

AUSTRALIAN ACADEMY OF LAW PATRON'S LECTURE

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“Back to the future? Reconciling sovereignty and the interests of first peoples”

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In an interview shortly before her retirement, Chief Justice Beverley McLachlin of Canada described four defining moments in Canadian constitutional history. The first three were Confederation, the *Persons case* (in which the Privy Council found that women were “persons” and gave us the “living tree metaphor” for how a constitution works),¹ and enactment of the Canadian Charter of Rights and Freedoms. The fourth defining moment, still not concluded, she identified as being the Canadian Supreme Court’s “affirmation of the need to reconcile First Nations interests with Crown sovereignty”.²

In common with other countries with colonial pasts and indigenous peoples, including Canada, the legal orders of Australia and New Zealand continue to grapple with claims of right by our native peoples. Today they have growing support in the international legal order. The treatment of indigenous peoples in our legal orders is not therefore a matter of historical interest only as the United Nations adoption of the Universal Declaration on the Rights of Indigenous Peoples shows.

In my remarks today I confine myself to the assumptions of sovereignty at the start and their implications for the properties of indigenous populations. Indigenous populations have, of course other claims to priority of concern and to self-government. They are claims which are increasingly reflected in laws concerning resources and their management and in arrangements for participation in governance. I do not overlook the fact that in Australia and in New Zealand there are statutory regimes under which most claims for native title or for recognition of native rights are now being advanced. But I want to go back and revisit how we got where we are today for three reasons. First, present solutions are partial only, because of past extinguishment of interests which they cannot rectify. Secondly, they are likely to evolve, as is indicated by the Australian Law Reform Commission’s 2015 review of the Native Title Act 1993.³ Finally, because how native populations have been treated in law provides an early example of comparative law reasoning which has been influential in both our jurisdictions. I hope I may be forgiven for looking back.

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¹ *Edwards v Attorney-General for Canada* [1930] AC 124 (PC).

² Beverley McLachlin “Defining Moments: The Canadian Constitution” (Speech to the Canadian Club of Ottawa, Ontario, 5 February 2013), available at <www.scc-csc.ca/judges-juges/spe-dis/bm-2013-02-05-eng.aspx>.

³ Australian Law Reform Commission *Connection to Country: Review of the Native Title Act 1993 Final Report* (ALRC R126, Australian Government, 2015).

Any process of reconciliation seems to me to require us to begin at the beginning. And if TS Eliot is right that “time future [is] contained in time past”, it may help with future directions to start there.

Law and Politics

There are those who think accommodation for indigenous populations which goes beyond securing freedom from discrimination is an intensely political matter in which law has little or no role. Mathew Palmer, a Judge of the High Court of New Zealand, suggests that many New Zealanders are likely to take the view that the claims of Maori, who comprise 15% of the population, should be sorted out by politicians “who understand policy and politics, principle and pragmatism”, not judges.⁴ It is not necessary to disagree that this is an intensely political topic to take the view that it does not follow that law has no role.

Dealings between colonisers and indigenous populations have almost always been based on or justified by law. The American legal historian, Stuart Banner, has said in relation to the native inhabitants of the United States that no settler acquiring land in the 17th and 18th centuries thought he was acting outside the law.⁵ The claims to sovereignty made by colonising powers were themselves mostly justified by appeals to law: whether discovery doctrine, settlement, or (as in New Zealand) by a treaty of cession. Law, then, mattered – and the legitimacy it offers is substantial prize, especially for those who are marginalised in our societies.

In New Zealand, the principal institution which addresses issues of reconciliation is the Waitangi Tribunal. Because it provides a public forum, observes natural justice, and its processes result in findings and reports, it too provides legitimacy and acts as a bridge to understanding. Ultimately, however, it is a recommendatory body which operates in a political setting. In introducing the Bill to set up the Tribunal in 1975, the Hon Matiu Rata made it clear that it was required “to cover matters for which the existing law provides no redress”.⁶ It is concerned with “practical application” of the “principles” of the Treaty of Waitangi in modern circumstances, rather than with claims of right according to law.⁷

I do not minimise what has been achieved in this process. Thirty years on there has been a substantial transfer of resources from the Crown to Maori. One commentator has questioned whether “mainstream Pakeha New Zealand” has any idea of the scale of the transfer of economic clout to Maori incorporations.⁸ There is an expectation that, from the economic base provided, Maori can

⁴ Matthew Palmer “Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution” (2006) 29 Dal LJ 1 at 34.

⁵ Stuart Banner *How the Indians Lost Their Land: Law and Power on the Frontier* (Harvard University Press, Cambridge, 2005) at 4.

⁶ (8 November 1974) 395 NZPD 5726.

⁷ Treaty of Waitangi Act 1975, long title.

⁸ Richard Boast “The Waitangi Tribunal and Transitional Justice” (2006) 4 Human Rights Research Journal 1 at 5.

themselves provide for their future development and be enabled to exercise authority over their resources and culture. If so, these settlements may meet many of the claims by Maori for self-determination and overtake the conditions in which disputes about original dispossession arise in the courts. That is also likely to be the experience and the hope in Australia of what is achieved through the Native Title Act.

Canada, Australia, and New Zealand have distinct histories, constitutions, and legislation which throw up different possibilities for the future. We are addressing the just claims of our native populations in different ways under current legislation. But we are in the habit of looking to each other for ideas. Our legal systems draw on familiar principles of common law and equity which make comparisons inevitable. We also have common spur in the depressingly familiar indications of deprivation and alienation in our native populations.

Our histories and legal orders were shaped by being part of the British Empire. There was however, no single imperial line as to the legal consequences of the acquisition of sovereignty over a territory. The statutes and common law of England attached to the new territory, but applied only so far as appropriate for local conditions. There was no standard approach to its application to native populations in their persons and in relation to their property. Both in London and on the frontier, thinking altered over time. The consequences of assertion of sovereignty therefore depend in part on when sovereignty was acquired. Some of these shifts in attitude may not have been sufficiently recognised in later legal doctrine.

With hindsight, the consequences for aboriginal communities of acquisition of sovereignty may have seemed the result of “essentially self-executing legal principles”.⁹ In fact, it is difficult to resist the view of an Australian legal historian that how native populations were treated under British law was “largely a matter of chance”.¹⁰ In many cases the principles when first applied were seriously contested. Cross-jurisdictional borrowings and later rationalisations have compounded the problem by suggesting there were universal principles of the common law or the law of nations which were consistently followed. In my remarks I attempt some unpacking.

Beginnings

New Zealand, as you will know, began as part of New South Wales. Not the least of the many odd notions of Chief Justice Prendergast in New Zealand 30 years later was that those origins meant that sovereignty in New Zealand arose out of the discovery of Australia. He did not quite suggest that the same reasoning compelled the view that New Zealand was *terra nullius*, but he ended with the same result because he considered Maori too primitive to be capable of owning property or entering into a Treaty of cession.¹¹

⁹ Alex Castles *An Australian Legal History* (Sweet and Maxwell, London, 1982) at 516.

¹⁰ At 520.

¹¹ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) at 78.

Nevertheless, it is true that in 1840 there was considerable entanglement between New South Wales and New Zealand. A number of themes which have continued to resonate in New Zealand law, particularly in relation to the impact of sovereignty on Maori, were played out in Sydney and concerned matters also of interest for the law of New South Wales.

The question whether Britain would intervene in New Zealand was of huge public interest in Sydney in 1839, fuelling speculation in New Zealand and debate in the local Sydney press about the impact of the activities of “land sharks” on the native population of New Zealand. Concern for the protection of aboriginal natives in British overseas possessions was a major political issue in London and in Sydney. It was the decisive factor in British intervention in New Zealand.¹²

The circumstances of British acquisition of New Zealand were quite different from the circumstances in which New South Wales had been established. Even so, after the complacent assumption that the new colony of New South Wales did not need to be troubled with the interests of the native population, reality had been setting in during the 1820s and 1830s with increase in European population and its spread and greater contact between the races. The Colony was having to confront questions about the application of British law to the indigenous people of the region and the basis on which European settlements had been established on lands used by them. Governor Gipps was therefore hardly a disinterested or distant observer of the proposals for New Zealand. He was facing similar issues in New South Wales.

Whether aboriginal people could be subject to British criminal law was not established in New South Wales until 1836 with the decision of the Full Court in *R v Jack Congo Murrell*.¹³ The case overturned earlier cases which had refused to apply the general criminal law in respect of killings and other serious crimes where perpetrator and victim were both aboriginal natives. It decided that all those within the territory acquired in sovereignty were subject to the general law. But in Port Phillip (the admittedly erratic) Justice Willis was not convinced. He held that in offences not involving Europeans the Court had no jurisdiction in the absence of enacted law subjecting aboriginal natives to the general criminal law.¹⁴ That was the approach taken in South Australia too. Justice Cooper there took the view that it did not follow from the acquisition of sovereignty that aboriginal natives were amenable to British justice in cases not involving Europeans.¹⁵

Such approach was not at all unusual in the British Empire at the time. In a number of British overseas possessions, including in British North America,

¹² Ned Fletcher and Sian Elias “A Collusive Suit to ‘Confound the Rights of Property Through the Length and Breadth of the Colony’?: *Busby v White* (1895)” (2010) 41 VUWLR 563 at 600.

¹³ *R v Jack Congo Murrell* (1836) 1 Legge 72.

¹⁴ *R v Borijon, Port Philip Herald (Newspaper)*, 21 September 1841, in which the jury found the defendant incapable of pleading, even with the assistance of an interpreter. See Castles *An Australian Legal History* at 531–532.

¹⁵ See Castles *An Australian Legal History* at 529.

crimes within native communities were not prosecuted unless they constituted *mala in se*. Native populations were often left undisturbed to regulate themselves under their own customs. Indeed, when New Zealand was later acquired in sovereignty the Colonial Office made it clear that there was no reason why the native New Zealanders should not be left to govern themselves under their own customs and laws, provided only that they were not “repugnant to general principles of humanity”.¹⁶ When a constitution was enacted by the Imperial Parliament in 1852 for New Zealand which provided for self-government, it empowered the setting aside of Districts under which Maori societies would govern themselves according to their own laws.¹⁷

Property and Sovereignty

How land and other property was treated after a change of sovereignty was a matter of debate in the 19th century. The general approach of the common law was that no automatic change in the status of property occurred with a change in sovereignty. In New South Wales however it was assumed that the land was not the subject of any property interests. The impression obtained from the reports of Cook’s explorations was that the native population was scattered and small and had no notions of property in land. No pre-existing settlement had been undertaken which might have provided opportunity for dealings in land, such as had occurred with the native populations in North America from the 17th century and from the 1820s in New Zealand. By the time it came to be understood that the aboriginal population of New South Wales was not insubstantial and did indeed have conceptions of property and sufficient social organisation to regulate it, those new insights had become highly inconvenient.

Although in 1824 the Supreme Court of New South Wales had held that Australia was an uninhabited continent in which the soil vested in the Crown on establishment of sovereignty and was available for disposal by it,¹⁸ there was considerable doubt about the decision and it was criticised by the Aborigines Committee of the UK House of Commons as an expropriation “without the assertion of any other title than superior force”.¹⁹ It was not easily reconciled with the basis on which colonisation was set up in South Australia. Earl Grey told the South Australia Colonisation Commission that it was not to permit “any act of injustice towards the Aboriginal Natives” whose “Proprietary Title to the Soil, we have not the slightest ground for disputing”.²⁰ The Letters Patent in setting up the Province of South Australia provided that they did not affect “the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own Persons or in the Persons of their Descendants of any Lands therein now actually occupied or enjoyed by such Natives”.

In New South Wales the titles of every landowner who had received a Crown grant rode on maintenance of the position that the native inhabitants had no

¹⁶ New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72, s 71.

¹⁷ Section 71.

¹⁸ *R v Steele* (1839) 1 Legge 117.

¹⁹ Stuart Banner “Why *Terra Nullius*? Anthropology and Property Law in Early Australia” (2005) 23 LHR 95 at 120.

²⁰ At 120.

property in land and that the Crown obtained the land and the ability to dispose of it with sovereignty. That was why Batman's purchases from the Kulin people at Port Phillip were repudiated as "invalid" by Governor Bourke in 1835. Bourke's Proclamation was approved by the Secretary of State, Lord Glenelg, as having been necessary to maintain the "right of the Crown to the Soil on which these new Settlements have been effected." The purchase would, he thought "subvert the foundation on which all Proprietary rights in New South Wales at present rest and defeat a large part of the most important Regulations of the Local Government".²¹

The legitimacy of Crown assumption of property in Australia was therefore a current issue when annexation of New Zealand was in prospect. Governor Gipps took the view that the United States Supreme Court's approach in the early Cherokee cases (which seem to have been known in Australia through the digests of Kent and Story) provided justification for Crown assumption of property with sovereignty and he was of the same view in relation to New Zealand. Certainly, references to Chief Justice Marshall's opinion in *Johnson v M'Intosh*²² were made in the debates before enactment of the Land Claims Ordinance to regulate pre-Treaty European land purchases.

The debates about the Land Claims Ordinance which took place in the Legislative Council in New South Wales on the nature and consequences of acquisition of sovereignty in New Zealand are important contemporary information about the different views current at the time. They continue to echo down through New Zealand law, as the 2017 decision of the Supreme Court in *Wakatu v Attorney-General*²³ illustrates.

The argument put to the Court in *Johnson v M'Intosh* drew on the writings of the Swiss philosopher Vattel (who had popularised the concept of *terra nullius*). Chief Justice Marshall, delivering the judgment of the Court in *Johnson v M'Intosh*, asserted the "universal recognition" in America of the principle that by discovery of America the European powers obtained "ascendancy" over the inhabitants because of their "character and religion". That gave the European power title to the government of the territory, to the exclusion of other European powers, when "consummated by possession".²⁴

Marshall said that the exclusion of all other Europeans "necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it". The new sovereign power was then left to regulate "those relations which were to exist between the discoverer and the natives".²⁵

Marshall allowed that the native inhabitants were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it

²¹ "Asiatic Intelligence – Australia" (1837) 23 *The Asiatic Journal and Monthly Register for British and Foreign India, China and Australasia* at 309.

²² *Johnson v M'Intosh* 21 US 543 (1823).

²³ *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423.

²⁴ At 573–574.

²⁵ At 577.

according to their own discretion". But they lost independence and the power to dispose of the soil by the "original fundamental principle, that discovery gave exclusive title to those who made it". The power to grant the soil even if occupied by the native inhabitants, was obtained with sovereignty and those who obtained grants of the land obtained good title "subject only to the Indian right of occupancy".²⁶

In the lands in issue in *Johnson v M'Intosh*, Virginia had passed a statute in 1779 to provide for an exclusive right of pre-emption from the Indians. The Court considered that such legislation was simply declaratory of "the broad principle, which had always been maintained, that the exclusive right to purchase from the Indians resided in the government". The validity of the titles given by the Crown or its grantees had never been questioned in the courts; "[a]ll our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right".²⁷

The propositions in *Johnson v M'Intosh*, decided in 1823, were less well-settled than Marshall CJ suggested. In the first of the Indian cases, *Fletcher v Peck*,²⁸ decided in 1810, one member of the Court, Johnson J, dissented from the view that the state had any proprietary interest in land held by Indians. Unless obtained by treaty, he considered the interest of the state in the soil within their territories was "nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase".²⁹ Chancellor Kent, in *Goodell v Jackson*³⁰ in 1823 held that the right of pre-emption proceeded from statutes and not from any inherent feature of sovereignty. Thompson and Story dissented from the decision in the later case of *Cherokee Nation v Georgia*³¹ on the basis that the guarantee of possession of their land was indistinguishable from ownership and was a right, not a matter of grace, and a right that could be enforced in the courts.

Marshall himself shifted his position in *Worcester v Georgia*³² in 1832, towards that taken by Johnson J in *Fletcher v Peck*. In 1835 in *Mitchell v United States*,³³ a case not involving the Cherokee, it was accepted by the Court that the territory acquired by the United States under treaties with Spain meant that the Seminole retained full property in their lands, not simply rights of occupation, as had been recognised under Spanish rule. The Spanish approach is indication that the view that the European powers obtained property in the soil as an inherent consequence of sovereignty was not as inevitable as described in *Johnson v M'Intosh*.

²⁶ At 574.

²⁷ At 585.

²⁸ *Fletcher v Peck* 10 US (6 Cranch) 87 (1810).

²⁹ At 147.

³⁰ *Goodell v Jackson* 20 Johns 188 NY (1822).

³¹ *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831).

³² *Worcester v Georgia* 31 US (6 Pet) 515 (1832).

³³ *Mitchell v United States* 34 US 711 (1835).

Modern scholars have questioned the history recited in *Johnson v M'Intosh*. Stuart Banner maintains that British policy in North America was that Indians owned their land and that Europeans could acquire it only by purchase.³⁴ He points to the large number of surviving deeds of purchase, even though statutes were often enacted requiring settlers to obtain permission for purchases as a protection against transactions improvident for the sellers. There are court cases involving trespass to Indian lands. The colonists themselves frequently referred to Indians as "proprieters". They were treated as full owners, whose interests were not adequately represented as rights of occupancy. Once private purchases had been made, there was common interest in recognising Indian ownership as the root of valid titles. There was outrage when in the 1680s the Governor of New England proposed to invalidate all titles that could not be traced to Crown grant. Although there was doubt about whether property interests extended beyond cultivated and occupied lands, in practice even hunting and other uncultivated lands were generally purchased by the British.

Matters and attitudes changed over time. By the end of the colonial period very little land was left to the native bands in the east of North America. The westward push of settlement led to contact with native people who were not cultivators settled on land. After the 1763 Royal Proclamation prohibited land purchases from Indians, settlers increasingly looked to the state for grants of land and new land for grant was acquired by treaties.³⁵

In Britain, James Stephen, Permanent Undersecretary at the Colonial Office, said that *Johnson v M'Intosh* was not the policy acted on by the British in North America. He said "British law in Canada is far more humane, for there, the Crown purchases of the Indians, before it grants to its own subjects".³⁶ While that may not quite have been the position in the Maritime Provinces or Lower Canada, in Upper Canada Indians were treated as the owners of property, and not merely occupiers, in the many treaties and surrenders.

The background to *Johnson v M'Intosh* is therefore less straightforward than was presented by Marshall. The necessity of pre-emption and limitations of native property interests to occupancy at sufferance once sovereignty was acquired were not as self-evident and inherent as they were made to seem. It is telling that the Aborigines' Committee of the House of Commons which surveyed British treatment of native populations in Britain's overseas territories said nothing about any right of pre-emption being inherent in the Crown as sovereign.

Treating for Sovereignty and Rights of Pre-emption in Exchange for Guarantees of Property

By the time the Treaty of Waitangi came to be entered into in 1840, Governor Gipps had become pessimistic about the prospects for the aboriginal

³⁴ Banner *How the Indians Lost Their Land*, ch 1.

³⁵ Banner *How the Indians Lost Their Land*, ch 3.

³⁶ Stuart Banner *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press, Cambridge, 2007) at 61.

inhabitants of Australia.³⁷ That attitude may have affected his views about the Treaty of Waitangi and its consequences. Gipps took the view that in New Zealand, as in Australia, sovereignty had already been acquired by discovery. It required only possession in order to perfect it. He considered that Maori were incapable of the political organisation required for a system of property and that the 1835 Declaration of Independence, although recognised by Britain, had been “silly as well as an unauthorised act”.³⁸

Gipps’s views were controversial. Before news of the signing of the Treaty had been received in Sydney, the newspaper *the Colonist* on 22 January 1840 noted that “there is no subject which at present occupies the public mind, of such extensive interest and immediate importance, as .. the subject of New Zealand Colonisation”. The paper took the view that taking possession of New Zealand on the basis of prior discovery would infringe Maori rights. It also rejected suggestions that Maori interests in land were interests in use only rather than being proprietary in nature. It argued that the rights of proprietorship had been recognised by the British government.

The Treaty took a different path from that preferred by Gipps. It was a Treaty of cession of government which contained a guarantee of the “full exclusive and undisturbed” property of Maori in land. It obtained cession of a right of pre-emption, not treating it as something that was inherent in sovereignty. The protection of land included in Art.2 was added to the draft Gipps had discussed with Hobson before the Treaty was entered into, almost certainly at the insistence of James Busby, the British resident, who said that Maori would never agree to the Treaty without it.

When news of the Treaty reached London in July 1840, James Stephen expressed the view that negotiating for sovereignty in this way had been “much wiser” than “relying on the proceedings of Captain Cook, or the language of Vattel ...”

The Secretary of State, Lord John Russell noted the despatch:

The English & Natives both rely on our good faith. Approve Capt. Hobson’s conduct.

Following the signing of the Treaty, the priority for Gipps was to deal with the pre-Treaty land purchases. This was done in a Land Claims Ordinance enacted

³⁷ At that time, many were doubtful about notions of protecting and “liv[ing] in amity” with the Aboriginal people. Such an attitude can be demonstrated by the Myall Creek Massacre in 1838 and the events which followed. Twenty-eight Aboriginal men, women and children were killed. Governor Gipps was said to have gone through “terrible anguish of the heart and mind” over whether to prosecute the perpetrators, or whether prosecution would cause conflict. Eventually, eleven men were charged with the murder of one man, to the outrage of the landholders of New South Wales. All eleven men were acquitted at trial. However, after acquittal, 7 were held responsible for the death of one of the children and were subsequently hanged. It has been said that this execution fostered “the vindictive spirit kindled in the hearts of white men”. See Castles *An Australian Legal History* at 522–523.

³⁸ G Gipps *Speech of His Excellency ... on the second reading of the bill for appointing commissioners to enquire into claims to grants of land in New Zealand* (1840) at 23–24.

in Sydney amid much public interest. The Bill made all pre-Treaty purchases void until investigated and passed by a Commissioner as having been entered into on terms that were fair and equitable.³⁹ The Crown was then able to make grants of land, but with the acreages capped. The alienated lands above the cap became demesne lands of the Crown, with native titled cleared and able to be granted. The Ordinance itself was therefore hardly consistent with any beneficial interest in land being obtained by the Crown through sovereignty.

The Charter and Instructions provided to Hobson which authorised grants of land, had made it clear that they could be made only out of the waste lands “belonging” to the Crown and that “nothing in the Charter authorised or was to be construed as affecting “the rights of any aboriginal natives of the said colony to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said colony then actually occupied or enjoyed by such natives”.⁴⁰ (Although this is the same language seen in the South Australia Instructions, it had different effect than in Australia, perhaps because of the acknowledgement that grants could be made only out of land “belonging” to the Crown.) In New Zealand the waste lands of the Crown, able to be granted, were the lands surplus to government needs which had already been cleared of native title.⁴¹

In *Mabo (No 2) v Queensland*⁴² Brennan J suggested that the waste lands available for Crown grant in Australia include all land to which the Crown had radical title. This is not the approach taken in New Zealand.⁴³ Kent McNeil has questioned whether, in Australia, it reinstates substantially the notion of *terra nullius*. In New Zealand, however, there were only two ways in which the Crown could acquire land: through clearance of pre-Treaty purchases under the Land Claims Act 1840 (NSW) on proof of alienation on fair and equitable terms and by purchase, in exercise of the power of pre-emption the Crown had obtained under the Treaty. On this, Australia and New Zealand took different courses.

The first draft of the Land Claims Bill Gipps introduced into the Legislative Council of New South Wales proceeded on the basis that Maori lacked the capacity to alienate land.⁴⁴ He was forced to withdraw it because the view that Maori lacked property was opposed not only by the Sydney land sharks who were trying to protect their pre-Treaty purchases of land but also by Bishop Broughton and Chief Justice Darling.

William Wentworth, one of the more audacious land speculators (but also a good lawyer as his speech on the Land Claims Bill demonstrates), rejected the

³⁹ Land Claims Ordinance 1841 4 Vict 2, ss 2 and 3. The Ordinance replaced earlier legislation enacted in New South Wales to the same effect in 1840 (the Court of Claims Act 1840 (NSW) 4 Vict 7).

⁴⁰ “Royal Instructions to Captain Hobson” (4 Sept 1841) *New Zealand Journal* No. 44 at 220.

⁴¹ See *Proprietors of Wakatu v Attorney-General* at [24].

⁴² *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁴³ See *Nireaha Tamaki v Baker* (1901) NZPCC 371; *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) and *Proprietors of Wakatu*.

⁴⁴ Ned Fletcher and Sian Elias “A Collusive Suit to “Confound the Rights of Property Through the Length and Breadth of the Colony”?: *Busby v White* (1895)” (2010) 41 VUWLR 563 at 567.

doctrine adopted in *Johnson v M'Intosh*.⁴⁵ He pointed to the abstract nature of the principle referred to by Chief Justice Marshall and its contradiction by other authorities. He also pointed to the very different circumstances of Maori. They had been treated as an independent nation by the Imperial government. He argued that no right of pre-emption arose unless obtained by cession (as had been obtained under the Treaty) or by legislation. He contended that Gipps had confused the acquisition of property and the establishment of colonies. Wentworth pointed out, with justification, that to deny Maori property was inconsistent with the Instructions given to Hobson and with the right of pre-emption ceded in the Treaty, which assumed such capacity.

Revisionism

Despite this, *Johnson v M'Intosh* continued to be invoked in Australia and in New Zealand in support of the view that acquisition of sovereignty brought with it at common law the Crown's right of pre-emption and transformed native interests in land into a right of occupancy only and only as long as permitted as a matter of grace by the Crown. This line was pushed by the New Zealand Company, which was trying to get its ambitious land settlements established. It claimed that Art 2 of the Treaty of Waitangi was simply declaratory of common law as authoritatively described in *Johnson v M'Intosh*. On this view, native property was reduced to a right of occupancy burdening the ultimate ownership acquired by the Crown with sovereignty and was unable to be vindicated in the courts.

In 1877 a Full Court of the New Zealand Supreme Court, relying on *Johnson v M'Intosh* and Governor Gipps's speech at the second reading of the debate in the Legislative Council on the Land Claims Bill, denied that any "regular system of territorial rights nor any definite ideas of property in land" existed in New Zealand before colonial authority was established.⁴⁶ The Court relied on the "well-known legal incidents of a settlement planted by a civilised Power in the midst of uncivilised tribes", as described in "the well-known case of *Johnson v M'Intosh*".⁴⁷ Under these principles, the court had no jurisdiction to protect native interests because "supreme executive Government ...of necessity must be the sole arbiter of its own justice".

This explanation perhaps stretched the point that Marshall CJ was making. But it is the basis of a persistent strand in New Zealand law that the interest of the native proprietors is a political trust only, not giving rise to legal rights recognisable by the courts. So the Court held in 1877 that there was no customary law of Maori of which the courts could take cognizance.⁴⁸ It described the Treaty of Waitangi as a "simple nullity" both because it was entered into by "savages" who lacked the capacity to enter into such a treaty (the view earlier expressed by Gipps) and because, irrespective of its effect in international law, it had no domestic effect under common law.

⁴⁵ Fletcher and Elias at 568.

⁴⁶ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) at 77.

⁴⁷ At 77.

⁴⁸ *Wi Parata v Bishop of Wellington*.

The Privy Council tried to correct the position at the turn of the 19th century. It said it was “rather late in the day” to suggest that native property could not be recognised in New Zealand courts by evidence as to the custom on which it was held.⁴⁹ But the local preference resurfaced and we forgot much of our own legal history. This revisionism was not corrected until 2003 by the Court of Appeal in *Attorney-General v Ngati Apa*.⁵⁰

In *Attorney-General v Ngati Apa*, the Court of Appeal affirmed New Zealand and Privy Council authorities that the Crown obtained with sovereignty no interest in land in New Zealand beyond the technical and notional concept described by Brennan J in *Mabo v Queensland (No 2)* as “merely a logical postulate required to support the doctrine of tenure”.⁵¹ Even then, it came into effect in New Zealand only when the Crown had acquired land and was able to grant it.

The content of the customary interest that remains is a question of fact discoverable by evidence. The Crown cannot simply assert title: the Privy Council said that the Crown’s title “[i]n a constitutional country” must be supported by evidence too.⁵² The customary interest may range from usufructuary rights (such as are common in Canadian reservation of hunting and fishing rights) to rights indistinguishable in practice from the exclusive rights of fee simple, reducing as was said in one Privy Council case any radical right in the sovereign to one of “comparatively limited rights of administrative interference”.⁵³

In contrast to the position in Australia, in New Zealand it was acknowledged from the start that the whole of the country was owned by Maori. After the pre-Treaty land purchases had been resolved (a process that took a very long time), Governor Grey avoided further argument about the nature of Maori rights to land by embarking on huge purchases to meet settler needs. These purchases themselves gave rise to significant grievances which are still being worked through by the Waitangi Tribunal and Crown settlement processes.

Customary Title Today

From the 1860s Maori customary title was brought within a system of ownership investigated and administered by the Native Land Court which, over time, replaced customary title with deemed Crown grants.⁵⁴ Maori were incentivised to exchange native title in this way. From 1909 those holding land according to native custom were prevented from asserting their title against the Crown.⁵⁵ Nor could they bring actions for ejection or trespass except through the Attorney-General.⁵⁶ The title conferred by the Native Land Court ignored

⁴⁹ *Nireaha Tamaki v Baker* (1901) NZPCC 371 at 382.

⁵⁰ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

⁵¹ At [30], referring to *Mabo v Queensland (No 2)* at 50.

⁵² *Nireaha Tamaki v Baker* at 381.

⁵³ *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 410.

⁵⁴ Native Lands Act 1862, ss 2, 7 and 9; Native Lands Act 1865, ss 5 and 46.

⁵⁵ Native Land Act 1909, s 84.

⁵⁶ Section 88.

overlapping interests and ultimately undermined Maori social organisation by making occupation the principal basis of grant. The title obtained through the Land Court processes is in form exclusive of the overlapping interests that might have given right to usufructuary rights recognisable at law.

With the exception of foreshore and seabed land, there are now no significant areas of land which are held in native title in New Zealand. That position is to be contrasted with the position in much of Australia but is comparable as I understand it to New South Wales because of the inconsistency of continuation of native title with the form of tenure in that State.

The native title claim considered in *Attorney-General v Ngati Apa* was made in relation to foreshore land that had not been investigated through the Maori Land Court. It was brought after the legislation preventing native title being asserted against the Crown was repealed (a move Maori had sought for almost a century). When the Court of Appeal held in 2003 that the claim for investigation of customary property in foreshore land could be taken to the Maori Land Court, Parliament removed the right to have the claim investigated and legislated that foreshore land was vested in the Crown.⁵⁷

The legislation led to a political storm. It was replaced by a legislative system of protected rights and customary marine title. The Marine and Coastal Area (Takutai Moana) Act 2011 allows Maori to make application for statutory interests to protect customary rights shown to have been continually exercised since 1840 according to tikanga (although some evolution in custom is envisaged) and not extinguished by law. "Customary marine title" exists if the area has been "exclusively used and occupied" in accordance with tikanga from 1840 to the present day "without substantial interruption".⁵⁸ Tikanga is defined as "Maori customary values and practices".⁵⁹

These criteria are similar to those under the Native Title Act in Australia.⁶⁰ Commentators have pointed out that they set substantial evidential hurdles for claimants. As Chief Justice French has pointed out, those who have suffered the greatest loss face the greatest hurdle. As he says:⁶¹

If by accident of history and the pressure of colonisation there has been dispersal of a society and an interruption of its observance of traditional law and custom, then the most sincere attempts at the reconstruction of that society and the revival of its law and custom seem to be of no avail.

The New Zealand Takutai Moana legislation may not set up as difficult a hurdle. It is early days yet. But a number of commentators take the view that most

⁵⁷ Foreshore and Seabed Act 2004, s 13.

⁵⁸ Section 58.

⁵⁹ Section 9.

⁶⁰ The High Court of Australia has suggested that decisions such as *Mabo v Queensland (No 2)* no longer provide the foundation for assessing native title. Instead, the statute will always be the starting point. See, for example, *Western Australia v Ward* [2002] HCA 28, (2002) 213 CLR 1.

⁶¹ Robert French "Native Title – A Constitutional Shift?" (JD Lecture Series, University of Melbourne Law School, 24 March 2009) at 32.

Maori are likely to prefer to enter into direct negotiations with the Crown rather than undertake the expensive and exhausting process of establishing the connection required by the statute.⁶²

The recognition of Maori fishing rights in fisheries legislation no longer exists, having been abolished in a major settlement of interests to enable the privatisation of fisheries under a quota management system to be implemented.⁶³ The foreshore and seabed lands which might have been the subject of usufructuary rights are now subject to the Takutai Moana legislation. It is not clear that there remains any scope for recognition of customary title at common law.

Obligations of the Crown

Canada, Australia and now New Zealand have rejected the application of political trust doctrine which had immunised the Crown from legal responsibility to native populations in relation to their property because of governmental duties to all. Such views were always in the background in cases in Canada, Australia and New Zealand. They were developed more recently in *Tito v Waddell (No 2)*.⁶⁴ In their application to native title they were convincingly dispelled by the decisions of the Supreme Court of Canada in *Guerin v The Queen*⁶⁵ and the High Court of Australia in *Mabo (No 2)*. Binnie J, delivering the decision of the Supreme Court of Canada in *Wewaykum Indian Band v Canada* described “the enduring contribution of *Guerin*” as having been to recognise that the “concept of political trust did not exhaust the potential legal character of the multitude of relationships between the crown and aboriginal people”.⁶⁶

A quasi-property interest (eg reserve land) could not be put on the same footing as a government benefits program. The latter will generally give rise to public law remedies only. The former raises considerations “in the nature of a private law duty”.

In *Guerin v The Queen* the native interest was accepted to be a pre-existing legal interest which was not created by Crown actions and could not be taken away except by lawful procedure.⁶⁷ *Guerin v The Queen* also rejected the concept of “political trust” as inadequate to describe the nature of native interests in property in North America. So Dickson J distinguished *Tito v Waddell (No 2)* and the cases relied upon by Sir Robert Megarry. They were, he said, cases concerned essentially with the distribution of public funds or other property held by the government. The interests relied on by the claiming parties depended on statute, ordinance or treaty. The situation of the Indians was “entirely different”.⁶⁸

⁶² See for example Richard Boast “Foreshore and Seabed, Again” (2011) 9 NZJPI 271 at 283.

⁶³ The quota management system is legislated for in the Fisheries Act 1996.

⁶⁴ *Tito v Waddell (No 2)* [1977] 1 Ch 106 (Ch).

⁶⁵ *Guerin v The Queen* [1984] 2 SCR 335.

⁶⁶ *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 255 at 74.

⁶⁷ At 378.

⁶⁸ At 379.

Usufructuary rights are only one sort of possible interest according to custom. Some cases however seem to suggest that customary interests are always “usufructuary”.⁶⁹ It is striking that many native title and native right cases under the Native Title Act in Canada appear to be based on use rather than more extensive occupation. In *Tsilhqot’in Nation v British Columbia*⁷⁰ the Supreme Court of Canada held that the aboriginal title there recognised conferred “ownership rights similar to those associated with fee simple”.⁷¹ This view was foreshadowed in *Delgamuukw v British Columbia* by Lamer CJ.⁷² In that case Lamer CJ expressed the view that the description of the Privy Council in *St Catherine’s Milling & Lumber Company v The Queen* of Indian interests as personal and usufructuary may mislead.⁷³ In New Zealand, the Treaty guarantee of “full exclusive and undisturbed possession” which passes to descendants describes an interest that is as complete as fee simple except in the limitations imposed on alienation.

The “inherent fragility” of native rights and interests is remarked on in a number of decisions of the High Court of Australia. I want to come on to question that in relation to some of the Canadian case-law about equitable obligations, but it may be that, even in relation to native rights that are truly usufructuary, the fragility of the right in law has been oversold. It is true that existing legal estates which are no longer able to be challenged through effluxion of time may limit usufructuary rights. If interests which are no longer able to be challenged are inconsistent with the native right, it will be lost, at least if it is not excluded on a temporary basis which allows revival. But I query whether, for example, a grant that infringes usufructuary rights cannot be challenged either directly or in equity and subject to defences arising by effluxion of time. I know that is not how it is seen at the moment in Australia. But the rights, after all, are recognised to be legal interests and Crown grants are susceptible to challenge.⁷⁴ It is not inconceivable that equitable remedies may be seen to be appropriate, as Toohey J in *Mabo v Queensland (No 2)* was prepared to contemplate.

It is the case that the settlements of claims now being undertaken in Australia, Canada and New Zealand and the substantial transfer of assets from which indigenous peoples can rebuild, may overtake legal claims based on original displacement, even if they are likely to give rise to a number of new legal issues both in public law and in relation to the management of the settlements. (That at least is our experience to date in New Zealand.)

Modern settlements may be undertaken under statutory frameworks, as in Australia, or prodded by common law and equitable claims, as in Canada, or as part of a political process, as in New Zealand, both through the Waitangi Tribunal process and through direct political negotiations. I do not enlarge on

⁶⁹ See *Commonwealth v Yarmirr* [2001] HCA 56, (2001) 208 CLR 1 per Kirby J.

⁷⁰ *Tsilhqot’in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257.

⁷¹ At [73].

⁷² *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

⁷³ See Kent McNeil “Indigenous Law and Aboriginal Title” (2017) *Osgoode Legal Studies Research Paper Series* 183.

⁷⁴ By writ of *scire facias*.

some of these challenges for law in my remarks today, although recent decisions of the New Zealand Supreme Court and in other jurisdictions suggest they may be of some difficulty particularly where there are overlapping claims or issues of mandate.⁷⁵ Rather, here I want to stay with residual claims arising out of displacement and disruption through application of questionable legal doctrine and dealings in land which may be contrary to law or equity.

In *Guerin v The Queen*, it was held that the inalienability of the interest except through surrender to the Crown, in which surrender the Crown acted on the Indian Band's behalf in setting up leases with third parties, meant that the Crown owed fiduciary duties to the Band. The purpose of the restriction was to prevent exploitation and the Crown had discretion to decide where the best interests of the Band lay. Dickson J cited Ernest Weinrib's view that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion".⁷⁶ Wilson J and the judges who agreed with him would have gone further and found the Crown to be a trustee for the Band.

In subsequent cases not involving traditional native properties, the Supreme Court of Canada has held that fiduciary obligations may nevertheless be assumed by the Crown in relation to native peoples, consistently with s 35 of the Canadian Constitution.⁷⁷ In general, a pre-existing proprietary interest will be necessary to found an obligation in equity and provide a distinction with the exercise of governmental functions such as distribution of benefits, in which public law remedies only are available.⁷⁸ But if there is an assumption of responsibility in dealings on behalf of native people for their exclusive benefit, the special relationship with the Crown may also place the Crown under obligations equity will enforce.⁷⁹

In *Alberta v Elder Advocates of Alberta Society*⁸⁰ (a case concerning benefits which were of the higher trust variety), the Court said of the legal interests of native Americans that sufficient Crown undertaking was provided by "clear government commitments" from the Royal Proclamation of 1763 to the Constitution Act 1982 and by "considerations akin to those found in the private sphere" where "a fiduciary duty has been recognized" that goes beyond "a general obligation to the public or sectors of the public".⁸¹ By this means the Supreme Court of Canada looks to reconcile native interests in land with Crown sovereignty. The Federal Court in Canada has said the Crown is required "to withhold its own consent to surrender where the transaction is exploitative".⁸²

⁷⁵ See for example, *Ngati Whatua Orakei Trust v Attorney General* [2018] NZSC 84 and *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

⁷⁶ At 286.

⁷⁷ *Wewaykum Indian Band v Canada*, concerning the creation of a new reserve on land in which there was no traditional native property interest.

⁷⁸ *Alberta v Elders Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261; *Manitoba Metis Federation v Canada (Attorney-General)* 2013 SCC 14, [2013] 1 SCR 623.

⁷⁹ *Manitoba Metis Federation v Canada (Attorney-General)*.

⁸⁰ *Alberta v Elders Advocates of Alberta Society*.

⁸¹ At [48].

⁸² *Semiahmoo Indian Band v Canada* [1997] FCJ 842 (QL) at [45].

In New Zealand we have not gone as far. But in the recent case of *Wakatu v Attorney-General* in the New Zealand Supreme Court we have drawn on the Canadian cases in accepting that the Crown obtained title to land in Nelson in the 1840s on a basis that gave rise to duties in equity to the Maori original proprietors. We have not explored to date whether similar reasoning attaches to the explicit commitments undertaken by the Crown in New Zealand from the Treaty onwards in clearance of pre-existing native title through purchase and through the processes of conversion to land deemed to be Crown-granted. Where there are pre-existing and independent property interests which can be surrendered only to the Crown (as under right of pre-emption) it may be arguable that a relationship of power and dependency exists in which fiduciary obligations may properly arise. This is a matter that may never have to be confronted by the courts in New Zealand because of Treaty settlements. Like the earlier land purchases, they may avoid the need to reconsider the circumstances of dispossession, although they may set up the conditions for further equitable duties in the settlements themselves along the lines recognised in Canada.

In Australia the Crown has not been held to owe fiduciary duties arising out of the customary interests in land recognised in *Mabo v Queensland (No 2)*. In that case, Toohey J was the only member of the Court to find that the Crown owed fiduciary duties to the Meriam people not to impair or destroy their traditional rights and interests in land. He considered that the power of the Crown to grant leases of land burdened by the traditional interests of the Meriam people and their corresponding vulnerability, imposed fiduciary duties on the Crown. As he said, “the power to destroy or impair a people’s interests in this way is extraordinary” and he considered, was sufficient to attract the protection of equity.⁸³ Although Brennan CJ dissented in the result in *Wik Peoples v The State of Queensland* on the basis of the terms of the empowering statute, it is of significance he accepted that where discretionary power “whether statutory or not” is conferred for exercise on behalf of or for the benefit of others, fiduciary obligations could arise that could give rise to constructive trust on established equitable principles or by analogy.⁸⁴ That seems to me to accord with the approach taken in Canada in *Guerin v The Queen*.

Conclusion

In writing of the steps taken in Colombia under its 1991 Constitution to grant political autonomy in respect of their communities and territories to native populations, Daniel Bonilla described how “for the first time in the history of the country” the difference of indigenous populations was seen as something valuable rather than as “a historical burden to be destroyed”.⁸⁵ Although I would not want to be too romantic, I think there is similarly national pride in the distinctiveness of our native cultures in Australia and New Zealand. There is of course good and not so good in this process of adaptation. It may diminish

⁸³ *Mabo v Queensland (No 2)* at 203.

⁸⁴ *Wik Peoples v The State of Queensland* (1996) 187 CLR 1 at 96.

⁸⁵ Daniel Bonilla “The Principle of Political Unity and Cultural Minorities’ Self-Government” (2005) 17 Fla J Int’l L 525 at 582.

indigenous authority and distort cultural precepts. But if the process of indigenisation still falls short, well this is a journey that is not yet over.
