul, MN: West Academic, 2015) [Anderson et al, *American Indian Law*].

Arizpe, Lourdes. *Culture, Diversity and Heritage: Major Studies*, electronic ed (Switzerland: Springer International, 2015).

Barten, Ulrike. *Minority Rights and Internal Self-Determination*, electronic ed (Switzerland: Springer International, 2015).

Barth, William Kurt. *On Cultural Rights: The Equality of Nations and the Minority Legal Tradition* (Leiden: Martinus Nijhoff, 2008).

Basso, Keith H. *Wisdom Sits in Places: Landscape and Language Among the Western Apache* (Albuquerque: University of New Mexico, 1996) [Basso, *Wisdom*].

Battiste, Marie & James (Sa'ke'j) Youngblood Henderson. *Protecting Indigenous Knowledge and Heritage — A Global Challenge*, Kindle ed (Saskatoon, Saskatchewan: Purich Publishing Ltd., 2000).

Beecham, John. *Remarks on Colonization in General with an Examination of the Proposals of the Association which has been Formed for Colonizing New Zealand*, 2nd ed (London: Hatchards, Piccadilly: 1838).

Bell, Diane. *Ngarrindjeri Wurruwarrin*: *A World That Is, Was, and Will Be*, new ed, Kindle version (North Melbourne, Vic: Spinifex 2014) [Diane Bell, *Ngarrindjeri Wurruwarrin*].

Berkes, Fikret. *Sacred Ecology: Traditional Ecological Knowledge and Resource Management* (Philadelphia, PA: Taylor & Francis, 1999).

Bisaz, Corsin. *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons* (Leiden: Martinus Nijhoff, 2012).

Borrows, John. *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Indigenous Constitution*].

Borrows, John J & Leonard I Rotman. *Aboriginal Legal Issues: Cases, Materials & Commentary*, 3rd ed, (Canada: LexisNexis, 2007) [Borrows & Rotman, *Aboriginal Legal Issues*].

Henri Brun, Guy Tremblay & Eugénie Brouillet. *Droit constitutionnel*, 5th ed, (Cowansville, Canada: Yvon Blais, 2008).

Calabrese, Joseph D. *A Different Medicine: Postcolonial Healing in the Native American Church* (Oxford Scholarship Online: 2013).

Carlson, Bronwyn. *The Politics of Identity: Who Counts as Aboriginal Today* (Canberra, Aboriginal Studies Press, 2016).

Casals, Neus Torbisco. *Group Rights as Human Rights: A Liberal Approach to Multiculturalism* (Dordrecht: Springer, 2006).

Casertano, Stefano. *Our Land, Our Oil! Natural Resources, Local Nationalism, and Violent Secession* (Wiesbaden: Springer Fachmedien, 2013).

Chandler, Michael J, et al. "Personal Persistence, Identity Development, and Suicide: A Study of Native and Non-Native North American Adolescents" (2003) 68:2 *Monographs of the Society for Research in Child Development,* Series No 273.

Clifford, James. *Returns: Becoming Indigenous in the Twenty-First Century* (Cambridge, Mass: Harvard University Press, 2013) [Clifford, *Returns*].

Cohen, Felix. *Cohen's Handbook of Federal Indian Law*, 5th ed, Nell Jessup Newton, ed (Albuquerque, New Mexico: LexisNexis, 2012) [Newton, *Cohen's Federal Indian Law*].

Cooper, Karen Coody. *Spirited Encounters: American Indians Protest Museum Policies and Practices* (Plymouth, United Kingdom: AltaMira Press, 2008).

Cutcher, Alexandra J. *Displacement, Identity and Belonging: An Arts-Based, Auto/Biographical Portrayal of Ethnicity and Experience* (Rotterdam: Sense, 2015).

De Saint-Exupéry, Antoine. *Terre des hommes* (Paris: Gallimard, 1963).

De Tocqueville, Alexis. *Oeuvres, papiers et correspondances: Édition definitive publiée sous la direction de J-P Mayer, Tome I, De la démocratie en Amérique*, 3rd ed, J-P Mayer, ed (Paris: Gallimard, 1951).

Deloria Jr, Vine. *For This Land: Writings on Religion in America* (New York: Routledge, 1999) [Deloria, *For This Land*].

Dixon, Martin, Robert McCorquodale & Sarah Williams. *Cases & Materials on International Law*, 6th ed, (Oxford: Oxford University Press, 2016).

Dugard, John. *International Law: A South African Perspective*, 4th ed (Cape Town: Juta, 2011).

Eberhard, Christoph. *Droits de l'homme et dialogue interculturel*, Kindle ed (Paris: Connaissances & Savoirs, 2011) [Eberhard, *Droits de l'homme*].

Evans, Julie, Patricia Grimshaw, David Philips & Shurlee Swain. *Equal Subjects, Unequal Rights: Indigenous Peoples in British Settler Colonies, 1830–1910* (Manchester: Manchester University Press, 2003).

Farget, Doris. *Le droit au respect des modes de vie minoritaires et autochtones dans les contentieux internationaux des droits humains* (Montréal: Les Éditions Thémis, 2012).

Fox Bourne, HR. *The Claims of Uncivilized Races: A Paper Submitted to the International Congress on Colonial Sociology, Held in Paris in August, 1900* (London: Aborigines Protection Society, 1900).

Froude, James Anthony. *Oceana or England and her Colonies* (London: Longman, Green, and Co, 1886).

Gadamer, Hans-Georg. *Truth and Method*, 2nd ed by Garrett Barden and John Cumming (New York: The Seabury Press, 1975) [Gadamer, *Truth*].

Gadamer, Hans-Georg. *Vérité et métode: Les grandes lignes d'une herméneutique philosophique* (Paris: Seuil, 1996) [Gadamer, *Vérité*].

Gadamer, Hans-Georg. *Wahrheit und Methode* (Tübingen: J.C.B. Möhr (Paul Siebeck) Tübingen, 1965) [Gadamer, *Wahrheit*].

Gaudreault-DesBiens, Jean-François. *La liberté d'expression entre l'art et le droit* (Montreal & Quebec: Liber & Presses de l'Université Laval, 1996) [Gaudreault-DesBiens, *Liberté d'expression*].

Gaudreault-DesBiens, Jean-François. *Les solitudes du bijuridisme au Canada* (Montreal: Thémis, 2007).

Gelder, Ken & Jane L Jacobs. "'Talking out of Place': Authorizing the Aboriginal Sacred in Postcolonial Australia" (1995) 9:1 Cultural Studies 150.

Gilbert, Jérémie. *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (Ardsley, NY: Transnational Publishers, 2006).

Goodrich, Peter. *Oedipus Lex* (Berkeley, 1995).

Gordon-McCutchan, RC. *The Taos Indians and the Battle for Blue Lake* (Santa Fe, New Mexico: Red Crane, 1991).

Gover, Kirsty. "Tribalism Constitutionalized: The Tribal Governance of Membership in Australia, Canada, New Zealand, and the United States", c 2 of her *Tribal Constitutionalism: States, Tribes, and the* Governance *of Membership* (Oxford Scholarship Online: Oxford University Press, January 2011), DOI < 10.1093/acprof:oso/9780199587094.001.0001>.

Greene, Sandra E. *Sacred Sites and the Colonial Encounter: A History of Meaning and Memory in Ghana* (Bloomington & Indianapolis: Indiana University Press, 2002).

Haas, Michael. *International Human Rights: A Comprehensive Introduction*, 2nd ed (London: Routledge, 2014).

Henderson, James (Sa'ke'j) Youngblood. *Indigenous Diplomacy and the Rights of Peoples* (Saskatoon: Purich Publishing, 2008).

Hofbauer, Jane A. *Sovereignty in the Exercise of the Right to Self-Determination* (Leiden Boston: Brill Nijhoff, 2016).

Howitt, William. *Colonization and Christianity, A Popular History of the Treatment of Natives by the Europeans in All their Colonies* (London: Longman, Orme, Brown, Green & Longmans, 1838).

Islam, M Rafiqul. *International Law: Current Concepts and Future Directions* (Chatwood, NSW: LexisNexis Butterworths Australia, 2014).

Keegan, Marcia. *The Taos Pueblo and its Sacred Blue Lake* (Santa Fe: Clear Light, 1991).

King, Thomas. *The Inconvenient Indian: A Curious Account of Native People in North America*, electronic ed v3.1, (Canada: Anchor Canada, 2013) [King, *Inconvenient Indian*].

King, Thomas. *The Truth About Stories: A Native Narrative* (Toronto, Canada: House of Anansi Press, 2003) [King, *Stories*].

King, Thomas F. *Places that Count: Traditional Cultural Properties in Cultural Resource Management* (Walnut Creek: Altamira, 2003) [TF King, *Places that Count*].

Kono, Toshiyuki, ed. *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century* (Leiden: Martinus Nijhoff, 2010).

Kuprecht, Karolina. *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond*, electronic ed (Switzerland: Springer International, 2014).

Kymlicka, Will. *Multicultural Citizenship* (Oxford: Oxford University Press, 1995).

Kymlicka, Will. *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007) [Kymlicka, *Multicultural Odysseys*].

LaDuke, Winona. *All Our Relations: Native Struggles for Land and Life* (Cambridge, Massachusetts: South End Press, 1999) [LaDuke, *All Our Relations*].

LaDuke, Winona. *Recovering the Sacred. The Power of Naming and Claiming* (Toronto: Between the Lines, 2005) [LaDuke, *Recovering the Sacred*].

Legrand, Pierre. *Le droit comparé*, 4th ed (Paris: PUF, 2011).

Liebenberg, Sandra. *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Claremont, Cape Town: Juta, 2010).

Mackaay, Ejan. *Law and Economics for Civil Law Systems* (Cheltenham: Edward Elgar, 2013).

Mead, Greg. *A Royal Omission: A Critical Summary of the Evidence Given to the Hindmarsh Island Bridge Royal Commission with an Alternative Report* (Halifax, South Australia: Greg Mead, 1995).

Miller, R, J Ruru, L Behrent & T Lindbergh. *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010).

Nabokov, Peter. *A Forest of Time: American Indian Ways of History* (Cambridge: Cambridge University Press, 2002) [Nabokov, *Forest of Time*].

Nabokov, Peter. *Where the Lightning Strikes: The Lives of American Indian Sacred Places* (New York: Penguin Books, 2006) [Nabokov, *Lightning*].

Newman, Dwight. *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart Publishing, 2011).

Nicol, Mike. *The Making of the Constitution: The Story of South Africa's Constitutional Assembly, May 1994 to December 1996* (South Africa: Churchill Murray, 1997).

Niezen, Ronald. *The Rediscovered Self. Indigenous Identity and Cultural Justice* (Montreal & Kingston: McGill-Queen's University Press, 2009) [Niezen, *Rediscovered Self*].

Orange, Claudia. *The Treaty of Waitangi*, kindle ed, (Bridget Williams Books Ltd, 2013).

Ponthoreau, Marie-Claire. *Droit(s) Constitutionnel(s) Comparé(s)* (Paris: Economica, 2010).

Rose, Deborah Bird. *Dingo Makes Us Human: Life and Land in an Aboriginal Australian Culture* (Cambridge: Cambridge University Press, 1992) [Rose, *Dingo*].

Ross, Michael Lee. *First Nations Sacred Sites in Canada's Courts* (Vancouver: UBC Press, 2005).

Sahlins, Marshall. *Historical and Mythical Realities: Structure in the Early History of the Sandwich Islands Kingdom* (Ann Arbor: University of Michigan Press, 1981).

Sahlins, Marshall. *Islands of History* (Chicago: University of Chicago Press).

Samuel, Geoffrey. *An Introduction to Comparative Law Theory and Method,* Kindle ed (Oxford and Portland, Oregon: Hart, 2014).

Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Oxford: Hart Publishing, 2016).

Scambary, Benedict. *My Country, Mine Country: Indigenous People, Mining and Development Contestation in Remote Australia* (Canberra: ANU E Press, 2013).

Shachar, Ayelet. *Multicultural Jurisdictions: Cultural Difference and Women's Rights* (Cambridge: Cambridge University Press, 2001).

Shaw, Malcolm N. *International Law*, 7th ed, (Cambridge, UK: Cambridge University Press, 2014).

Stamatopoulou, Elsa. *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Leiden: Martinus Nijhoff, 2007).

Stavenhagen, Rodolfo. *The Emergence of Indigenous Peoples*, electronic ed (Heidelberg: Springer, 2013).

Stavenhagen, Rodolfo. *Peasants, Culture and Indigenous Peoples: Critical Issues*, electronic ed (Heidelberg: Springer, 2013).

Stevens, Iris. *Report of the Hindmarsh Island Bridge Royal Commission* (Adelaide: Hindmarsh Island Bridge Royal Commission, 1995).

Taylor, John. *Indigenous People and the Pilbara Mining Boom: A Baseline for Regional Participation* (Canberra: ANU E-Press, 2005).

Thornton, Thomas F. *Being and Place Among the Tlingit* (Seattle: University of Washington, 2008).

Wang, Pu, Sikui Dong & James P Lassoie. *The Large Dam Dilemma: An Exploration of the Impacts of Hydro Projects on People and the Environment in China*, electronic ed (Dordrecht: Springer Science & Business Media, 2014).

Ward, J Langfield. *Colonization in its Bearing on the Extinction of the Aboriginal Races* (London: William Clemens, 1873).

Jeremy Webber. *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart, 2015).

Wenzel, Nicola. *Group Rights* (Oxford University Press, 2011).

Tanja Zinterer. *Politikwandel durch Politikberatung? Die kanadesische Royal Commission on Aboriginal Peoples und die Unabhängige Kommission "Zuwanderung" im Vergleich* (Wiesbaden, Springer Fachmedien, 2004).

COLLECTIONS OF ESSAYS / CHAPTERS IN BOOKS

Åhrén, Matthias. "Protecting Peoples' Cultural Rights: A Question of Properly Understanding the Notion of States and Nations?" in Francesco Francioni & Martin Scheinin, eds, *Cultural Human Rights* (Leiden: Martinus Nijhoff, 2008) 91.

Allen, Harry. "The Past in the Present" in Ann McGrath & Mary Anne Jebb, eds, *Long History, Deep Time: Deepening Histories of Place* (Canberra, ACT: ANU E Press, 2015) 171.

Altman, Jon. "Contestations over Development" in Jon Altman & David Martin, eds, *Power, Culture, Economy: Indigenous Australians & Mining* (Canberra: ANU E-Press, 2009) 1.

Altman, Jon. "Indigenous Communities, Miners and the State in Australia" in Jon Altman & David Martin, eds, *Power, Culture, Economy: Indigenous Australians & Mining* (Canberra: ANU E-Press, 2009) 17.

Altman, Jon. "Indigenous Rights, Mining Corporations, and the Australian State" in Suzana Sawyer & Edmund Terence Gomez, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State*, electronic ed, (London: Palgrave-Macmillan, 2012) 46.

Amery, Rob & Vincent (Jack) Kanya Busckskin. "Pinning Down Kaurna Names: Linguistic Issues Arising in the Development of the Kaurna Place Names Database" in Ian D Clark, Luise Hercus, & Laura Kostanski, eds, *Indigenous and Minority Placenames: Australian and International Perspectives* (Canberra, ACT: ANU E Press, 2014) 187.

Amery, Rob & Georgina Yambo Williams. "Reclaiming through Renaming: The Reinstatement of Kaurna Toponyms in Adelaide and the Adelaide Plains" in Luise Hercus, Flavia Hodges & Jane Simpson, eds, *The Land is a Map: Placenames of Indigenous Origin in Australia*, 2nd ed (Canberra, ACT: ANU E Press, 2009) 255.

Anaya, S James (Purepecha/Apache). "International Law and U.S. Trust Responsibility toward Native Americans" in Richard A Grounds, George E Tinker & David E Wilkens, eds, *Native Voices: American Indian Identity & Resistance* (Lawrence, Kansas: University Press of Kansas: 2003) 155.

Anaya, S James. "Reparations for Neglect of Indigenous Land Rights at the Intersection of Domestic and International Law — The Maya Cases in the Supreme Court of Belize" in Federico Lenzerini, ed, *Reparations for Indigenous Peoples: International and Comparative Perspectives*, electronic ed (Oxford Scholarship Online: 2008) 567.

Atzl, Andreas. "Transnational NGO Networks Campaign Against the Ilisu Dam, Turkey" in Waltina Scheumann & Oliver Hensengerth, eds, *Evolution of Dam Policies: Evidence from the Big Hydropower States*, electronic ed (Berlin: Springer-Verlag, 2014) c 7.

Baldwin, Clive. "Do Vulnerable Groups Within Ethnic, Religious or Linguistic Minorities Need Special Standards?" in Kristin Henrad, ed, *Double Standards Pertaining to Minority Protection* (Leiden: Martinus Nijhoff, 2010) 243.

Barber, Marcus. "'Nothing Ever Changes': Historical Ecology, Causality and Climate Change in Arnhem Land, Australia" in Yasmine Musharbash & Marcus Barber, *Ethnography & The Production of Anthropological Knowledge: Essays in Honour of Nicolas Peterson* (Canberra, ACT: ANU E Press, 2011) 89.

Barker, Sir Ian. "The Protection of Cultural Heritage Items in New Zealand" in Barbara T Hoffman, ed, *Art and Cultural Heritage: Law, Policy, and Practice* (New York, NY: Cambridge University Press: 2006) 145.

Barrow Edmund GC. "Falling Between the 'Cracks' of Conservation and Religion: The Role of Stewardship for Sacred Trees and Groves" in Bas Verschuuren et al, eds, *Sacred Natural Sites Conserving Nature and Culture* (London: Earthscan, 2012) 42.

Bartels, Dennis & Alice Bartels. "Mi'gmaq Lives: Aboriginal Identity in Newfoundland" in Ute Lischke & David T McNab, eds, *Walking a Tightrope: Aboriginal People and their Representations* (Waterloo, Ontario: Wilfried Laurier University Press, 2005) 249.

Barth, William K. "Cultural Rights: A Necessary Corrective to the Nation State" in Francesco Francioni & Martin Scheinin, eds, *Cultural Human Rights* (Leiden: Martinus Nijhoff, 2008) 79.

Bassett, Robert A. "The Impact of Cultural Resources Laws on the United States Mining Industry" in Barbara T Hoffman, ed, *Art and Cultural Heritage: Law, Policy, and Practice* (New York, NY: Cambridge University Press: 2006) 260.

Bazhonoodah, Asa. "Navajo, Dark Sky Over Black Mesa" in Peter Nabokov, ed, *Native American Testimony: A Chronicle of Indian-White Relations from Prophecy to the Present* (New York: Penguin Books, 1991) 397.

Bekhruz, KH N. "Comparative Legal Research in an Era of Globalization" in WE Butler, OV Kresin & Iu S Shemshuchenko, eds, *Foundations of Comparative Law: Methods and Typologies* (London: Wildy, Simmons & Hill, 2011) 123.

Bell, Diane. "Aboriginal Women and the Religious Experience" in Max Charlesworth, ed, *Religious Business: Essays on Australian Aboriginal Spirituality* (Cambridge: Cambridge University Press, 1998) 46 [Diane Bell, "Aboriginal Women"].

Bell, John. "Comparing Public Law" in Andrew Harding & Esin Örücü, eds, *Comparative Law in the 21st Century* (Great Britain: Kluwer Law International, 2002) 235.

Bellfy, Phillip. "Permission and Possession: The Identity Tightrope" in Ute Lischke & David T McNab, *Walking a Tightrope: Aboriginal People and their Representations* (Waterloo, Ontario: Wilfried Laurier University Press) 29.

Berndt, Ronald M. "A Profile of Good and Bad in Aboriginal Religion" in Max Charlesworth, ed, *Religious Business: Essays on Australian Aboriginal Spirituality* (Cambridge: Cambridge University Press, 1998) 24.

Bhandar, Brenna. "Critical Legal Studies and the Politics of Property" in Susan Bright & Sarah Blandy, eds, *Researching Property* Law (Palgrave, 2015) 60.

Bicskei, Marianna, Kilian Bizer & Zulia Gubaydullina. "Der Schutz kultureller Güter: Die Ökonomie der Identität" in Regina Bendix, Kilian Bizer & Stefan Groth, eds, *Die Konstituierung von Cult Prop Forschungsperspektiven* (Göttingen: Universitätsverlag Göttingen, 2010) 135.

Biswas, Asit K. "Impacts of Large Dams: Issues, Opportunities and Constraints" in Cecilia Tortajada, Dogan Altinbilek & Asit K Biswas, eds, *Water Resources Development and Management: Impact of Large Dams: A Global Assessment*, electronic ed (Berlin: Springer-Verlag, 2012) c 1.

Blu, Karen I. "'Where Do You Stay At?' Home Place and Community among the Lumbee" in Steven Feld & Keith H Basso, eds, *Senses of Place* (Santa Fe, New Mexico: School of American Research Press, 1996) 197.

Blue Cloud, Peter (Mohawk). "Resistance at Oka" in Peter Nabokov, ed, *Native American Testimony: A Chronicle of Indian-White Relations from Prophecy to the Present* (New York: Penguin Books, 1991).

Bobbio, Norberto. "Sur le positivisme juridique" in Paul Roubier, ed, *Mélanges en l'honneur de Paul Roubier Vol I: Théorie générale du droit et droit transitoire* (Paris: Dalloz & Sirey, 1961) 53.

Bocking, Stephen. "Scientists and Evolving Perceptions of Indigenous Knowledge in Northern Canada" in Ute Lischke & David T McNab, *Walking a Tightrope: Aboriginal People and their Representations* (Waterloo, Ontario: Wilfried Laurier University Press) 215.

Booth, Annie L. "We Are the Land: Native American Views of Nature" in Helaine Selin, ed, *Nature Across Cultures: Views of Nature and the Environment in Non-Western Cultures* (Dordrecht: Springer, 2003) 329.

Broadbent, Noel D & Britta Wennstedt Edvinger. "Sacred Sites, Settlements and Place-Names: Ancient Saami Landscapes in Northern Coastal Sweden" in Peter Jordan, ed, *Landscape and Culture in Northern Eurasia* (Walnut Creek, California: Left Coast Press: 2011) 315.

Brookfield, F M. "The New Zealand Constitution" in I H Kawharu, ed, *Waitangi: Māori & Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 1.

Brown, Steve. "Poetics and Politics: Bikini Atoll and World Heritage Listing" in Sally Brockwell, Sue O'Connor & Denis Byrne, eds, *Transcending the Culture–Nature Divide in Cultural Heritage: Views from the Asia-Pacific Region* (Canberra: ANU E-Press, 2013) 35.

Brueckner, Martin et al. "Confronting the 'Resource Curse or Cure' Binary" in Martin Brueckner et al, eds, *Resource Curse or Cure? On the Sustainability of Development in Western Australia*, electronic ed (Berlin: Springer-Verlag, 2014) c 1.

Brueckner, Martin et al. "Curse or Cure? Revisiting State, Capital and Resources" in Martin Brueckner et al, eds, *Resource Curse or Cure? On the Sustainability of Development in Western Australia*, electronic ed (Berlin: Springer-Verlag, 2014) c 18.

Buggey, Susan. "An Approach to Aboriginal Cultural Landscapes in Canada" in Igor Krupnik et al, eds, *Northern Ethnographic Landscapes: Perspectives from Circumpolar Nations* (Washington, DC: Arctic Studies Center) 17.

Byrne, Denis. "The WCPA's Natural Sacred Sites Taskforce: A Critique of Conservation Biology's View of Popular Religion" in Sally Brockwell, Sue O'Connor & Denis Byrne, eds, *Transcending the Culture–Nature Divide in Cultural Heritage: Views from the Asia-Pacific Region* (Canberra: ANU E-Press, 2013) 157.

Cantwell Margot & Chad W Adams. "An Aboriginal Planning Initiative: Sacred Knowledge and Landscape Suitability Analysis" in Hannes Palang & Gary Fry, eds, *Landscape Interfaces: Cultural Heritage in Changing Landscapes* (Dordrecht: Springer, 2003) 163.

Carmichael, David L. "Places of Power: Mescalero Apache Sacred Sites and Sensitive Areas" in David Carmichael et al, eds, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 89.

Carmichael, David Jane Hubert & Brian Reeves. "Introduction" in David Carmichael et al, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 1.

Carter, Sarah. "Aboriginal People of Canada and the British Empire" in Phillip Buckner, ed, *Canada and the British Empire* (Oxford Scholarship Online, 2010) 200.

Carozza, Paolo G. "Human Dignity" in Dinah Shelton, ed, *Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) 345.

Cestti, Rita & RPS Malik. "Indirect Economic Impacts of Dams" in Cecilia Tortajada, Dogan Altinbilek & Asit K Biswas, eds, *Water Resources Development and Management: Impact of Large Dams: A Global Assessment*, electronic ed (Berlin: Springer-Verlag, 2012) c 2.

Chadha, Ashish. "The Anatomy of Dispossession: A Study in the Displacement of the Tribals from their Traditional Landscape in the Narmada Valley due to the Sardar Sarovar Project" in Peter J Ucko & Robert Layton, eds, *The Archaeology and Anthropology of Landscape: Shaping Your Landscape* (London: Routledge, 1999) 148.

Charlesworth, Max. "Introduction" in Max Charlesworth, ed, *Religious Business: Essays on Australian Aboriginal Spirituality* (Cambridge: Cambridge University Press, 1998) xiii [Charlesworth, "Religious Business"].

Charlesworth, Max. "Introduction" in Max Charlesworth, Howard Morphy, Diane Bell & Kenneth Maddock, eds, *Religion in Aboriginal Australia: An Anthology* (St Lucia, Queensland: University of Queensland Press, 1984) 1 [Charlesworth, "Introduction"].

Choudhry, Sujit. "Group Rights in Comparative Constitutional Law: Culture, Economics, or Political Power" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1099.

Choudhury, Nirmalaya. "Towards Responsible Hydropower Development through Contentious Multi-Stakeholder Negotiations: The Case of India" in Waltina Scheumann & Oliver Hensengerth, eds, *Evolution of Dam Policies: Evidence from the Big Hydropower States*, electronic ed (Berlin: Springer-Verlag, 2014) c 4.

Churchill, Ward. "I am an Indigenist: Notes on the Ideology of the Fourth World" in Ward Churchill, *Struggle for the Land: Native North American Resistance to Genocide, Ecocide and Colonization* (San Francisco: City Lights, 2002) 367 [Churchill, "Indigenist"].

Churchill, Ward. "The Indigenous Peoples of North America: A Struggle Against Internal Colonialism" in Ward Churchill, *Struggle for the Land: Native North American Resistance to Genocide, Ecocide and Colonization* (San Francisco: City Lights, 2002) 15 [Churchill, "Internal Colonialism"].

Clark, Elizabeth A. "International and Comparative Law Protections of Collective Aspects of Religious Freedom" in Dwight Newman, *Religious Freedom and Communities* (Canada: LexisNexis, 2016) 131.

Clark, Ian. "Reconstruction of Aboriginal Microtoponymy in Western and Central Victoria: Case Studies from Tower Hill, the Hopkins River, and Lake Boga" in Harold Koch & Luise Hercus, eds, *Aboriginal Placenames: Naming and Re-Naming the Australian Landscape* (Canberra, ACT: ANU E Press, 2009) 207.

Clark, Ian D. "Dissonance Surrounding the Aboriginal Origin of a Selection of Placenames in Victoria, Australia: Lessons in Lexical Ambiguity" in Ian D Clark, Luise Hercus, & Laura Kostanski, eds, *Indigenous and Minority Placenames: Australian and International Perspectives* (Canberra, ACT: ANU E Press, 2014) 251.

Clark, Ian D, Luise Hercus, & Laura Kostanski. "Introduction: Indigenous and Minority Placenames — Australian and International Perspectives" in Ian D Clark, Luise Hercus, & Laura Kostanski, eds, *Indigenous and Minority Placenames: Australian and International Perspectives* (Canberra, ACT: ANU E Press, 2014) 1.

Clarke, Jennifer. "Australia: The White House with Lovely Dot Paintings Whose Inhabitants Have 'Moved On' From History?" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Osgoode Readers, 2009) 81 [Clarke, "White House"].

Cogswell, Ainslie. "Seasonally Scarce: Reoccupation of Archaeological Sites on Baffin Island, Nunavut" in Jill Oakes et al, eds, *Sacred Landscapes* (Manitoba: Aboriginal Issues Press, University of Manitoba, 2009) 109.

Cooney, Gabriel. "Sacred and Secular Neolithic Landscapes in Ireland" in David Carmichael et al, eds, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 32.

Cooray, LJM. "The High Court and Mabo: Legalist or L'Égotiste" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 82.

Cosgrove, Denis. "Landscape: Ecology and Semiosis" in Hannes Palang & Gary Fry, eds, *Landscape Interfaces: Cultural Heritage in Changing Landscapes* (Dordrecht: Springer, 2003) 15.

Cotterrell, Roger. "Seeking Similarity, Appreciating Difference: Comparative Law and Communities" in Andrew Harding & Esin Örücü, eds, *Comparative Law in the 21st Century* (London, UK: Kluwer Law International, 2002) 35.

Cotterrell, Roger & James Gordley. "Comparative Law and Legal History" in Mathias Reimann & Reinhard Zimmermann, eds, *Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 709.

Crumlin, Rosemary. "Aboriginal Spirituality: Land as Holder of Story and Myth in Recent Aboriginal Art" in Max Charlesworth, ed, *Religious Business: Essays on Australian Aboriginal Spirituality* (Cambridge: Cambridge University Press, 1998) 94 [Crumlin, "Aboriginal Spirituality"].

Dannemann, Gerhard. "Comparative Law: Study of Similarity or Differences?" in Mathias Reimann & Reinhard Zimmermann, eds, *Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 383.

Davis, Megan. "Identity, Power, and Rights: The State, International Institutions, and Indigenous Peoples in Canada" in Suzana Sawyer & Edmund Terence Gomez, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State*, electronic ed, (London: Palgrave-Macmillan, 2012) 230.

Delic, Emir. "Mondialisation, minoritarité et conscience altéritaire" in Sophie Croisy, ed, *Globalization and 'Minority' Cultures: The Role of 'Minor' Cultural Groups in Shaping Our Global Future* (Leiden & Boston: Brill Nijhoff, 2015) 31.

Deloria Jr, Vine. "A Simple Question of Humanity: The Moral Dimensions of the Reburial Issue" in *Deloria, For This Land: Writings on Religion in America* (New York: Routledge, 1999) 187.

Deloria, Jr, Vine. "Anthropologists and Other Friends" in Vine Deloria, Jr, *Custer Died for Your Sins: An Indian Manifesto*, ed with new preface (Norman: University of Oklahoma Press, 1988) 78.

Deloria, Jr, Vine. "Completing the Theological Circle: Civil Religion in America" in Vine Deloria, Jr, *For This Land: Writings on Religion in America* (New York: Routledge, 1999) 166 [Deloria, "Theological Circle"].

Deloria, Jr, Vine. "Missionaries and the Religious Vacuum" in Vine Deloria, Jr, *Custer Died for Your Sins: An Indian Manifesto*, ed with new preface (Norman: University of Oklahoma Press, 1988) 101.

Deloria Jr, Vine. "Sacred Lands and Religious Freedom" in Vine Deloria Jr, *For this Land: Writings on Religion in America* (New York: Routledge, 1999) 203 [Deloria, "Sacred Lands"].

Deloria Jr, Vine. "Worshipping the Golden Calf: Freedom of Religion in Scalia's America" in Deloria, *Writings on Religion in America* (New York: Routledge, 1999) 214.

Dickason, Olive Patricia. "The Many Faces of Canada's History as it Relates to Aboriginal People" in Ute Lischke & David T McNab, *Walking a Tightrope: Aboriginal People and their Representations* (Waterloo, Ontario: Wilfried Laurier University Press) 117 [Dickason, "Many Faces"].

Dockery, Alfred Michael. "The Mining Boom and Indigenous Labour Market Outcomes" in Martin Brueckner et al, eds, *Resource Curse or Cure? On the Sustainability of Development in Western Australia*, electronic ed (Berlin: Springer-Verlag, 2014) c 5.

Dockstator, Mark. "Aboriginal Representations of History and the Royal Commission on Aboriginal Peoples" in Ute Lischke & David T McNab, *Walking a Tightrope: Aboriginal People and their Representations* (Waterloo, Ontario: Wilfried Laurier University Press) 99.

Donahoe, Brian. "Naming, Claiming, Proving? The Burden of Proof Issue for Russia's Indigenous Peoples" in Julia Eckert et al (eds), *Law Against the State: Ethnographic Forays into Law's Transformations* (Cambridge, UK: Cambridge University Press, 2012) 44.

Donders, Yvonne. "A Right to Cultural Identity in UNESCO" in Francesco Francioni & Martin Scheinin, eds, *Cultural Human Rights* (Leiden: Martinus Nijhoff, 2008) 317.

Dudgeon, Roy C & Fikret Berkes. "Local Understandings of the Land: Traditional Ecological Knowledge and Indigenous Knowledge" in Helaine Selin, ed, *Nature Across Cultures: Views of Nature and the Environment in Non-Western Cultures* (Dordrecht: Springer, 2003) 75.

Eichert, Sara. "NGOs as Strategic Actors in the Promotion of Sustainable Dam Development" in Waltina Scheumann & Oliver Hensengerth, eds, *Evolution of Dam Policies: Evidence from the Big Hydropower States*, electronic ed (Berlin: Springer-Verlag, 2014) c 6.

Eisenberg, Avigail. "The Public Assessment of Indigenous Identity" in Michael Seymour, ed, *The Plural States of Recognition*, electronic ed (Hampshire, England: Palgrave Macmillan, 2010) 197 [Eisenberg, "Public Assessment"].

Eisenberg, Avigail & Will Kymlicka. "Bringing Institutions Back In: How Public Institutions Assess Identity" in Avigail Eisenberg & Will Kymlicka, eds, *Identity Politics in the Public Realm: Bringing Institutions Back In* (Vancouver: UBC Press, 2011) 1.

Evans, Julie, Patricia Grimshaw, David Philips & Shurlee Swain. "Canada: 'If They Treat the Indians Humanely, All Will Be Well'" in *Equal Subjects, Unequal Rights: Indigenous Peoples in British Settler Colonies, 1830–1910* (Manchester: Manchester University Press, 2003), 43.

Ewing, Geoffrey W. "Terra Australis post Mabo: For Richer or for Poorer" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 157.

Fairclough, Graham. "'The Long Chain': Archaeology, Historical Landscape Characterization and Time Depth in the Landscape" in Hannes Palang & Gary Fry, eds, *Landscape Interfaces: Cultural Heritage in Changing Landscapes* (Dordrecht: Springer, 2003) 295.

Farley, Rick. "The Mabo Spiral", in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 167.

Feinberg, Richard & Cluny Macpherson. "The 'Eastern Pacific'" in Andrew Strathern, Pamela J Steward, Laurence M Carucci, Lin Poyer, Richard Feinberg & Cluny Macpherson, eds, *Oceania: An Introduction to the Cultures and Identities of Pacific Islanders* (Durham, North Carolina: Carolina Academic Press, 2002) 101.

Ferrier, Åsa & Richard Cosgrove. "Aboriginal Exploitation of Toxic Nuts as a Late-Holocene Subsistence Strategy in Australia's Tropical Rainforests" in Simon G Haberle & Bruno David, eds, *Peopled Landscapes: Archaeological and Biographic Approaches to Landscapes* (Canberra, ACT: ANU E Press, 2012) 103.

Fielder, John. "Sacred Sites and the City: Urban Aboriginality, Ambivalence, and Modernity" in Rob Wilson & Arif Dirlik, eds, *Asia/Pacific as Space of Cultural Production* (Durham and London: Duke University Press, 1995) 101.

Fleras, Augie. "Beyond Multiculturalism: Managing Complex Diversities in a Postmulticultural Canada" in Shibao Guo & Lloyd Wong, eds, *Revisiting Multiculturalism in Canada: Theories, Policies and Debates* (Rotterdam, Sense, 2015).

Francioni, Francesco. "Culture, Heritage and Human Rights: An Introduction" in Francesco Francioni & Martin Scheinin, eds, *Cultural Human Rights* (Leiden: Martinus Nijhoff Publishers, 2008) 1 [Francioni, "Culture"].

Francioni, Francesco. "The Evolving Framework for the Protection of Cultural Heritage in International Law" in Silvia Borelli & Federico Lenzerini, eds, *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Leiden Boston: Martinus Nijhoff Publishers, 2012) 3.

Francioni, Francesco & Federico Lenzerini. "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq" in Barbara T Hoffman, ed, *Art and Cultural Heritage: Law, Policy and Practice* (New York: Cambridge University Press, 2006) 28.

Gaudreault-DesBiens, Jean-François. "Libres propos sur l'essai juridique et l'élargissement souhaitable de la catégorie 'doctrine' en droit" in K Benyekhlef, ed, *Le texte mis à nu* (Montreal: Éditions Thémis, 2009).

Gaudreault-DesBiens, Jean-François. "The State Management of Legal and Cultural Diversity in Canada" in Marie-Claire Foblets, Jean-François Gaudreault-DesBiens & Alison Dundes Renteln, eds, *Cultural Diversity Law and State Responses from Around the World* (Brussels: Yvon Blais, 2010) 195 [Gaudreault-DesBiens, "State Management"].

Gaudreault-DesBiens, Jean-François. "L'Université dans la Cité/le Droit dans l'Université" in Jean-François Gaudreault-DesBiens, ed, *Le droit, la religion et le "raisonnable" : Le fait religieux entre monisme étatique et pluralisme juridique* (Montreal: Thémis, 2009) 3 [Gaudreault-DesBiens, "L'Université"].

Gelder, Ken & Jane L Jacobs. *Uncanny Australia: Sacredness and Identity in a Postcolonial Nation* (Victoria, Australia: Melbourne University Press, 1998).

Gill, Roger & Morag Anderson. "Impacts of King River Power Development, Australia" in Cecilia Tortajada, Dogan Altinbilek & Asit K Biswas, eds, *Water Resources Development and Management: Impact of Large Dams: A Global Assessment*, electronic ed (Berlin: Springer-Verlag, 2012) c 9.

Goldsworthy, Jeffrey. "Constitutional Interpretation" in Michel Rosenfeld & András Sajó, eds, *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 689.

Gomez, Edmund Terence & Suzana Sawyer. "On Indigenous Identity and a Language of Rights" in Suzana Sawyer & Edmund Terence Gomez, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State*, electronic ed, (London: Palgrave-Macmillan, 2012) 9.

Gomez, Edmund Terence & Suzana Sawyer. "State, Capital, Multinational Institutions, and Indigenous Peoples" in Suzana Sawyer & Edmund Terence Gomez, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State*, electronic ed, (London: Palgrave-Macmillan, 2012) 33.

Gomez, Edmund Terence & Suzana Sawyer. "Transnational Governmentality in the Context of Resource Extraction" in Edmund Terence Gomez & Suzana Sawyer, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations and the State*, electronic ed (London: Palgrave-Macmillan, 2012) 1 ["Gomez & Sawyer, "Transnational Governmentality"].

Goodison, Lucy. "'Nature', the Minoans and Embodied Spiritualities" in Kathryn Rountree, Christine Morris & Alan AD Peatfield, eds, *Archaeology of Spiritualties* (New York: Springer, 2012) 207.

Goot, Murray. "Polls as Science, Polls as Spin: Mabo and the Miners" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 133.

Goot, Murray. "The Wild West? Yes, No and Maybe" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 194.

Green, M Christian & John Witte Jr. "Religion" in Dinah Shelton, ed, *Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) 9.

Griffin, James. "Group Rights" in Lukas H Meyer et al, eds, *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*, electronic ed, (Oxford Scholarship Online: 2003) 162.

Grimm, Dieter. "Types of Constitutions" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 98 [Grimm, "Types"].

Hacker, J David & Michael R Haines. "The Construction of Life Tables for the American Indian Population at the Turn of the Twentieth Century" in Per Axelsson & Peter Sköld, eds, *Indigenous Peoples and Demography: The Complex Relation Between Identity and Statistics* (New York: Berghahn Books, 2011) 74.

Hackshaw, Frederika. "Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi" in I H Kawharu, ed, *Waitangi: Māori & Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 91.

Harvey, Graham. "Performing Identity and Entertaining Guests in the Maori Diaspora" in Graham Hervey & Charles D Thompson Jr, eds, *Indigenous Diasporas and Dislocations* (Aldershot, England: Ashgate, 2005) 121 [Harvey, "Maori Diaspora"].

Head, Lesley & Joachim Regnéll. "Nature, Culture and Time: Contested Landscapes Among Environmental Managers in Skåne, Southern Sweden" in Simon G Haberle & Bruno David, eds, *Peopled Landscapes: Archaeological and Biographic Approaches to Landscapes* (Canberra, ACT: ANU E Press, 2012) 221.

Heil, Daniela. "Happiness in an Aboriginal Australian Community: What it Means 'To Be Well' and 'To Enjoy Life' in Central-Western New South Wales, Australia" in Helaine Selin & Gareth Davey, eds, *Happiness Across Cultures: Views of Happiness and Quality of Life in Non-Western Cultures* (Dordrecht: Springer: 2012) 251.

Heinämäki, Leena. "Global Context — Arctic Importance: Free, Prior and Informed Consent, a New Paradigm in International Law Related to Indigenous Peoples" in Thora Martina Herrmann & Thibault Martin, eds, *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic*, electronic ed (Switzerland: Springer International, 2016) 209.

Helander, Kaisa Rautio. "Sámi Placenames, Power Relations and Representation" in Ian D Clark, Luise Hercus, & Laura Kostanski, eds, *Indigenous and Minority Placenames: Australian and International Perspectives* (Canberra, ACT: ANU E Press, 2014) 325.

Hele, Karl. "The Whirlwind of History: Parallel Nineteenth-Century Perspectives on 'Are They Savage?'" in Ute Lischke & David T McNab, *Walking a Tightrope: Aboriginal People and their Representations* (Waterloo, Ontario: Wilfried Laurier University Press) 149.

Hensengerth, Oliver. "Between Local and Global Norms: Hydropower Policy Reform in China" in Waltina Scheumann & Oliver Hensengerth, eds, *Evolution of Dam Policies: Evidence from the Big Hydropower States*, electronic ed (Berlin: Springer-Verlag, 2014) c 3.

Henrad, Kristen. "Minorities, Identity, Socio-Economic Participation and Integration: About Interrelations and Synergies" in Kristen Henrad, ed, *The Interrelation Between the Right to Identity of Minorities and Their Socio-Economic Participation* (Leiden: Martinus Nijhoff, 2013) 21.

Hercus, Luise. "Is It Really a Placename?" in Luise Hercus, Flavia Hodges & Jane Simpson, eds, *The Land is a Map: Placenames of Indigenous Origin in Australia*, 2nd ed (Canberra: ANU E Press, 2009) 63.

Hercus, Luise & Jane Simpson. "Indigenous Placenames: An Introduction" in Luise Hercus, Flavia Hodges & Jane Simpson, eds, *The Land is a Map: Placenames of Indigenous Origin in Australia*, 2nd ed (Canberra, ACT: ANU E Press, 2009) 1.

Hiatt, LR. "Swallowing and Regurgitation in Australian Myth and Rite" in Max Charlesworth, Howard Morphy, Diane Bell & Kenneth Maddock, eds, *Religion in Aboriginal Australia: An Anthology* (St Lucia, Queensland: University of Queensland Press, 1984) 31.

Hiebert, Janet L. "The Canadian Charter of Rights and Freedoms" in John C Courtney & David E Smith, eds, *The Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010) 54.

Hill, MA & AJ Press. "Kakadu National Park: An Experiment in Partnership" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 23.

Hocking, Barbara Ann & Margaret Stephenson. "Why the Persistent Absence of a Foundational Principle? Indigenous Australian, Proprietary and Family Reparations" in Federico Lenzerini, ed, *Reparations for Indigenous Peoples: International & Comparative Perspectives* (2008) 481.

Holcombe, Sarah. "Indigenous Entrepreneurialism and Mining Land Use Agreements" in Jon Altman & David Martin, eds, *Power, Culture, Economy: Indigenous Australians & Mining* (Canberra: ANU E-Press, 2009) 149.

Hoveman, Alice R. "The Wintu People of the McLeod River" in Alice R Hoveman, *Journey to Justice: The Wintu People and the Salmon* 18 [Hoveman, "Wintu People"].

Hubert, Jane. "Sacred Belief and Beliefs of Sacredness" in David Carmichael et al, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 9.

Hunter, Ian. "Native Title: Acts of State and the Rule of Law" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 97.

Insoll, Timothy, Benjamin W Kankpeyeng & Samuel N Nkumbaan. "Fragmentary Ancestors? Medicine, Bodies, and Personhood in a Koma Mound, Northern Ghana" in Kathryn Rountree, Christine Morris & Alan AD Peatfield, eds, *Archaeology of Spiritualties* (New York: Springer, 2012) 25.

Jackson, Vicki C. "Comparative Constitutional Law: Methodologies" in Michel Rosenfeld & András Sajó, eds, *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 54.

Jacobson, Chris et al. "Co-Operative Management of Auyuittuq National Park: Moving Towards Greater Emphasis and Recognition of Indigenous Aspirations for the Management of Their Lands" in Thora Martina Herrmann & Thibault Martin, eds, *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic*, electronic ed (Switzerland: Springer International, 2016) 3.

Jaimes-Guerrero, MA (Juaneño/Yaqui). "The Metaphysics of Federal Indian Law and US Colonialism of American Indians" in Richard A Grounds, George E Tinker & David E Wilkens, eds, *Native Voices: American Indian Identity & Resistance* (Lawrence, Kansas: University Press of Kansas: 2003) 77.

James, Diana. "Tjukurpa Time" in Ann McGrath & Mary Anne Jebb, eds, *Long History, Deep Time: Deepening Histories of Place* (Canberra, ACT: ANU E Press, 2015) 33.

Johnson, John FC. "The Spirits of the Chugach People of Alaska Are At Rest Once Again" in David Carmichael et al, eds, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 209.

Jonuks, Tõnno. "From Holy Hills to Sacred Stone: Diverse and Dynamic Meanings of Estonian Holy Sites" in Kathryn Rountree, Christine Morris & Alan AD Peatfield, eds, *Archaeology of Spiritualties* (New York: Springer, 2012) 163.

Kawharu, I H. "Mana and the Crown a Marae at Orakei" in I H Kawharu, ed, *Waitangi: Māori & Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 211.

Keen, Ian. "The Language of Property: Analyses of Yolgnu Relations to Country" in Yasmine Musharbash & Marcus Barber, *Ethnography & The Production of Anthropological Knowledge: Essays in Honour of Nicolas Peterson* (Canberra, ACT: ANU E Press, 2011) 101.

Kelley, James B & Christopher P Manfredi. "Courts" in John C Courtney & David E Smith, eds, *The Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010) 39.

Kelly, John E & James A Brown. "In Search of Cosmic Power: Contextualizing Spiritual Journeys Between Cahokia and the St Francois Mountains" in Kathryn Rountree, Christine Morris & Alan AD Peatfield, eds, *Archaeology of Spiritualties* (New York: Springer, 2012) 107.

King, Thomas. "A Million Porcupines Crying in the Dark" in Thomas King, *The Truth About Stories: A Native Narrative* (Toronto: Anansi, 2003) 91 [King, "Porcupines"].

King, Thomas. "What Is It About Us That You Don't Like?" in *The Truth About Stories. A Native Narrative* (Toronto, Ontario: Anansi, 2010) 124.

King, Thomas. "You're Not the Indian I had in Mind" in *The Truth About Stories. A Native Narrative* (Toronto, Ontario: Anansi, 2010) 20 [King, "Indian"].

King, Thomas F. "Cultural Heritage Preservation and the Legal System With Specific Reference to Landscapes" in Ludomir R Lozny, ed, *Landscapes Under Pressure: Theory and Practice of Cultural Heritage Research and Preservation* (New York: Springer Science & Business Media: 2008) 246.

Kingsbury, Benedict. "The Treaty of Waitangi Some International Law Aspects" in I H Kawharu, ed, *Waitangi: Māori & Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 121.

Kirby, Michael. "In Defence of Mabo" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 67.

Kirsch, Stuart. "Changing Views of Place and Time Along the Ok Tedi" in Alan Rumsey & James Weiner, eds, *Mining and Indigenous Lifeworlds in Australia and Papua New Guinea* (Oxon: Sean Kingston, 2004) 182.

Koch, Harold. "The Methodology of Reconstructing Indigenous Placenames. Australian Capital Territory and South-Eastern New South Wales" in Harold Koch & Luise Hercus, eds, *Aboriginal Placenames: Naming and Re-Naming the Australian Landscape* (Canberra, ACT: ANU E Press, 2009) 115.

Kohen, JL. "Knowing Country: Indigenous Australians and the Land" in Helaine Selin, ed, *Nature Across Cultures: Views of Nature and the Environment in Non-Western Cultures* (Dordrecht: Springer, 2003) 229.

Kostanski, Laura. "Toponymic Books and the Representation of Indigenous Identities" in Harold Koch & Luise Hercus, eds, *Aboriginal Placenames: Naming and Re-Naming the Australian Landscape* (Canberra, ACT: ANU E Press, 2009) 175.

Kral, Michael J & Lori Idlout. "It's All in the Family: Wellbeing Among Inuit in Arctic Canada" in Helaine Selin & Gareth Davey, eds, *Happiness Across Cultures: Views of Happiness and Quality of Life in Non-Western Cultures* (Dordrecht: Springer: 2012) 478.

Kukutai, Tahu. "Building Ethnic Boundaries in New Zealand: Representations of Maori Identity in the Census" in Per Axelsson & Peter Sköld, eds, *Indigenous Peoples and Demography: The Complex Relation Between Identity and Statistics* (New York: Berghahn Books: 2011) 33.

Kuppe, René. "Religious Freedom Law and the Protection of Sacred Sites" in Thomas G Kirsch & Bertram Turner, *Permutations of Order: Religon and Law as Contested Sovereignties* (Surrey: Ashgate Publications, 2009) 49 [Kuppe, "Religious Freedom Law"].

Kymlicka, Will. "Ethnic, Linguistic, and Multicultural Diversity of Canada" in John C Courtney & David E Smith, eds, *The Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010) 301 [Kymlicka, "Diversity"].

Kymlicka, Will. "Liberal Theories of Multiculturalism" in Lukas H Meyer et al, eds, *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*, electronic ed, (Oxford Scholarship Online: 2003) 229.

Langton, Marcia. "The Edge of the Sacred, the Edge of Death: Sensual Inscriptions" in Bruno David & Meredith Wilson, eds, *Inscribed Landscapes: Marking and Making Place* (Honolulu, Hawai'i: University of Hawai'i Press, 2002) 253.

Lavorel, Sabine. "Exploitation des ressources naturelles et droit des peoples à l'autodetermination économique" in Mihaela Ailincai & Sabine Lavorel, eds, *Exploitation des ressources naturelles et protection des droits de l'homme* (Paris: Éditions Pedone, 2013) 35.

Layton, Robert. "The Alawa Totemic Landscape: Ecology, Religion and Politics" in Robert Layton & Peter J Ucko, *The Archaeology and Anthropology of Landscape: Shaping Your Landscape* (London: Routledge, 1999) 219.

Leane, Jeanine. "Historyless People" in Ann McGrath & Mary Anne Jebb, eds, *Long History, Deep Time: Deepening Histories of Place* (Canberra, ACT: ANU E Press, 2015) 151.

Leclair, Jean. "Le droit et le sacré ou la recherche d'un point absolu" in Jean-François Gaudreault-DesBiens, ed, *Le droit, la religion et le "raisonnable": le fait religieux entre monisme étatique et pluralisme juridique* (Montreal: Thémis, 2009) 475 [Leclair, "Le sacré"].

Lefebvre, Solange. "La liberté religeuse modelée par les effets paradoxaux de la modernité" in Jean-François Gaudreault-DesBiens, ed, *Le droit, la religion et le "raisonnable": le fait religieux entre monisme étatique et pluralisme juridique* (Montreal: Thémis, 2009) 195.

Legrand, Pierre. "The Same and the Different" in Pierre Legrand & Roderick Munday, eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2015) 240 [Legrand, "The Same"].

Lennon, Jane L. "Paris Down Under – World Heritage Impacts in Australia" in Barbara T Hoffman, ed, *Art and Cultural Heritage: Law, Policy, and Practice* (New York, NY: Cambridge University Press: 2006) 210.

Lenzerini, Federico. "Suppressing and Remedying Offences Against Culture" in Ana Vrdoljak, ed, *The Cultural Dimension of Human Rights*, electronic ed (Oxford Scholarship Online, 2014) 241.

Levitan, Tyler & Emilie Cameron. "Privatizing Consent? Impact and Benefit Agreements and the Neoliberalization of Mineral Development in the Canadian North" in Arn Keeling & John Sandlos, eds, *Mining and Communities in Northern Canada: History, Politics and Memory* (Calgary, Alberta: University of Calgary Press, 2015) 259.

Leviticus, Robert. "Aboriginal Organizations and Development: The Structural Context" in Jon Altman & David Martin, eds, *Power, Culture, Economy: Indigenous Australians & Mining* (Canberra: ANU E-Press, 2009) 73.

Lilley, Ian. "Nature and Culture in World Heritage Management: A View from the Asia-Pacific (Or, Never Waste a Good Crisis!)" in Sally Brockwell, Sue O'Connor & Denis Byrne, eds, *Transcending the Culture–Nature Divide in Cultural Heritage: Views from the Asia-Pacific Region* (Canberra: ANU E-Press, 2013) 13.

Longley, Hereward. "Indigenous Battles for Environmental Protection and Economic Benefits during the Commercialization of the Alberta Oils Sands, 1967–1986" in Arn Keeling & John Sandlos, eds, *Mining and Communities in Northern Canada: History, Politics and Memory* (Calgary, Alberta: University of Calgary Press, 2015) 207.

Lourandos, Harry, Bruno David, Ken Aplin, Jerome Mialanes, Brit Asmussen, Sean Ulm, Patrick Faulkner, Cassandra Rowe & Thomas Richards. "An Early-Holocene Aboriginal Coastal Landscape at Cape Duquesne, Southwest Victoria, Australia" in Simon G Haberle & Bruno David, eds, *Peopled Landscapes: Archaeological and Biographic Approaches to Landscapes* (Canberra, ACT: ANU E Press, 2012) 65.

Lozny, Ludomir R. "Place, Historical Ecology and Cultural Landscape: New Directions for Applied Archaeology" in Ludomir R Lozny, ed, *Landscapes Under Pressure: Theory and Practice of Cultural Heritage Research and Preservation*, new ed, (New York: Springer, 2008) 15.

Lynch, Gordon. "Ontological and Durkheimian Theories of the Sacred" in Gordon Lynch, *The Sacred in the Modern World: A Cultural Sociological Approach* (Oxford: Oxford University Press, 2012) 9 [Lynch, "The Sacred"].

Maaka, Roger & Augie Fleras. "Ngā Tangata Whenua: Māori in Aotearoa" in Roger Maaka & Augie Fleras, *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (Dunedin, New Zealand: University of Otago Press, 2005 65 [Maaka & Fleras, "Ngā Tangata Whenua"].

Maaka, Roger & Augie Fleras. "Sovereignty Lost, Tino Rangatiratanga Reclaimed, Self-Determination Secured, Partnership Forged?" in Roger Maaka & Augie Fleras, *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (Dunedin, New Zealand: University of Otago Press, 2005) 98 [Maaka & Fleras, "Sovereignty Lost"].

Maaranen, Päivi. "Landscape Archaeology and Management of Ancient Cultural Heritage Sites: Some Notes Based on Finnish Experience" in Hannes Palang & Gary Fry, eds, *Landscape Interfaces: Cultural Heritage in Changing Landscapes* (Dordrecht: Springer, 2003) 255.

Maddock, Kenneth. "Introduction: The Foundations of Aboriginal Religious Life" in Max Charlesworth, Howard Morphy, Diane Bell & Kenneth Maddock, eds, *Religion in Aboriginal Australia: An Anthology* (St Lucia, Queensland: University of Queensland Press, 1984) 23 [Maddock, "Foundations"].

Maddock, Kenneth. "The World-Creative Powers" in Max Charlesworth, Howard Morphy, Diane Bell & Kenneth Maddock, eds, *Religion in Aboriginal Australia: An Anthology* (St Lucia, Queensland: University of Queensland Press, 1984) 85 [Maddock, "Powers"].

Magallanes, Catherine J Iorns. "Reparations for Maori Grievances in Aotearoa New Zealand" in Federico Lenzerini, ed, *Reparations for Indigenous Peoples: International & Comparative Perspectives* (2008) 523.

Mahlmann, Matthias. "Human Dignity and Autonomy in Modern Constitutional Orders" in Michel Rosenfeld & András Sajó, eds, *Oxford Companion to Comparative Constitutional Law*, (Oxford, 2012) 370.

Makkonen, Tino. "Minorities' Right to Maintain and Develop Their Cultures: Legal Implications of Social Science Research" in Francesco Francioni & Martin Scheinin, eds, *Cultural Human Rights* (Leiden: Martinus Nijhoff, 2008) 193).

Malloy, Tove H. "Standards to Eliminate Compounded Discrimination: The Case of the Intersectionality of 'Minorities Within Minorities' Or, Why Universal Legal Standards Must Engage with the Concept of Culture" in Kristin Henrad, ed, *Double Standards Pertaining to Minority Protection* (Leiden: Martinus Nijhoff, 2010) 259.

Mameamskum, John, Thora Martina Herrmann & Blanka Füleki. "Protecting the 'Caribou Heaven': A Sacred Site of the Naskapi and Protected Area Establishment in Nunavik, Canada" in Thora Martina Herrmann & Thibault Martin, eds, *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic*, electronic ed (Switzerland: Springer International, 2016) 107.

Mann, Henrietta (Cheyenne). "Earth Mother and Prayerful Children: Sacred Sites and Religious Freedom" in Richard A Grounds, George E Tinker & David E Wilkens, eds, *Native Voices: American Indian Identity & Resistance* (Lawrence, Kansas: University Press of Kansas: 2003) 194.

Marciniak, Katarzyna. "The Perception and Treatment of Prehistoric and Contemporary Sacred Places and Sites in Poland" in David Carmichael et al, eds, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 140.

Martin, David F. "The Governance of Agreements Between Aboriginal People and Resource Developers: Principles for Sustainability" in Jon Altman & David Martin, eds, *Power, Culture, Economy: Indigenous Australians & Mining* (Canberra: ANU E-Press, 2009) 99.

Martin, John Hilary. "Australian Aboriginal Societies" in Mark Juergensmeyer, ed, *The Oxford Handbook of Global Religions* (Oxford: Oxford University Press, 2009) 576.

Martin, Thibault. "Beyond the Protection of the Land, National Parks in the Canadian Arctic: A Way to Actualized and Institutionalized Aboriginal Cultures in the Global" in Thora Martina Herrmann & Thibault Martin, eds, *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic*, electronic ed (Switzerland: Springer International, 2016) 167.

Matunga, Hirini. "*Waahi Tapu*: Maori Sacred Sites" in David Carmichael et al, eds, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 217.

McCorquodale, R. "International Law, Boundaries and Imagination" in D Miller & S Hashmi, eds, *Boundaries and Justice* (2001), as extracted by Martin Dixon, Robert McCorquodale & Sarah Williams, *Cases & Materials on International Law*, 6th ed, (Oxford: Oxford University Press, 2016) at 245.

McGrath, Ann. "Deep Histories in Time, or Crossing the Great Divide?" in Ann McGrath & Mary Anne Jebb, eds, *Long History, Deep Time: Deepening Histories of Place* (Canberra, ACT: ANU E Press, 2015) 1.

McHugh, PG. "Constitutional Theory and Māori Claims" in I H Kawharu, ed, *Waitangi: Māori & Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 25.

McHugh, PG. "Doctrinal Pathways in Canada and Australia – The Devil in the Detail of a Maturing Jurisprudence" in *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford Scholarship Online, 2011) 106.

McHugh, PG. "Moving Beyond Recognition: Aboriginal Governance in the Turbulent 1990s" in *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford Scholarship Online, 2004) 427.

McLeod, Brittany M. "Impact of Hydro-Electric Development on Connections to Traditional Lands" in Jill Oakes et al, eds, *Sacred Landscapes* (Manitoba: Aboriginal Issues Press, University of Manitoba, 2009) 227.

McNeil, Kent. "Judicial Treatment of Indigenous Land Rights in the Common Law World" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives*, (Oxford: Osgoode Readers, 2009) 257 [McNeil, "Judicial Treatment"].

McWilliam, Andrew. "Cultural Heritage and Its Performative Modalities: Imagining the Nino Konis Santana National Park in East Timor" in Sally Brockwell, Sue O'Connor & Denis Byrne, eds, *Transcending the Culture–Nature Divide in Cultural Heritage: Views from the Asia-Pacific Region* (Canberra: ANU E-Press, 2013) 191.

Miller, Jim R. "Reconciliation with Residential School Survivors: A Progress Report" in Jerry P White, Erik Anderson, Jean-Pierre Morin & Dan Beavon, eds, *Aboriginal Policy Research: A History of Treaties and Policies* vol VII (Toronto: Thompson Educational, 2010) 133.

Miller, Robert J, Jacinta Ruru, Larissa Behrendt & Tracey Lindberg. "The Doctrine of Discovery in Canada" in *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford Scholarship Online: 2010), 89.

Modood, Tariq. "Difference, 'Multi' and Equality" in Michael Seymour, ed, *The Plural States of Recognition*, electronic ed (Hampshire, England: Palgrave Macmillan, 2010) 152 [Modood, "Difference"].

Mohs, Gordon. "Sto:lo Sacred Ground" in David Carmichael et al, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 184.

Monaghan, Paul. "'What Name?': The Recording of Indigenous Placenames in the Western Desert of South Australia" in Luise Hercus, Flavia Hodges & Jane Simpson, eds, *The Land is a Map: Placenames of Indigenous Origin in Australia*, 2nd ed (Canberra, ACT: ANU E Press, 2009) 202.

Morales, Sarah. "Qat'muk: *Ktunaxa* and the Religious Freedom of Indigenous Canadians" in Dwight Newman, *Religious Freedom and Communities* (Canada: LexisNexis, 2016) 287.

Morphy, Howard. "Art and Politics: The Bark Petition and the Barunga Statement", in Sylvia Keener & Margo Neale, eds, *The Oxford Companion to Aboriginal Art and Culture* (Oxford: Oxford University Press, 2000) 100.

Morris, Stephen G. "The Science of Happiness: A Cross-Cultural Perspective" in Helaine Selin & Gareth Davey, eds, *Happiness Across Cultures: Views of Happiness and Quality of Life in Non-Western Cultures* (Dordrecht: Springer: 2012) 541.

Morse, Bradford W. "Indigenous Peoples of Canada and Their Efforts to Achieve True Reparations" in Federico Lenzerini, ed, *Reparations for Indigenous Peoples: International and Comparative Perspectives*, (Oxford: Oxford University Press, 2008) 271.

Muir Watt, Horatia. "New Challenges in Public and Private International Legal Theory: Can Comparative Scholarship Help" in Mark Van Hoecke, ed, *Epistemology and Methodology of Comparative Law* (Portland: Hart Publishing, 2004) 271.

Mulk, Inga-Maria. "Sacrificial Places and their Meaning in Saami Society" in David L Carmichael et al, eds, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 121.

Musharbash, Yasmine. "Nic's Gift: Turning Ethnographic Data into Knowledge" in Yasmine Musharbash & Marcus Barber, *Ethnography & The Production of Anthropological Knowledge: Essays in Honour of Nicolas Peterson* (Canberra, ACT: ANU E Press, 2011) 1.

Naanen, Ben. "The Nigerian State, Multinational Oil Corporations, and the Indigenous Communities of the Niger Delta" in Edmund Terence Gomez & Suzana Sawyer, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations and the State* (Hampshire: Palgrave Macmillan, 2012) 153.

Nabokov, Peter. "Red Herring or Real Turkey: The Race for an American Founding Rite" in Regina Bendix & Rosemary Lévy Lumwalt, eds, *Folklore Interpreted — Essays in Honor of Alan Dundes* 93 [Nabokov, "Red Herring"].

Nabokov, Peter. "So Long as This Land Exists" in Peter Nabokov, ed, *Native American Testimony: A Chronicle of Indian-White Relations from Prophecy to the Present* (New York: Penguin Books, 1991) 381 [Nabokov, "Land"].

Nabokov, Peter. "The Treaty Trail" in Peter Nabokov (ed), *Native American Testimony: A Chronicle of Indian-White Relations from Prophecy to the Present, 1492–1992* (New York: Penguin Books, 1991).

Nash, David. "The Diminutive Suffix *–dool* in Placenames of Central North NSW" in Ian D Clark, Luise Hercus, & Laura Kostanski, eds, *Indigenous and Minority Placenames: Australian and International Perspectives* (Canberra, ACT: ANU E Press, 2014) 38.

Nettheim, Garth. "The Uncertain Dimensions of Native Title" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 55.

Newhouse, David R & Yale D Belanger. "Beyond the 'Indian Problem': Aboriginal Peoples and the Transformation of Canada" in John C Courtney & David E Smith, eds, *The Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010) 339.

Newman, Dwight. "Implications of the *Ktunaxa Nation* / Jumbo Valley Case for Religious Freedom Jurisprudence" in Dwight Newman, *Religious Freedom and Communities* (Canada: LexisNexis, 2016) 309 [Newman, "Implications of *Ktunaxa Nation*"].

Nickel, Scott. "The Oka Crisis: Building on Burial Grounds" in Jill Oakes et al, eds, *Sacred Landscapes* (Manitoba: Aboriginal Issues Press, University of Manitoba, 2009) 221.

Nobles, Melissa. "The Challenge of Census Categorization in the Post-Civil Rights Era" in Avigail Eisenberg & Will Kymlicka, eds, *Identity Politics in the Public Realm: Bringing Institutions Back In* (Vancouver: UBC Press, 2011) 31.

Norman, Waerete. "The Muriwhenua Claim" in I H Kawharu, ed, *Waitangi: Māori & Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989).

O'Connor, Sue, Sandra Pannell & Sally Brockwell. "The Dynamics of Culture and Nature in a 'Protected' Fataluku Landscape" in Sally Brockwell, Sue O'Connor & Denis Byrne, eds, *Transcending the Culture–Nature Divide in Cultural Heritage: Views from the Asia-Pacific Region* (Canberra: ANU E-Press, 2013) 203.

O'Regan, Tipene. "The Ngāi Tahu Claim" in I H Kawharu, ed, *Waitangi: Māori & Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989).

Otis, Ghislain. "Les figures de la théorie pluraliste dans la recherche juridique" in Ghislain Otis, ed, *Méthodologie du pluralisme juridique* (Paris: Karthala, 2012) 9 ["Les figures"].

Ovsyannikov, OV & NM Terebikhin. "Sacred Space in the Culture of the Arctic Regions", translated by Katherine Judelson in David L Carmichael et al, eds, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 44.

Palang, Hannes & Gary Fry. "Landscape Interfaces" in Hannes Palang & Gary Fry, eds, *Landscape Interfaces: Cultural Heritage in Changing Landscapes* (Dordrecht: Springer, 2003) 1.

Pannell, Sandra. "Nature and Culture in a Global Context: A Case Study from World Heritage Listed Komodo National Park, Eastern Indonesia" in Sally Brockwell, Sue O'Connor & Denis Byrne, eds, *Transcending the Culture–Nature Divide in Cultural Heritage: Views from the Asia-Pacific Region* (Canberra: ANU E-Press, 2013) 53.

Parkes, Graham. "Winds, Waters, and Earth Energies: *Fengshui* and Awareness of Place" in Helaine Selin, ed, *Nature Across Cultures: Views of Nature and the Environment in Non-Western Cultures* (Dordrecht: Springer, 2003) 185.

Partington, Geoffrey. "Hindmarsh Island and the Fabrication of Aboriginal Mythology" in *Upholding the Australian Constitution Volume 15* (Proceedings of the Fifteenth Conference of the Samuel Griffith Society, 2003) 96.

Paton, Rob. "The Mutability of Time and Space as a Means of Healing History in an Australian Aboriginal Community" in Ann McGrath & Mary Anne Jebb, eds, *Long History, Deep Time: Deepening Histories of Place* (Canberra, ACT: ANU E Press, 2015) 67.

Paz, Victor. "Accessing Past Mythologies through Material Culture and the Landscape in the Philippines" in Kathryn Rountree, Christine Morris & Alan AD Peatfield, eds, *Archaeology of Spiritualties* (New York: Springer, 2012) 133.

Pearson, Noel. "From Remnant Title to Social Justice", in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 179.

Peatfield, Alan AD & Christine Morris. "Dynamic Spirituality on Minoan Peak Sanctuaries" in Kathryn Rountree, Christine Morris & Alan AD Peatfield, eds, *Archaeology of Spiritualties* (New York: Springer, 2012) 227.

Peek, Matthew & Susan Reye. "Judicial Interpretations of the World Heritage Convention in the Australian Courts" in Barbara T Hoffman, ed, *Art and Cultural Heritage: Law, Policy, and Practice* (New York, NY: Cambridge University Press: 2006) 206.

Pentikäinen, Juha. "Thinking Globally about Local Religious Societies" in Mark Juergensmeyer, ed, *The Oxford Handbook of Global Religions* (Oxford: Oxford University Press, 2009) 558.

Pere, Rangimarie Turuki. "A Celebration of Maori Sacred and Spiritual Wisdom" in Julian Kunnie & Nomalungelo I Goduka, eds, *Indigenous Peoples' Wisdom and Power: Affirming Our Knowledge through Narratives* (Hants, England: Aldershot, 2006) 143 [Pere, "Celebration"].

Perreault, Thomas. "Extracting Justice: Natural Gas, Indigenous Mobilization, and the Bolivian State" in Suzana Sawyer & Edmund Terence Gomez, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State*, electronic ed, (London: Palgrave-Macmillan, 2012) 75.

Phillimore, John. "The Politics of Resource Development in Western Australia" in Martin Brueckner et al, eds, *Resource Curse or Cure? On the Sustainability of Development in Western Australia*, electronic ed (Berlin: Springer-Verlag, 2014) c 2.

Philp, Janette. "The Political Appropriation of Burma's Cultural Heritage and its Implications for Human Rights" in Michele Langfield, William Logan & Máiréad Nic Craith, eds, *Cultural Diversity, Heritage and Human Rights* (London: Routledge, 2010) 83.

Pineschi, Laura. "Cultural Diversity as a Human Right? General Comment No. 21 of the Committee on Economic, Social and Cultural Rights" in Silvia Borelli & Federico Lenzerini, eds, *Cultural Heritage, Cultural Rights, Cultural Diversity — New Developments in International Law* (Leiden: Martinus Nijhoff Publishers, 2012) 29.

Price, Nicole. "Tourism and the Bighorn Medicine Wheel" in David Carmichael et al, eds, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 259.

Radimilahy, Chantal. "Sacred Sites in Madagascar" in David Carmichael et al, eds, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 82.

Ramble, Charles. "The Politics of Sacred Space in Bon and Tibetan Popular Tradition" in Toni Huber, ed, *Sacred Spaces and Powerful Places in Tibetan Culture: A Collection of Essays* (Dharamsala: Library of Tibetan Works and Archives, 1999) 3.

Ravna, Øyvind. "Recognition of Indigenous Lands Through the Norwegian 2005 Finnmark Act: An Important Example for Other Countries with Indigenous People?" in Thora Martina Herrmann & Thibault Martin, eds, *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic*, electronic ed (Switzerland: Springer International, 2016) 189.

Raymond-Yakoubian, Julie. "Conceptual and Institutional Frameworks for Protected Areas, and the Status of Indigenous Involvement: Considerations for the Bering Strait Region of Alaska" in Thora Martina Herrmann & Thibault Martin, eds, *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic*, electronic ed (Switzerland: Springer International, 2016) 83.

Razzaque, Jona. "Resource Sovereignty in the Global Environmental Order" in Elena Blanco & Jona Razzaque, eds, *Natural Resources and the Green Economy: Redefining the Challenges for People, States and Corporations* (Leiden: Martinus Nijhoff, 2012) 81.

Reap, James K. "The United States and the World Heritage Convention" in Barbara T Hoffman, ed, *Art and Cultural Heritage: Law, Policy, and Practice* (New York, NY: Cambridge University Press: 2006) 234.

Reeves, Brian. "Ninaistákis — the Nitsitapii's Sacred Mountain" in David Carmichael et al, eds, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 265.

Richardson, Benjamin J. "The Dyadic Character of US Indian Law" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Osgoode Readers, 2009) 51.

Richardson, Benjamin J. "The Ties that Bind: Indigenous Peoples and Environmental Governance" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford and Portland, Oregon: Osgoode Readers, 2009) 337 [Richardson, "Ties that Bind"].

Ritchie, David. "Principles and Practice of Site Protection Laws in Australia" in David Carmichael, ed, *Sacred Sites, Sacred Places* (London & New York: Routledge, 1994) 227.

Riles, Annelise. "Comparative Law and Socio-Legal Studies" in Mathias Reimann & Reinhard Zimmermann, eds, *Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 775.

Robbins, Steve. "Whose 'culture', whose 'survival'? The ≠Khomani San land claim and the cultural politics of 'community' and 'development' in the Kalahari" in Alan Barnard & Justin Kenrick, eds, *Africa's Indig Peoples 'First Peoples" or 'Marginalized Minor* (Edinburgh: Edinburgh University Centre of African Studies, 2001) 229.

Rodaway, Paul. "David Ley" in Phil Hubbard & Rob Kitchin, eds, *Key Thinkers on Space and Place*, 2nd ed (Los Angeles: Sage, 2011) 286.

Rodaway, Paul. "Yi-Fu Tuan" in Phil Hubbard & Rob Kitchin, eds, *Key Thinkers on Space and Place*, 2nd ed (Los Angeles: Sage, 2011) 426.

Rodd, Adrien. "Indigenous Peoples and National Self-Image in Australia and New Zealand" in Sophie Croisy, ed, *Globalization and 'Minority' Cultures: The Role of 'Minor' Cultural Groups in Shaping Our Global Future* (Leiden & Boston: Brill Nijhoff, 2015) 77.

Rose, Deborah Bird. "Ned Kelly Died for Our Sins" in Max Charlesworth, ed, *Religious Business: Essays on Australian Aboriginal Spirituality* (Cambridge: Cambridge University Press, 1998) 103 [Rose, "Ned Kelly"].

Rotherham, Ian D. "Cultural Landscapes and Problems Associated with the Loss of Tradition and Custom: An Introduction and Overview" in Ian D Rotherham, ed, *Cultural Severance and the Environment: The Ending of Traditional and Customary Practice on Commons and Landscapes Managed in Common*, electronic ed (Dordrecht: Springer Science & Business Media, 2013).

Rovillos, Raymundo D & Victoria Tauli-Corpuz. "Development, Power, and Identity Politics in the Philippines" in Suzana Sawyer & Edmund Terence Gomez, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State*, electronic ed, (London: Palgrave-Macmillan, 2012) 129.

Rowse, Tim. "How We Got a Native Title Act", in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 111.

Rowse, Tim. "The Principles of Aboriginal Pragmatism" in Murray Goot & Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo* (Leichardt, NSW: Pluto Press, 1994) 194.

Ruru, Jacinta. "The Māori Encounter with Aotearoa: New Zealand's Legal System" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Osgoode Readers, 2009).

Ryan, Edward. "Blown to Witewitekalk: Placenames and Cultural Landscapes in North-West Victoria" in Luise Hercus, Flavia Hodges & Jane Simpson, eds, *The Land is a Map: Placenames of Indigenous Origin in Australia*, 2nd ed (Canberra, ACT: ANU E Press, 2009) 157.

Saunders, Nicholas J. "At the Mouth of the Obsidian Cave: Deity and Place in Aztec Religion" in David Carmichael et al, eds, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 172.

Sawyer, Suzana & Edmund Terence Gomez. "Transnational Governmentality in the Context of Resource Extraction" in Suzana Sawyer & Edmund Terence Gomez, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State*, electronic ed, (London: Palgrave-Macmillan, 2012) 1.

Scambary, Benedict. "Mining Agreements, Development, Aspirations, and Livelihoods" in Jon Altman & David Martin, eds, *Power, Culture, Economy: Indigenous Australians & Mining* (Canberra: ANU E-Press, 2009) 171.

Scheinin, Martin. "The Right of a People to Enjoy Its Culture: Towards a Nordic Saami Rights Convention" in Francesco Francioni & Martin Scheinin, eds, *Cultural Human Rights* (Leiden: Martinus Nijhoff, 2008) 151.

Scheumann, Waltina & Oliver Hensengerth. "Dams and Norms: Current Practices and the State of the Debate" in Waltina Scheumann & Oliver Hensengerth, eds, *Evolution of Dam Policies: Evidence from the Big Hydropower States*, electronic ed (Berlin: Springer-Verlag, 2014) c 1.

Scudder, Thayer. "Resettlement Outcomes of Large Dams" in Cecilia Tortajada, Dogan Altinbilek & Asit K Biswas, eds, *Water Resources Development and Management: Impact of Large Dams: A Global Assessment*, electronic ed (Berlin: Springer-Verlag, 2012) c 3.

Sermet, Laurent. "Juridicité, normativité et pluralisme. De quelques enseignements tirés de la Déclaration des Nations unies sur les droits des peuples autochtones" in Ghislain Otis, ed, *Méthodologie du pluralisme juridique* (Paris: Éditions Karthala, 2012) 201.

Sewell, Elizabeth A. "Religious Liberty and Religious Minorities in the United States" in John C Courtney & David E Smith, eds, *The Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010) 339.

Seymour, Michel. "Conclusion: The Return of Peoples" in Michel Seymour, ed, *The Plural States of Recognition*, electronic ed (Hampshire, England: Palgrave Macmillan, 2010) 1 [Seymour, "Conclusion"].

Seymour, Michel. "Introduction" in Michel Seymour, ed, *The Plural States of Recognition*, electronic ed, (Hampshire, Palgrave Macmillan, 2010) [Seymour, "Introduction"].

Seymour, Michel. "Political Liberalism and the Recognition of Peoples" in Michel Seymour, ed, *The Plural States of Recognition*, electronic ed (Hampshire, England: Palgrave Macmillan, 2010) 172 [Seymour, "Political Liberalism"].

Simandiraki-Grimshaw, Anna. "Dusk at the Palace: Exploring Minoan Spiritualities" in Kathryn Rountree, Christine Morris & Alan AD Peatfield, eds, *Archaeology of Spiritualties* (New York: Springer, 2012) 247.

Simpson, Leane. "Advancing an Indigenist Agenda: Promoting Indigenous Intellectual Traditions in Research" in Jill Oakes et al, eds, *Sacred Landscapes* (Manitoba: Aboriginal Issues Press, University of Manitoba, 2009) 141 [Simpson, "Indigenist Agenda"].

Sinclair, Katherine. "Untouched and Uninhabited: Conflicting Canadian Rhetoric on the Protection of the Environment and Advancing Northern Economics" in Thora Martina Herrmann &

Thibault Martin, eds, *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic*, electronic ed (Switzerland: Springer International, 2016) 243.

Siebert, Ute. "Are Sacred Forests in Northern Bénin 'Traditional Conservation Areas'?" in Michael J Sheridan & Celia Nyamweru, eds, *African Sacred Groves: Ecological Dynamics & Social Change* (Oxford: James Currey, 2008) 164.

Smith, Anita & Cate Turk. "Customary Systems of Management and World Heritage in the Pacific Islands" in Sally Brockwell, Sue O'Connor & Denis Byrne, eds, *Transcending the Culture–Nature Divide in Cultural Heritage: Views from the Asia-Pacific Region* (Canberra: ANU E-Press, 2013) 23.

Smith, David E. "Canada: A Double Federation" in John C Courtney & David E Smith, eds, *The Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010) 75 [Smith, "Canada"].

Smith, Jim. "Illuminating the Cave Names of Gundungurra Country" in Ian D Clark, Luise Hercus, & Laura Kostanski, eds, *Indigenous and Minority Placenames: Australian and International Perspectives* (Canberra, ACT: ANU E Press, 2014) 83; Murray Garde, "Doing Things with Toponyms: The Pragmatics of Placenames in Western Arnhem Land" in Ian D Clark, Luise Hercus, & Laura Kostanski, eds, *Indigenous and Minority Placenames: Australian and International Perspectives* (Canberra, ACT: ANU E Press, 2014) 97.

Smith, Jim. "New Insights into Gundungurra Place Naming" in Harold Koch & Luise Hercus, eds, *Aboriginal Placenames: Naming and Re-Naming the Australian Landscape* (Canberra, ACT: ANU E Press, 2009) 87.

Sole, T & K Wood. "Protection of Indigenous Sacred Sites: the New Zealand Experience" in J Birckhead, T de Lacey & L Smith (eds), *Aboriginal Involvement in Parks and Protected Areas* (Canberra: Aboriginal Studies, 1992) 339.

Sorrenson, MPK. "Towards a Radical Reinterpretation of New Zealand History: The Role of the Waitangi Tribunal" in I H Kawharu, ed, *Waitangi: Māori & Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 158.

Stanner, WEH. "Some Aspects of Aboriginal Religion" in Max Charlesworth, ed, *Religious Business: Essays on Australian Aboriginal Spirituality* (Cambridge: Cambridge University Press, 1998) 1 [Stanner, "Aboriginal Religion"].

Stoffle, Richard Rebecca Toupal & Nieves Zedeño. "Landscape, Nature, and Culture: A Diachronic Model of Human-Nature Adaptations" in Helaine Selin, ed, *Nature Across Cultures: Views of Nature and the Environment in Non-Western Cultures* (Dordrecht: Springer, 2003) 97.

Strathern, Andrew & Pamela J Stewart. "The South West Pacific" in Andrew Strathern, Pamela J Steward, Laurence M Carucci, Lin Poyer, Richard Feinberg & Cluny Macpherson, eds, *Oceania: An Introduction to the Cultures and Identities of Pacific Islanders* (Durham, North Carolina: Carolina Academic Press, 2002) 11.

Swain, Tony. "On 'Understanding' Aboriginal Religion" in Max Charlesworth, ed, *Religious Business: Essays on Australian Aboriginal Spirituality* (Cambridge: Cambridge University Press, 1998) 72.

Tamir, Yael (Yuli). "Against Collective Rights" in Lukas H Meyer et al, eds, *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz,* electronic ed, (Oxford Scholarship Online: 2003) 184.

Tamisari, Franca. "Names and Naming: Speaking Forms into Place" in Luise Hercus, Flavia Hodges & Jane Simpson, eds, *The Land is a Map: Placenames of Indigenous Origin in Australia*, 2nd ed (Canberra, ACT: ANU E Press, 2009) 87.

Tanudirjo, Daud A. "Changing Perspectives on the Relationship Between Heritage, Landscape and Local Communities: A Lesson from Borobudur" in Sally Brockwell, Sue O'Connor & Denis Byrne, eds, *Transcending the Culture–Nature Divide in Cultural Heritage: Views from the Asia-Pacific Region* (Canberra: ANU E-Press, 2013) 65.

Taylor, Braeden. "An Upstream Battle: A Story of the Sockeye Salmon" in Jill Oakes et al, eds, *Sacred Landscapes* (Manitoba: Aboriginal Issues Press, University of Manitoba, 2009) 234.

Te Rito, Joseph S. "Struggles to Protect Puketapu, a Sacred Hill in Aotearoa" in Gloria Pungetti, Gonzalo Oviedo & Della Hooke, eds, *Sacred Species and Sites: Advances in Biocultural Conservation* (Cambridge, UK: Cambridge University Press, 2012) 165.

Ten Bruggencate, Rachel. "Changing Site Use and the Sacred at the Forks of the Red and the Assiniboine Rivers" in Jill Oakes et al, eds, *Sacred Landscapes* (Manitoba: Aboriginal Issues Press, University of Manitoba, 2009) 101.

Tennant, Paul. "Aboriginal Rights and the Penner Report on Indian Self-Government" in Menno Boldt & J Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 321.

Theodoratus, Dorothea J & Frank LaPena. "Wintu Sacred Geography in Northern California" in David Carmichael et al, eds, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 20.

Thomas, Paul G. "Parliament and Legislatures: Central to Canadian Democracy" in John C Courtney & David E Smith, eds, *The Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010) 153.

Tinker, George E (Osage/Cherokee). "American Indian Religious Traditions, Colonialism, Resistance, and Liberation" in Richard A Grounds, George E Tinker & David E Wilkens, eds, *Native Voices: American Indian Identity & Resistance* (Lawrence, Kansas: University Press of Kansas: 2003) 223.

Tommasini, Daniela. "The Governance of Protected Areas in Greenland: The Resource National Park among Conservation and Exploitation" in Thora Martina Herrmann & Thibault Martin, eds, *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic*, electronic ed (Switzerland: Springer International, 2016) 125.

Tonkinson, Robert. "Semen Versus Spirit-Child in a Western Desert Culture" in Max Charlesworth, Howard Morphy, Diane Bell & Kenneth Maddock, eds, *Religion in Aboriginal Australia: An Anthology* (St Lucia, Queensland: University of Queensland Press, 1984) 107 [Tonkinson, "Semen"].

Tucker, Mary Evelyn. "Worldviews and Ecology" in Helaine Selin, ed, *Nature Across Cultures: Views of Nature and the Environment in Non-Western Cultures* (Dordrecht: Springer, 2003) 115.

Tushnet, Mark. "Comparative Constitutional Law" in Matthias Reimann & Reinhard Zimmermann, eds, *Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 1225.

Urteaga-Crovetto, Patricia. "The Broker-State and the 'Inevitability' of Progress: The Camisea Project and Indigenous Peoples in Peru" in Edmund Terence Gomez & Suzana Sawyer, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations and the State* (Hampshire: Palgrave Macmillan, 2012) 103.

Van de Vliert, Evert. "Climate, Cash, and Culturally Embedded Happiness" in Helaine Selin & Gareth Davey, eds, *Happiness Across Cultures: Views of Happiness and Quality of Life in Non-Western Cultures* (Dordrecht: Springer: 2012) 495.

Van der Vyver, Johan D. "Sovereignty" in Dinah Shelton, ed, *Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) 379.

Van Hoecke, Mark. "Deep Level Comparative Law" in Mark Van Hoecke, ed, *Epistemology and Methodology of Comparative Law* (Portland, Oregon: Hart, 2004) 165 [Van Hoecke, "Deep Level"].

VanPool, Christine S & Todd L VanPool. "Breath and Being: Contextualizing Object Persons at Paquimé, Chihuahua, Mexico" in Kathryn Rountree, Christine Morris & Alan AD Peatfield, eds, *Archaeology of Spiritualties* (New York: Springer, 2012) 87.

Vaudry, Stéphanie. "Conflicting Understandings in Polar Bear Co-Management in the Inuit Nunangat: Enacting Inuit Knowledge and Identity" in Thora Martina Herrmann & Thibault Martin, eds, *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic*, electronic ed (Switzerland: Springer International, 2016) 145.

Vrdoljak, Ana Filipa. "Reparations for Cultural Loss" in Federico Lenzerini, ed, *Reparations for Indigenous Peoples: International and Comparative Perspectives*, electronic ed (Oxford Scholarship Online: 2008) 197).

Vrdoljak, Ana Filipa. "Self-Determination and Cultural Rights" in Francesco Francioni & Martin Scheinin, eds, *Cultural Human Rights* (Leiden: Martinus Nijhoff, 2008) 41.

Walters, Mark D. "Promise and Paradox: The Emergence of Indigenous Rights Law in Canada" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* 1st ed (Oxford and Portland, Oregon: Osgoode Readers, 2009) 21.

Warner, W Lloyd. "Spirit Conception in Murngin Thought" in Max Charlesworth, Howard Morphy, Diane Bell & Kenneth Maddock, eds, *Religion in Aboriginal Australia: An Anthology* (St Lucia, Queensland: University of Queensland Press, 1984) 125.

Werner, Hanna. "Rivers, Dams and Landscapes: Engaging with the Modern on Contested Grounds" in Marcus Nüsser, ed, *Large Dams in Asia: Contested Environments Between Technological Hydroscapes and Social Resistance*, electronic ed (Dordrecht: Springer Science Media, 2014) c 7.

Wheeler, Winona. "Social Relations of Indigenous Oral Histories" in Ute Lischke & David T McNab, *Walking a Tightrope: Aboriginal People and their Representations* (Waterloo, Ontario: Wilfried Laurier University Press) 189.

Wiens, Jonathan. "Including Traditional Knowledge in a Wildlife Study" in Jill Oakes et al, eds, *Sacred Landscapes* (Manitoba: Aboriginal Issues Press, University of Manitoba, 2009) 171.

Wiessner, Siegfried. "Culture and the Rights of Indigenous Peoples" in Ana Vrdoljak, ed, *The Cultural Dimension of Human Rights*, electronic ed (Oxford Scholarship Online, 2014) 117.

Wilkens, David. "The Concept of Place Among the Arrernte" in Luise Hercus, Flavia Hodges & Jane Simpson, eds, *The Land is a Map: Placenames of Indigenous Origin in Australia*, 2nd ed (Canberra, ACT: ANU E Press, 2009) 24.

Wilkins David E. (Lumbee). "From Time Immemorial: The Origin and Import of the Reserved Rights Doctrine" in Richard A Grounds, George E Tinker & David E Wilkens, eds, *Native Voices: American Indian Identity & Resistance* (Lawrence, Kansas: University Press of Kansas: 2003) 81.

Willeto, Angela AA. "Happiness in Navajos (Diné Ba' Hózhó)" in Helaine Selin & Gareth Davey, eds, *Happiness Across Cultures: Views of Happiness and Quality of Life in Non-Western Cultures* (Dordrecht: Springer: 2012) 465.

Williams, "David V. *Te Tiriti o Waitangi* – Unique Relationship Between Crown and *Tangata Whenua*?" in I H Kawharu, ed, *Waitangi: Māori & Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 64.

Wynberg Rachel & Roger Chennells. "Green Diamonds of the South: An Overview of the San-Hoodia Case" in Rachel Wynberg, Doris Schroeder & Roger Chennells, eds, *Indig Peoples, Consent Benefit Sharing Lessons from San-Hoodia Case* (Dordrecht: Springer, 2009) 89.

Xaxa, Virginius. "Identity, Power, and Development: The Kondhs in Orissa, India" in Suzana Sawyer & Edmund Terence Gomez, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State*, electronic ed, (London: Palgrave-Macmillan, 2012) 180.

Yefimenko, Alona. "Sacred Sites and Sanctuaries in Northern Russia" in Erich Kasten, ed, *Properties of Culture —Culture as Property: Pathways to Reform in Post-Soviet* Siberia (Germany: Dietrich Reimer Verlag, 2004) 157.

Zarsky, Lyuba & Leonardo Stanley. *Searching for Gold in the Highlands of Guatemala: Economic Benefits and Environmental Risks of the Marlin Mine: Report Fact Sheet* (Medford, Massachusetts: Global Development and Environment Institute [GDAE], Tufts University, September 2011).

DICTIONARIES & ENCYCLOPEDIAS

GENERAL DICTIONARIES

Merriam-Webster Unabridged. 2016 ed, *sub verbo* "natural resources".

Oxford English Dictionary, *The*. 2016 ed, *sub verbo* "development".

Oxford English Dictionary, *The*. 2016 ed, *sub verbo* "exploitation".

ENCYCLOPEDIAS

Busby Brian John. "Thomas King" (4 April 2014) *Historica Canada*, online: <www.thecanadianencyclopedia.ca/en/article/thomas-king/>.

De Cruz, Peter. "Comparative Law, Functions and Methods" in *Max Planck Encyclopedia of Public International Law* by Rüdiger Wolfrum (Oxford: Oxford University Press, 2013) [De Cruz, "Comparative Law"].

Kingsbury, Benedict. "Indigenous Peoples" in *Max Planck Encyclopedia of Public International Law*, by Rüdiger Wolfrum (Oxford: Oxford University Press, 2012).

Petersen, Niels. "Human Dignity, International Protection" in *Max Planck Encyclopedia of Public International Law*, by Rüdiger Wolfrum (Oxford, Oxford University Press, 2012).

Vastokas, Joan. "Contemporary Indigenous Art in Canada" (24 July 2013) *Historica Canada*, online: <www.thecanadianencyclopedia.ca/en/article/contemporary-aboriginal-art-in-canada/>.

Walter, Christian. "Religion or Belief, Freedom of, International Protection" in *Max Planck Encyclopedia of Public International Law* by Rüdiger Wolfrum (Oxford: Oxford University Press, 2013).

ARBITRATION CASES

Glamis Gold, Ltd v United States of America (2009) (International Centre for Settlement of Investment Disputes) (Arbitrators: Michael K Young, Prof David D Caron, Kenneth D Hubbard).

BOOK REVIEWS

Donahoe, Brian. "Book Review: *Khanty: People of the Taiga: Surviving the 20th Century* by Andrew Wiget and Olga Balalaeva" (2014) 13:1 Siberica 84.

Rozwadowski, Andrzej. "Review of *Landscape and Culture in Northern Eurasia* by Peter Jordan" (2014) 13:1 Siberica 81.

CASE COMMENTS AND COMMENTS ON LEGISLATION

"Calder v Attorney-General of British Columbia (1973)", *ATNS Project*, online: <http://www.atns.net.au/agreement.asp?EntityID=2359>.

"Specific Claims Policy 1973", *ATNS Project*, online: <http://www.atns.net.au/agreement.asp?EntityID=2360>.

"*The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* [1996] High Court of Australia (23 December 1996)", *ATNS Project*, online: <http://www.atns.net.au/agreement.asp?EntityID=775>.

"Treaty of Waitangi Fisheries Settlement", *ATNS Project*, online: <http://www.atns.net.au/agreement.asp?EntityID=1730>.

Borrows, John. "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37 Osgoode Hall LJ 537.

Burton, Lloyed & David Ruppert. "Bear's Lodge or Devil's Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands", (1999)8 Cornell JL & Pub Pol'y 201.

Christie, Gordon. "A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*" (2005) 23 Windsor YB Access Just 17.

Hardt, Scott. "Comment, The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis" (1989) 60 U Colo L Rev 601.

Yablon, Marcia. "Note: Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land" (2004) 113 Yale LJ 1623.

COMMENTS, REMARKS, AND NOTES

Axelsson, Per, Peter Sköld, John P Ziker & David G Anderson. "Epilogue: From Indigenous Demographics to an Indigenous Demography" in Per Axelsson & Peter Sköld, eds, *Indigenous Peoples and Demography: The Complex Relation Between Identity and Statistics* (New York: Berghahn Books: 2011) 295.

Carmichael, David, Jane Hubert & Brian Reeves. "Introduction" in David Carmichael et al, *Sacred Sites, Sacred Places* (London: Routledge, 1994).

Fowler, Don. "Foreword" in Thomas F King, *Places that Count: Traditional Cultural Properties in Cultural Resource Management* (Walnut Creek: Altmira, 2003) ix.

Granoff, Phyllis and Koichi Shinohara. "Introduction" in Phyllis Granoff and Koichi Shinohara, eds, *Pilgrims, Patrons and Place: Localizing Sanctity in Asian Religions* (Vancouver: UBC Press, 2003) 1.

Hoveman, Alice R. "Acknowledgements" in in Alice R Hoveman, *Journey to Justice: The Wintu People and the Salmon.*

Hoveman, Alice R. "Editor's note" in in Alice R Hoveman, *Journey to Justice: The Wintu People and the Salmon* 6.

Hubbard, Phil & Rob Kitchin. "Glossary" in Phil Hubbard & Rob Kitchin, eds, *Key Thinkers on Space and Place*, 2nd ed (Los Angeles: Sage, 2011) 499.

LaDuke, Winona. "Succeeding into North America: A Secessionist View" in Ward Churchill, *Struggle for the Land: Native North American Resistance to Genocide, Ecocide and Colonization* (San Francisco: City Lights, 2002) 11 [LaDuke, "Secessionist View"] – Preface.

Lalouche, Judith E. "Preface" in Alice R Hoveman, *Journey to Justice: The Wintu People and the Salmon* 9.

LaPena, Frank. "Introduction in Alice R Hoveman, *Journey to Justice: The Wintu People and the Salmon* 15.

Lischke, Ute & David T McNab. "Introduction" in Ute Lischke & David T McNab, *Walking a Tightrope: Aboriginal People and their Representations* (Waterloo, Ontario: Wilfried Laurier University Press) 1 [Lischke & McNab, "Introduction"].

Lischke, Ute & David T McNab. "Preface" in Ute Lischke & David T McNab, *Walking a Tightrope: Aboriginal People and their Representations* (Waterloo, Ontario: Wilfried Laurier University Press) xvii [Lischke & McNab, "Preface"].

Lowe, Thomas & William Whitby. "Introduction" in Rev Robert Ward, *Life Among the Maories of New Zealand: Being a Description of Missionary, Colonial, and Military Achievements* (London: G lamb, 1872) vii.

Roosevelt, Theodore. "Foreword" to Edward S Curtis, *The North American Indian, Vol 1* (1907) at xi (The Project Gutenberg EBook of the North American Indian by Edward S Curtis, released 3 October 2006, Ebook #19449).

Ucko, PJ. "Foreword" to David L Carmichael et al (eds), *Sacred Sites, Sacred Places* xii [Ucko, "Foreword"].

Waters, Frank. "Foreword" in RC Gordon-McCutchan, *The Taos Indians and the Battle for Blue Lake* (Santa Fe, New Mexico: Red Crane, 1991) vii at xiii.

THESES AND DISSERTATIONS

Bear, Leon Crane. *The Indian Association of Alberta's 1970* Red Paper *Published as a Response to the Canada Federal Government's Proposed 1969* White Paper *on Indian Policy* (MA Thesis: Department of Native Studies, University of Lethbridge, Alberta, Canada, 2015) [Unpublished].

Charette, Frederick. *Les droits collectifs: De quel droit?* (LLD Thesis, Faculty of Law, Université de Montréal, 1996).

Gaudreault-DesBiens, Jean-François. *La critique identitaire, la liberté d'expression ou la pensée juridique à l'ère de l'angoisse: Un essai critique de la pensée juridique* (LLD Thesis: Faculty of Law, University of Ottawa, 1997) [Unpublished][Gaudreault-DesBiens, *Critique identitaire*].

Kuppe, René. *Indianische* Sacred Sites *und das Recht auf Religionsfreiheit in den Vereingten Staaten von Amerika* (*Habilitationsschrift*, Faculty of Law, Universität Wien, Austria, 2003) [unpublished] [Kuppe, *Indianische Sacred Sites*].

Margl, Lisbeth. *The Protection of Indigenous Sacred Sites (Wahi Tapu) in New Zealand: An Analysis of the Legal and Political Situation for Maori People of Aotearoa concerning the Protection of Wahi Tapu (Indigenous Sacred Sites)* (LL.M. Dissertation, Faculty of Law, Universität Wien, Austria, 2008) [unpublished] [Margl, *Wahi Tapu*].

Ngo, Mary. *Loss of Sacred Spaces: The Winnemem Wintu Struggle Against a Cultural Genocide by California Water Demands* (MA Thesis: Department of Geography, California State University, Long Beech, 2010) [Unpublished].

Osman, Alice Louise Marie. *The Effects of Unincorporated International Instruments on Judicial Reasoning in New Zealand* (LLB (Hons) Dissertation: Faculty of Law, University of Otago, 2012) [unpublished].

Payne, H. *Singing a Sister's Rites: Women's Rites in the Musgrave Ranges* (PhD Thesis: University of Auckland, 1988) at 72, cited in Jane Hubert, "Sacred Belief and Beliefs of Sacredness" in David Carmichael et al, *Sacred Sites, Sacred Places* (London: Routledge, 1994) 9 at 16.

Reichert, Alexis. *Sacred Trees, Sacred Deer, Sacred Duty to Protect : Exploring Relationships between Humans and Nonhumans in the Bishnoi Community* (MA Religious Studies, Department of Classics and Religious Studies, Faculty of Arts: University of Ottawa, 2015) [unpublished].

ADDRESSES AND PAPERS DELIVERED AT CONFERENCES

Gaudreault-DesBiens, Jean-François. *In Praise of Principles, or Beyond the Toolbox Approach to Federalism* (Paper presented at the 8th World Congress of the International Association of Constitutional Law, in Mexico City, on 8 December 2010) available online: <ssrn.com/abstract=1907271>.

Laidler, Pawel. "The Distinctive Character of the Quebec Legal System" in Magdalena Paluszkiewicz-Misiaczek et al, eds, *Place and memory in Canada : global perspectives : 3rd Congress of Polish Association for Canadian Studies and 3rd International Conference of Central European Canadianists, April 30-May 3, 2004, Cracow, Poland : proceedings = Lieu et mémoire au Canada : perspectives globales : 3ème Congrès de l'Association Polonaise des Études Canadiennes et 3ème Conférence internationale des canadianistes d'Europe Centrale, 30 avril - 3 mai, 2004, Cracovie, Pologne : actes* (Kraków: Polska Akademia Umiejętnosci, 2005) 277.

Leclair, Jean. "The Substance and Scope of Aboriginal Rights in Canadian Constitutional Law" (Beijing, China, October 2011).

Otis, Ghislain. "The Impact of the Royal Proclamation of 1763 on Quebec: Then and Now", *LCAC Creating Canada Symposium* (7 October 2013), online: <ssrn.com/abstract=2423785>.

Steyn, Elizabeth. "'*Mni Wiconi* – Water is Life': The Significance of Standing Rock for the Ongoing Natural Resources/Indigenous Sacred Sites Debate", paper delivered at the Faculty of Law of Université de Montréal (27 March 2017) as part of a Workshop entitled, *Conversations About Indigenous Peoples and Their Rights to Land.*

Steyn, Elizabeth. "'Taking a Stand at Standing Rock': Native American Sacred Sites Versus Natural Resource Development Projects", paper delivered at McGill Faculty of Law (6 April 2017) as part of the *2017 Annual RDCG (*Regroupement Droit, Changements et Gouvernance*) Conference*.

Steyn, Elizabeth. "The Winnemem Wintu, Spiritual Warfare and Legal Formalism, or: The Bureaucrat's Guide to Native American Sacred Sites", Paper delivered at the 2017 Annual Meeting of the American Association of Geographers (AAG) (Boston, 8 April 2017).

MAGAZINES

Cohen, Gail J. "The Top 25 Most Influential 2016" (1 August 2016) *Canadian Lawyer*, online: <www.canadianlawyermag.com/6098/The-Top-25-Most-Influential-2016.html>.

Price, Kirsten. "Shifting Sands: A New Approach to Ownership of the Foreshore and Seabed", *Australasian Legal Business Magazine* 9:9 (9 September 2011) 8.

NEWSPAPERS, NEWSWIRES, AND OTHER NEWS SOURCES

"Cherokee Nation Expels Descendants of Tribe's Black Slaves" (25 October 2011) *The Huffington Post*, online: <www.huffingtonpost.com/2011/08/25/cherokee-nations-expels-d_n_936930.html>.

"Contested Wilderness: Skiers v the Religious Rights of Canada's Indigenous Peoples" (26 November 2016) *The Economist*, online: < http://www.economist.com/news/americas/21710857-case-supreme-court-will-set-noteworthy-precedent-skiers-v-religious-rights >.

"First Nations launch Federal Court challenge of B.C.'s Site C dam - The Globe and Mail", online: <http://www.theglobeandmail.com/news/british-columbia/first-nations-launch-federal-court-challenge-of-bcs-site-c-dam/article21568662/>.

"First Nations split over BC Hydro's Site C dam megaproject (with video)", online: <http://www.vancouversun.com/news/First+Nations+split+over+Hydro+Site+megaproject+with+video/9262380/story.html#__federated=1>.

"Glencore Xstrata McArthur River Mine Expansion Approved" (2013) *Mining.com*, online: <www.mining.com/glencore-xstrata-mcarthur-river-mine-expansion-plan-approved-39488/>.

"Indian Supreme Court Rules Rivers Are Not People" (7 July 2017), *RTÉ*, online: <https://www.rte.ie/news/2017/0707/888557-india-rivers/>.

"McArthur River Mining: Phase 3 Development Project", *Glencore,* online: <www.mcarthurrivermine.com.au/EN/mineexpansion/Pages/Phase3DevelopmentProject.aspx>.

"Peel supporters vow to take case to Supreme Court if needed - North - CBC News", online: <http://www.cbc.ca/news/canada/north/peel-supporters-vow-to-take-case-to-supreme-court-if-needed-1.2912514?cmp=rss>.

"Site C to provide more than 100 years of affordable, reliable clean power | BC Newsroom", online: <http://www.newsroom.gov.bc.ca/2014/12/site-c-to-provide-more-than-100-years-of-affordable-reliable-clean-power.html>.

"Winnemem Wintu Tribal Timeline", *Sacred Land Film Project*, online: < www.sacredland.org/PDFs/Wintu_Timeline.pdf >.

Allemand, Andrés. "L'Esprit du Grizzli en appelle à la Cour supreme du Canada", (2 December 2016), *Tribune de Genèeve*, online: < http://www.tdg.ch/monde/esprit-grizzli-appelle-cour-supreme-canada/story/14647131>.

APTN National News. "Justice Minister Jody Wilson-Raybould Says Adopting UNDRIP Into Canadian Law 'Unworkable'" (12 July 2016) *APTN National News*, online: < http://aptnnews.ca/2016/07/12/justice-minister-jody-wilson-raybould-says-adopting-undrip-into-canadian-law-unworkable/>.

Archembault II, David. "Taking a Stand at Standing Rock" (24 August 2016), *New York Times*, online: < https://www.nytimes.com/2016/08/25/opinion/taking-a-stand-at-standing-rock.html?_r=0>.

Canadian Press, The. "Prosperity, Tulsequah mines get environmental certificates extended – British Columbia – CBC News", (2015), *Canadian Press*, online: <http://www.cbc.ca/news/canada/british-columbia/prosperity-tulsequah-mines-get-environmental-certificates-extended-1.2901844?cmp=rss>.

CBC News. "Frustration Mounts as Land Dispute Continues in Oka, Qué" (2 August 2017), *CBC News Indigenous*, online: < http://www.cbc.ca/news/indigenous/frustration-mounts-kanesatake-land-dispute-continues-1.4231208>.

Hume, Mark. "First Nations in Northern BC Worry Site C Dam Will Obliterate Their Heritage" (28 August 2015) *The Globe and Mail*, online: < https://www.theglobeandmail.com/news/british-columbia/site-c/article26154330/>.

Hume, Mark. "First Nations protesters shut down northern B.C. drilling site", (9 September 2014), online: The Globe and Mail <http://www.theglobeandmail.com/news/british-columbia/first-nations-protesters-shut-down-northern-bc-drilling-site/article20507396/>.

Hunter, Justine. "BC Premier Plays Wedge Politics with Site C Dam" (4 October 2015), *The Globe and Mail*, online: < https://www.theglobeandmail.com/news/british-columbia/bc-premier-plays-wedge-politics-with-site-c-dam/article26646321/ >.

Hunter, Justine. "Some things change when it comes to B.C. dams. Some remain the same", (2014), online: *Globe Mail* <http://www.theglobeandmail.com/news/british-columbia/some-things-change-when-it-comes-to-dams-some-remain-the-same/article22175016/>.

Kestler-D'Amours, Jillian. "Canada and the Aboriginal Mental Health Crisis" (22 March 2016) *Al Jazeera*, online: < http://www.aljazeera.com/indepth/features/2016/03/canada-aboriginal-mental-health-crisis-160317100523366.html>.

Kestler-D'Amours, Jillian. "Canada Unveils Inquiry Into Murdered Indigenous Women" (4 August 2016) *Al Jazeera*, online: <www.inkl.com/news/canada-unveils-inquiry-into-murdered-indigenous-women>.

Lavoie, Judith. "Jumbo Ski Resort Threatens Grizzly Bears from Southern B.C. Into U.S.: Scientists", (31 October 2014), *Huffpost*, online: <http://www.huffingtonpost.ca/desmog-canada/jumbo-ski-resort-grizzly-bears_b_6079352.html>.

Maibeth-Mortimer, Carlos Enrique. "There's a Crisis Erupting Along Nicaragua's Northern Coast. Here's 5 Ways You Can Help" (6 July 2016) online: *IC Magazine* <https://intercontinentalcry.org/crisis-erupting-along-nicaraguas-northern-coast-heres-5-ways-can-help/>.

Marlow, Karina. "Update: Royal Commission into NT Detention" (27 July 2016) *NITV*, online: <www.sbs.com.au/nitv/article/2016/07/26/update-royal-commission-nt-detention>.

McCarthy, Shawn & Justine Hunter. "From Standing Rock to Trans Mountain, Dissent is in the Pipeline" *The Globe and Mail* (11 December 2016) online: < http://www.theglobeandmail.com/news/national/standing-rock-and-what-comes-next/article33280583/>.

Medley, Mark. "Thomas King Wins Governor-General's Award for Fiction" (18 November 2014) *The Globe and Mail*, online: <www.theglobeandmail.com/arts/books-and-media/thomas-king-wins-governor-generals-award-for-fiction/article21636001/>.

Schwartz, Daniel & Mark Gollom. "N.B. fracking protests and the fight for aboriginal rights", *CBC News* (2013), online: CBC < www.cbc.ca/news/canada/n-b-fracking-protests-and-the-fight-for-aboriginal-rights-1.2126515>.

Treuer, David. "An Indian Protest for Everyone" (26 November 2016) *New York Times*, online: <https://www.nytimes.com/2016/11/26/opinion/sunday/an-indian-protest-for-everyone.html?_r=0>.

Woolley, Pieta. "The Fight for Qat'muk" (April 2007), *UC Observer*, online: <http://www.ucobserver.org/faith/2017/04/fight_qatmuk/>.

NEWS RELEASES

First Nations Summit. "Approval of Site-C Dam project a major step backwards in Provincial Government relations with BC First Nations" (2014).

Hallbauer, Russell. "News Release: Taseko Responds to Government of Canada Decision on New Prosperity Project", (2014), *Taseko New Prosperity*, online: <http://newprosperityproject.ca/taseko-responds-to-government-of-canada-decision-on-new-prosperity-project>.

Hallbauer, Russell. "Taseko files second judicial review on New Prosperity", (2014), *Taseko New Prosperity*, online: <http://newprosperityproject.ca/news-release-taseko-files-second-judicial-review-on-new-prosperity>.

Keepers of the Water Beaver River Council. "Resolution #2 - Passed on June 7th, 2014, on the Cold Lake First Nation Treaty Grounds", (2014), online: Keepers of the Water <www.keepersofthewater.ca/unistoten.pdf>.

Ktunaxa Nation. *Backgrounder: Ktunaxa Nation at the Supreme Court of Canada* (undated).

Ktunaxa Nation. *Qat'muk Declaration* (15 November 2010).

Ktunaxa Nation. *Qat'muk Stewardship Principles* (15 November 2010).

Ktunaxa Nation. *Ktunaxa Nation Appealing B.C. Supreme Court Decision on Qat'muk* (Cranbrook, BC, 2014).

Native Women's Association of Canada (NWAC). Press Release, "Government of Canada Officially Launches National Inquiry Into Missing and Murdered Indigenous Women and Girls (MMIWG)" (3 August 2016), online: <nwac.ca/2016/08/press-release-government-of-canada-officially-launches-national-inquiry-into-missing-and-murdered-indigenous-women-and-girls-mmiwg/>.

Sebastian, Troy. "Qat'muk" (22 November 2016), *patagonia*: <http://www.patagonia.com/blog/2016/11/qatmuk/>.

Swarner, Jessica. "Did Obama Just Block the Sale of Sacred Apache Land to a Foreign Mining Company? Well…" (17 March 2016) *Cronkite News*, online: < https://indiancountrymedianetwork.com/news/environment/did-obama-just-block-the-sale-of-sacred-apache-land-to-a-foreign-mining-company-well/>.

Swarner, Jessica. "Oak Flat Peril: Feds Begin Environmental Review of Proposed Resolution Copper Mine" (23 March 2016), Cronkite News: online < https://indiancountrymedianetwork.com/news/environment/oak-flat-peril-feds-begin-environmental-review-of-proposed-resolution-copper-mine/>.

Wanganui Chronicle. "River Deal Binds Iwi, Crown" (3 September 2012) *The New Zealand Herald*, online: <www.nzherald.co.nz/wanganui-chronicle/news/article.cfm?c_id=1503426&objectid=11073832>.

WORKING PAPERS & REPORTS

BC Hydro. *Environmental Impact Statement Executive Study* (BC Hydro, 2013) at 10.

Berndt, RM & D Roughsey. *On the Question of the Secret-Sacred Dimensions Vis-à-Vis Traditional Australian Aboriginal Life*, Unpublished Report to Council of the AIAS (18 September 1975) at 3–5, cited in PJ Ucko, "Foreword" to David L Carmichael et al (eds), *Sacred Sites, Sacred Places* xii at xv.

CAFF Technical Report No 11. *The Conservation Value of Sacred Sites of Indigenous Peoples of the Arctic: Report on the State of Sacred Sites and Sanctuaries* (Conservation of Arctic Flora and Fauna, 2004) [CAFF Technical Report No 11].

Coyle, Michael. "Marginalized by *Sui Generis*? Duress, Undue Influence and Crown-Aboriginal Treaties" (2009), online: <ssrn.com/abstract=1344110>.

Crawford, Emily. *Monism and Dualism: An Australian Perspective,* Legal Studies Research Paper No 12/87, (Sydney Law School, University of Sydney: 2012).

Gaudreault-DesBiens, Jean-François. *In Praise of Principles, or Beyond the Toolbox Approach to Federalism* (Mexico City: SSRN-id1907271, 2011).

Gaudreault-DesBiens, Jean-François. *Religion, expression et libertés: l'offense comme raison faible de la régulation juridique*, Social Science Research Network Working Paper Series SSRN-id1907274 (2011) [Gaudreault-DesBiens, *Religion, expression et libertés*].

Grammond, Sébastien. "Discrimination in the Rules of Indian Status and the McIvor Case" (19 August 2009) SSRN Working Paper online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1416409>.

Hunyet, Ousmane. *Rapport de l'étude d'inventaire de la biodiversité des forêts sacrées des sites RAMSAR 1017 et 1018 du Bénin*, Avant Projet PPD 165/12REV.1(F) (2013) at 39.

Johnston, Darlene. *Respecting and Protecting the Sacred* (2006) at 6–14, online: < https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Johnston_Respecting-and-Protecting-the-Sacred.pdf > [Ipperwash Enquiry Report].

Mukundi, G Wachira. *Country Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples: South Africa* (Centre for Human Rights, University of Pretoria, 2009).

Ragsdale Jr, John W. *Sacred in the City: The Huron Indian Cemetery and the Preservation Laws,* SSRN Paper No 2648526 (August 2015), online: < ssrn.com/abstract=2648526 >.

Sahtu Heritage Places & Sites Joint Working Group, The. "Rakekée Gok'é Godi: Places We Take Care Of" (January 2000), 2nd ed.

Saunders, Cheryl. *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the Significant Aboriginal Area in the Vicinity of Goolwa and Hindmarsh (Kumarangh) Island* (Adelaide: South Australian Government Printer, 1994).

ELECTRONIC SOURCES

"About Maori Television", online: *Maori Television* <http://www.maoritelevision.com/about/about-maori-television>.

"Agreement Making with Indigenous Peoples: Background Material", *ATNS Project*, online: <http://www.atns.net.au/page.asp?PageID=1#aust>.

"AMW News" *Aboriginal Music Week* online: <www.aboriginalmusicweek.ca/news/read,article/200/aboriginal-music-week-2016-festival-details>.

"Awards" *Juno Canada's Music Awards* online: <junoawards.ca/awards/?from-year=1970&to-year=2016&nomination-category=&wins-only=no&artist=buffy+sainte-marie>.

"Dhimurru Aboriginal Corporation", *Dhimurru Aboriginal Corporation* (website), online: <www.dhimurru.com.au/yolngu-culture.html>.

"Docket: 36664", *Supreme Court of Canada*, online: <www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=36664>.

"How Natural Resources Boost the US Economy", (10 May 2016), *about.com*, online: < http://useconomy.about.com/od/supply/p/Resources.htm>.

"Jawoyn Association Aboriginal Corporation", *Jawoyn Association Aboriginal Corporation* (website), online: <www.jawoyn.org>.

"Land Exchange, The" (2017) *Resolution Copper*: online < http://resolutioncopper.com/protecting-the-desert/land-exchange/>.

"List of Unrecognized Tribes in the United States", *Wikipedia*, online: <en.wikipedia.org/wiki/List_of_unrecognized_tribes_in_the_United_States>.

"Māori Culture", (2014), *New Zealand Tourism Board,* online: <www.newzealand.com/travel/en/media/features/maori-culture/maori-culture_aotearoa-maori-culture_feature.cfm>.

"McArthur River Mining: Phase 3 Development Project", *Glencore,* online: <www.mcarthurrivermine.com.au/EN/mineexpansion/Pages/Phase3DevelopmentProject.aspx>.

"Parliament Brief: What is Parliament?", *New Zealand Parliament Pāremata Aotearoa*, online: <https://www.parliament.nz/en/visit-and-learn/how-parliament-works/fact-sheets/pbrief7/>.

"Resolution Copper Mine" (2017) *Resolution Copper*: online < http://resolutioncopper.com/resolution-copper-mine/>.

"Site C Clean Energy Project", online: <https://www.bchydro.com/energy-in-bc/projects/site_c.html>.

"Summary: 36664", *Supreme Court of Canada*, online: <www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas+36664>.

"Tribes Forced to Prove Existence", *Manataka American Indian Council*, online: <www.manataka.org/page240.html>.

"Waitangi Tribunal Te Rōpū Wakamana I Te Tiriti O Waitangi", (2014), *Ministry of Justice Tahū o te Ture*, online: <http://www.justice.govt.nz/tribunals/waitangi-tribunal>.

"Winnemem Wintu Tribal Timeline" online: *Sacred Land Film Project* at <www.sacredland.org/PDFs/Wintu_Timeline.pdf >

Aotearoa New Zealand, "Ruruku Whakatupua: Whanganui River Deed of Settlement Between the Crown and Whanganui Iwi Summary" (5 August 2014) *Government of New Zealand*, online: <www.govt.nz/treaty-settlement-documents/whanganui-iwi/whanganui-iwi-whanganui-river-deed-of-settlement-summary-5-aug-2014/>.

Busby, Brian John. "Thomas King" (4 April 2014) *Historica Canada*, online: <www.thecanadianencyclopedia.ca/en/article/thomas-king/>.

Corbin, Amy. "Indian Pass" (1 September 2005), *Sacred Land Film Project*, online: <www.sacredland.org/indian-pass/trackback/> [Corbin, "Indian Pass"].

Corbin, Amy. "Klabona" (5 November 2007), *Sacred Land Film Project* (report), online: <www.sacredland.org/index.html@p=120.html (2007)> [Corbin, "Klabona"].

D'Errico, Peter. "Be Clear: Distinguish Between Civil Rights and Treaty Rights" (19 December 2016), *Indian Country Media Network*, online: < https://indiancountrymedianetwork.com/news/opinions/clear-distinguish-civil-rights-treaty-rights/>.

Inuit Tapiriit Kanatami. "A Note on Terminology: Inuit, Métis, First Nations, and Aboriginal", online: <https://www.itk.ca/note-terminology-inuit-metis-first-nations-and-aboriginal> .

Jamasmie, C. "Glencore Xstrata McArthur River Mine Expansion Approved" (2013) *Mining.com*, online: <www.mining.com/glencore-xstrata-mcarthur-river-mine-expansion-plan-approved-39488/>.

Lee, Trymaine. "No Man's Land: The Last Tribes of the Plains", Geography of Poverty Series, *MSNBC*, online: < http://www.msnbc.com/interactives/geography-of-poverty/nw.html>.

Linnitt, Carol. "First Nations Case Against Site C Won't Be Heard by Supreme Court of Canada" (29 June 2017) *DesmogCanada*, online: < https://www.desmog.ca/2017/06/29/first-nations-case-against-site-c-struck-down-supreme-court-canada>.

Luger, Chelsey. "Inside the Apache Fight Against Development that Inspired Standing Rock" (25 October 2016) *Project Earth*, online: <https://projectearth.us/inside-the-apache-fight-against-development-that-inspir-1796423038 >.

Macdougall Greg. "Nine Algonquin Chiefs, AFNQL Oppose 'Zibi' Condos and Resolve to Protect Sacred Area in Ottawa/Gatineau" (25 November 2015), online: <equitableeducation.ca/2015/Algonquin-chiefs-afnql-oppose-zibi>.

Ministry for Culture and Heritage. "Treaty FAQs", (2014), *New Zealand History Nga korero a ipurangi o Aotearoa*, online: <www.nzhistory.net.nz/politics/treaty/treaty-faqs>.

Ministry of Justice *Tahū o te Ture*. "Human Rights Review Tribunal", (2014), online: <www.justice.govt.nz/tribunals/human-rights-review-tribunal>.

Oliff, Helen. "Can Tribes Be Unrecognized" (9 July 2013) *Partnership with Native Americans*, online: < http://blog.nativepartnership.org/can-tribes-be-unrecognized/>.

Polidor, Amberly. "Teztan Biny (Fish Lake)" (5 January 2015), *Sacred Land Film Project* (report), online: <www.sacredland.org/index.html@p=8124.html>.

Polidor, Amberly, Amy Corbin & Ashley Tindall. "Site Report: Athabasca River Delta" (20 September 2013), *Sacred Land Film Project* (report), online:

<standingonsacredground.org/film-series/profit-and-loss/alberta-canada/site-report-athabasca-river-delta>.

Polidor, Amberly & Ashley Tindall. "McArthur River (8 May 2016), *Sacred Land Film Project* (report), online: <www.sacredland.org/index.php/mcarthur-river/>.

Rio Tinto. "Energy Resources of Australia Ltd", *Our Business* (website), online: <www.riotinto.com/energy/energy-resources-of-australia-ltd-4711.aspx>.

Sharples, Pita. "Supporting UN Declaration restores NZ's mana" (20 April 2010), *beehive.govt.nz*, online: < https://www.beehive.govt.nz/release/supporting-un-declaration-restores-nz039s-mana>.

Statistics New Zealand Tatauronga Aortearoa. "National Population Estimates: At 30 June 2014", (14 August 2014), online: <http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/NationalPopulationEstimates_HOTPAt30Jun14.aspx>.

SustainableBusiness.com News. "Native Americans Enter $3 Billion Biofuels Deal" (24 September 2012), *SustainableBusiness.com* (news), online: <www.sustainablebusiness.com/index.cfm/go/news.display/id/24105>.

Tindall, Ashley. "Hindmarsh Island" (12 March 2007), *Sacred Land Film Project* (report), online: <www.sacredland.org/index.html@p=77.html> [Tindall, "Hindmarsh Island"].

Tindall, Ashley. "Kakadu" (10 September 2014), *Sacred Land Film Project* (report), online: <www.sacredland.org/index.html@p=79.html> [Tindall, "Kakadu"].

Vastokas, Joan. "Contemporary Indigenous Art in Canada" (24 July 2013) *Historica Canada*, online: <www.thecanadianencyclopedia.ca/en/article/contemporary-aboriginal-art-in-canada/.

DIGITAL MEDIA

Jumbo Wild, produced by Nick Waggoner (Patagonia: 2015) [documentary].

"Ktunaxa Nation Council v British Columbia (minister of Forests, Lands and Natural Resource Operations) No 36664" (13 January 2017), *Supreme Court of Canada*, online: < http://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=36664&urlen=http%3a%2f%2fcivic.neulion.com%2fsccen%2fliveembed.php%3fclipid%3d3495283%2c000&urlfr=http%3a%2f%2fcivic.neulion.com%2fsccfr%2fliveembed.php%3fclipid%3d3495291%2c000&date=2016-12-01 > [Webcast, *Ktunaxa Nation*, Supreme Court].

"Pilgrims and Tourists" in *Standing on Sacred Ground*, produced and directed by Christopher McLeod (Bullfrogfilms, 2013).