

2000

Negotiation and Native Title: Why Common Law Courts Are Not Proper Fora for Determining Native Land Title Issues

Geoffrey R. Schiveley

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Recommended Citation

Geoffrey R. Schiveley, Negotiation and Native Title: Why Common Law Courts Are Not Proper Fora for Determining Native Land Title Issues, 33 *Vanderbilt Law Review* 427 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol33/iss2/4>

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Negotiation and Native Title: Why Common Law Courts Are Not Proper Fora for Determining Native Land Title Issues

ABSTRACT

The displacement of indigenous populations is an obvious but often-overlooked consequence of worldwide European colonization. Until relatively recently, the rights of these groups have consistently been held to lower standards of protection than those of their colonizing counterparts, partly through the use of doctrines such as terra nullius. While earlier decades established the groundwork for recognition of these rights, in the 1990s native rights issues became of greater importance to both the international community and individual nations. Some of this heightened interest can be attributed to a series of high-profile common law court cases that provided native populations with favorable precedents to rely on for the first time in post-colonization history. The cases of Mabo v. Queensland in 1992, and Delgamuukw v. British Columbia in 1997, opened the floodgates in Australia and Canada, respectively, for indigenous populations to litigate claims to land titles that had been assumed settled for centuries.

This Note argues that, given the recent volatility of common law court decisions in the area of native title, these common law courts are not the proper fora for resolving centuries-old disputes between native populations and settler societies. Rather, a series of negotiations seems much more appropriate due to the complexity of the issues and differing worldviews of the parties involved. First, this Note will use the words of Canadian and Australian scholars and indigenous leaders to emphasize the importance of native title issues to indigenous populations. Next, this Note will focus on the two landmark cases of Mabo and Delgamuukw to emphasize the level of complexity involved in resolving such issues and the importance of resolving those issues through a flexible, non-adversarial process. Finally, this Note will examine both the legal and extralegal features of common law court systems that create inherent constraints on their ability to deal with the problems raised by issues of native rights.

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I. INTRODUCTION

To understand our law, our culture and our relationship to the physical and spiritual world, you must begin with the land. Everything about Aboriginal society is inextricably interwoven with, and connected to, the land. Culture is the land, the land and spirituality of Aboriginal people, our cultural beliefs or reason for existence is the land. You take that away and you take away our reason for existence. We have grown the land up. We are dancing, singing and painting for the land. We are celebrating the land. Removed from our lands, we are literally removed from ourselves.¹

Aboriginal² struggles for land rights and self-government are hardly new concepts. In many "settled" New World nations,

1. Michael Dodson, *Land Rights and Social Justice*, in *OUR LAND IS OUR LIFE: LAND RIGHTS—PAST, PRESENT AND FUTURE* 39, 41 (Galarrwuy Yunupingu ed., 1997) [*hereinafter* *OUR LAND IS OUR LIFE*].

2. The term "Aborigine" or "Aboriginal" will be used synonymously with "indigenous populations" and "native populations" to refer to all Aboriginal societies, particularly those in Canada and Australia.

natives' rights have been at issue for hundreds of years.³ However, it is only recently that these rights have become a matter of both national struggle and public international debate. The 1990s have seen sweeping changes in the area of native land rights, and not all of them have been for the better.⁴ These changes have occurred through a variety of means, including the legislative process, negotiated settlements, and the court system.

The purposes of this Note are both to explain why the common law court system is an inadequate forum for determining native rights issues and to emphasize negotiation, of which legislation plays an inevitable role, as the proper alternative to litigation. This Note will focus on the issue of native title to land to provide the framework for these arguments. Part II of the Note will discuss reasons why land rights issues are of such importance to Aboriginal societies.

Parts III and IV will discuss Australian and Canadian treatment of native title issues and native rights in general. An examination of these two countries are important for a variety of reasons, including their similarities as common law countries, their significant ties to the same colonial ruler (England), and the prominence of each country's native rights movement. Additionally, for reasons that will be discussed in more detail in this Note, the current political and legal state in each country easily lend themselves to a direct analysis of the benefits of negotiation over litigation in this area.

Finally, Part V addresses specific factors favoring negotiation over litigation in the native rights context, drawing on specific examples from both Australia and Canada. These factors are split into legal and extralegal justifications, even though there is much overlap between the two areas. The current political climates in Australia and Canada make these nations prime candidates to consider the arguments set forth in this Note.

3. The United States is certainly no stranger to the debate, as such early cases as *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), illustrate. In the first major native rights case, Justice John Marshall and the U.S. Supreme Court invalidated a group of speculators claim of title because they had bought the land directly from the Indians involved. The Court reasoned that the Indians could sell or cede their land only to the U.S. government. See *id.* at 587-89.

4. See *infra* notes 111-15 and accompanying text (discussing the Australia Native Title Amendment Act 1998 and Australia's recent shift away from granting land rights to a potentially more restrictive approach).

II. WHY LAND RIGHTS?

The basic assumption underlying the argument that native land rights claims need to be negotiated rather than litigated is that land rights are of great importance to indigenous populations. As the opening quotation to this Note emphasizes, many indigenous populations have a unique connection with their native lands. This connection almost invariably involves not just a physical element but strong spiritual and cultural ties as well.⁵ In an oft-cited passage, Professor W.E.H. Stanner compared European and Aboriginal conceptions of land as follows:

No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word 'home', warm and suggestive though it be, does not match the Aboriginal word that may mean 'camp', 'hearth', 'country', 'everlasting home', 'totem place', 'life source', 'spirit centre' and much else all in one. Our word 'land' is too spare and meagre. . . . The Aboriginal would speak of 'earth' and used the word in a richly symbolic way to mean his 'shoulder' or his 'side'. I have seen an Aboriginal embrace the earth he walked on.⁶

Aboriginal activist Galarrwuy Yunupingu also expressed the Aboriginal spiritual connection with the land in almost purely physical terms: "Getting the land back has been important because the land is part of us, we are one because of our relationship. There is nothing—no law, no person—that will separate our connection with land. Getting the land back has kept our spirits alive."⁷

As a corollary to the fundamental connection many indigenous populations feel toward their native lands, establishing land rights is an important step toward achieving the ability of self-determination and self-government. Even if self-

5. In this regard, Dodson wrote, "Land rights is a social justice issue because the result of not having access to your land is the destruction of culture, language and spirituality." Dodson, *supra* note 1, at 42.

6. W.E.H. STANNER, *WHITE MAN GOT NO DREAMING: ESSAYS 1938-1973*, 230 (1979). See also Stephen Aronson, *Aboriginal Land Rights*, in *ABORIGINAL ISSUES TODAY: A LEGAL AND BUSINESS GUIDE* 32, 32-33 (Stephen B. Smart & Michael Coyle eds., 1997) ("Aboriginal land rights are not comparable to concepts of Canadian property and real estate law. Part of the uniqueness flows from the spiritual and cultural relationship that Aboriginal peoples have with the land . . .").

7. Galarrwuy Yunupingu, *From the Bark Petition to Native Title*, in *OUR LAND IS OUR LIFE*, *supra* note 1, at 1, 11.

government is not the ultimate goal,⁸ the rights to exclude others and to determine the most economical use of land, both integral parts of self-determination, are important facets of many indigenous populations' agendas. As longtime Aboriginal activist Lois O'Donoghue wrote, "In so many different contexts, control of land is both the reality and symbolism of self-determination. Land ownership and management are not just the keys to our cultural futures, but the keys to our economic emancipation."⁹ The concern among many Aboriginal leaders is that any efforts toward self-determination will be undermined by a curtailment or removal of these land rights.¹⁰

O'Donoghue's view that land rights are essential to "economic emancipation" indicates that economic factors also play a role in justifying the importance of land rights to indigenous populations.¹¹ The role that economics takes is twofold. Both the potential positive effects to indigenous people and the negative economic impact current land rights policy entails must be considered.

Gaining and maintaining control of land provides indigenous populations with the economic base necessary to compete in the marketplace.¹² While all native people wish to recover lost lands because of the cultural and spiritual value they hold, many also recognize the practical economic interests inherent in the land. Mining, grazing, and timber operations represent big business on most Canadian and Australian native lands. If natives regained title to these lands, they alone would have the right to allow access to industrial and agricultural corporations.¹³ Natives also

8. See *infra* notes 205-12 and accompanying text (discussing the new Canadian province of Nunavut as a potential example of workable self-government).

9. Lois O'Donoghue, *Something to Celebrate*, in *OUR LAND IS OUR LIFE*, *supra* note 1, at 28, 29.

10. See Tracker Tilmouth, *Taking Stock of Land Rights*, in *OUR LAND IS OUR LIFE*, *supra* note 1, at 18, 24 ("Land rights are the foundation—but at the end of the 20th century it is time to take the next step to develop Aboriginal communities. We must take that step without continually having to expend precious energy having to defend land rights.").

11. O'Donoghue, *supra* note 9, at 24.

12. See NATIONAL INDIGENOUS WORKING GROUP ON NATIVE TITLE, COEXISTENCE—NEGOTIATION AND CERTAINTY: INDIGENOUS POSITION IN RESPONSE TO THE *WIK* DECISION AND THE GOVERNMENT'S PROPOSED AMENDMENTS TO THE NATIVE TITLE ACT, 1993 (1997) ("Native Title provides the way forward for Indigenous economic and social development and participation on a full and equal basis in the life of the nation.") [hereinafter NATIONAL INDIGENOUS WORKING GROUP ON NATIVE TITLE].

13. However, when Australia drafted national legislation on native land rights, the Federal Government stopped short of allowing Aborigines veto power over all future mining proposals on their lands. See FRANK BRENNAN, *ONE LAND, ONE NATION: MABO—TOWARDS 2001*, at 53 (1995).

possess sufficient knowledge of the market to be able to place a value on these business opportunities to those who would exploit them. As one commentator notes, "The ability for Aboriginal people to control access to, and use of, their country is the single most important factor in allowing them to negotiate effectively with the mining industry."¹⁴

Additionally, because of their unique connection to the land as a spiritual and cultural center, denial of rights to that land creates an adverse economic effect on indigenous and European populations alike. Once native peoples are removed from their spiritual and cultural center, they tend to gravitate to urban areas "in an increased state of social dislocation and spiritual desolation."¹⁵ The resulting economic and political effect on public welfare is "beyond quantification."¹⁶

Finally, the entire native rights movement is based in part on the need for reparation of hundreds of years of moral wrongs.¹⁷ European society relocated or decimated millions of native people, and the first step in doing so inevitably involved taking their native lands. The effects of these takings are still felt today, not only by dispossessed Aborigines, but also by the European societies that must support them through public welfare.¹⁸ Returning at least part of those lands is therefore the necessary first step toward some measure of absolution.¹⁹

14. Yunupingu, *supra* note 7, at 9.

15. Tilmouth, *supra* note 10, at 23.

16. *Id.*

17. See *infra* Part V.B.2 (discussing the incompatibility of morality and the common law court system in terms of dealing with native land rights issues).

18. In Australia, the situation is sobering. As stated by Dodson:

We are still the ones who are 18 times more likely to be in prisons; they still inadequately house 60 percent of us; we are still the ones dying 18 to 20 years younger than other Australians; still the ones only one-third as likely to complete secondary school, three times as likely to be unemployed, and 60 percent of us are unemployed.

Dodson, *supra* note 1, at 40.

19. See Peter Yu, *Multilateral Agreements—A New Accountability in Aboriginal Affairs*, in *OUR LAND IS OUR LIFE*, *supra* note 1, at 168, 179 ("Recognition of our native title rights offers government the opportunity to overcome its disgraceful and undignified behaviour towards Aboriginal people.").

III. AUSTRALIA

A. *History of Terra Nullius*

The Aboriginal²⁰ struggle for land rights in Australia has been defined by the common law doctrine of *terra nullius*. This is usually interpreted to mean “unoccupied land,”²¹ or “no-man’s land.”²² During the period of European colonization, three basic methods of acquiring colonial land were recognized—(1) persuading native populations to submit to the colonizer’s rule, (2) purchasing some or all of the land from native populations, or (3) discovering and possessing “unoccupied” land first.²³

When Captain Cook landed on the east coast of Australia in 1770, he disregarded the fact that the land was already occupied and chose the third option in declaring the land under British rule.²⁴ Cook apparently regarded the few Aborigines he encountered along the coast as insufficient in number to require either of the other two options.²⁵ Furthermore, he felt the “Aborigines had no property rights because they had not laboured to ‘subdue’ the land by agricultural cultivation.”²⁶ Upon discovery of the high population of indigenous people elsewhere in Australia—perhaps between 750,000 and 2,000,000²⁷—the British Empire applied the doctrine of “enlarged *terra nullius*.” This meant that a colony could be established despite the presence of a native population, provided such population was deemed uncivilized or backward.²⁸ For the two hundred years following Captain Cook’s “discovery,” colonizing Europeans

20. The term “Aborigine” or “Aboriginal” will be used to refer to both mainland Australian Aborigines and Torres Strait Islanders.

21. Ann McGrath, *A National Story*, in *CONTESTED GROUND: AUSTRALIAN ABORIGINES UNDER THE BRITISH CROWN* 1, 1 (Ann McGrath ed., 1995).

22. Bain Attwood, *Introduction—The Past as Future: Aborigines, Australia and the (Dis)course of History*, to *IN THE AGE OF MABO: HISTORY, ABORIGINES AND AUSTRALIA* at vii, ix (Bain Attwood ed., 1996).

23. McGrath, *supra* note 21, at 12.

24. *See id.*

25. *See id.*

26. *Id.* at 12-13.

27. *See* Matthew C. Miller, *An Australian Nunavut? A Comparison of Inuit and Aboriginal Rights Movements in Canada and Australia*, *EMORY INT’L L. REV.* 1175, 1190 (1998). *But see* Karen E. Bravo, Note, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia*, 30 *COLUM. J.L. & SOC. PROBS.* 529, 550 (1997) (placing the number of indigenous inhabitants at the time of discovery at 300,000).

28. *See* Miller, *supra* note 27, at 1191 n.101, 1192.

justified dispossession of indigenous populations based on the fallacy of "enlarged *terra nullius*."

For purposes of meaningful advances in Aboriginal land rights, very little happened during the course of those two hundred years. However, a few notable events occurred to set the stage for *Mabo v. Queensland*²⁹ and the land rights movements of the last twenty years. In 1879, the tiny Torres Strait Islands, as part of the Murray Islands, were annexed and made part of the Queensland colony.³⁰ In 1901, the separate colonies of Australia were federated into an independent nation.³¹ In 1967, the Commonwealth was granted the authority to legislate on behalf of the Aborigines by a referendum supported by 91 percent of the voters.³² It was in the 1970s, however, that the issue of Aboriginal land rights finally came to the forefront of political debate.

Aboriginal gains in land rights issues began with a severe setback in the courts. In *Milirrpum v. Nabalco Pty. Ltd. (Gove case)*,³³ the Yolngu people brought suit against the government and a mining company in an attempt to establish ownership of their traditional lands on the Gove Peninsula in north-east Arnhem Land.³⁴ Justice Blackburn, who decided the *Gove* case, set forth a test for establishing native title that included determining whether the petitioners "maintained the same linkages with the same areas of land as their ancestors had . . . [in] 1788 at the assertion of British sovereignty."³⁵ Based on cases from other common law countries, Justice Blackburn held that the common law only recognized individual title to land, precluding the possibility of community title sought by the Yolngu.³⁶ Finally, the *Gove* case held that even if native title did

29. *Mabo v. Queensland* (1992) 107 A.L.R. 1 (Austl.).

30. See BRENNAN, *supra* note 12, at 3.

31. See *id.* at xiii, xvii.

32. Yunupingu, *supra* note 7, at 5.

33. *Milirrpum v. Nabalco Pty. Ltd.* (1971) 1972-1973 A.A.L.R. 65 (Austl. N. Terr. S. Ct.).

34. *Id.* at 81.

35. BRENNAN, *supra* note 13, at 5.

36. *Milirrpum* (1971) 1972-1973 A.A.L.R. at 176. According to one commentator, the court's reasoning was based on the idea that "although indigenous Australians did have a system of land tenure, it could not be recognized within the current Australian conception of legal title because indigenous Australians lived in a 'primitive state of society' and as such should not be entitled to legal ownership of land." Gretchen Freeman Cappio, Comment, *Erosion of the Indigenous Right to Negotiate in Australia: Proposed Amendments to the Native Title Act*, 7 PAC. RIM L. & POL'Y J. 405, 409 (1998). This incompatibility between aboriginal and common law systems is one of the primary reasons negotiation is the appropriate forum for resolving the problems of native title. See

exist, it had been extinguished in 1788 with the declaration of British sovereignty over Australia.³⁷ In short, it was held that native title did not exist in the common law and that any land claims by Aborigines must be brought pursuant to rights conferred by the appropriate legislature.³⁸

In response to the *Gove* decision, the Australian government set the political process in motion. In 1973, the Commonwealth government established the Aboriginal Land Rights Commission and appointed Edward Woodward to guide it.³⁹ "The Commission's terms of reference were not aimed at determining whether or not land rights should be granted, but *how* they should be granted."⁴⁰ In its report to Parliament, the Commission focused on the Northern Territory, not only for efficiency, but also because the Territory is the one portion of Australia still directly subject to Commonwealth legislation.

The Commonwealth Parliament responded to these reports with two legislative enactments. The first of these, the Racial Discrimination Act of 1975,⁴¹ was passed to prohibit any "person to do any act involving a distinction, exclusion, restriction, or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom."⁴² In 1982, the High Court upheld the constitutionality of the Act,⁴³ which eventually played a significant role in future land rights decisions.⁴⁴

The second piece of legislation was the Aboriginal Land Rights (Northern Territory) Act, 1976.⁴⁵ This enactment provided Northern Territory Aborigines with a number of significant advances, including an immediate transfer in ownership of all land held as reserves,⁴⁶ establishment of procedures for claiming

infra Part V for a discussion of this and other justifications for favoring negotiation over litigation in this area.

37. See *Milirrpum* (1971) 1972-1973 A.A.L.R. at 176.

38. See *id.* at 154-55.

39. Woodward, later Justice Woodward, represented the Aborigines in the *Gove* case.

40. Marcia Langton & Nicolas Peterson, *Introduction to ABORIGINES, LAND AND LAND RIGHTS* 3, 3 (Nicolas Peterson & Marcia Langton eds., 1983) (emphasis added).

41. Racial Discrimination Act, 1975 (Austl.).

42. *Id.* § 9.

43. See *Koowarta v. Bjelke-Peterson* (1982) 39 A.L.R. 417 (Austl.).

44. See generally BRENNAN, *supra* note 13, at 12-13 (discussing the importance of the Racial Discrimination Act in the *Mabo* decision.).

45. Aboriginal Land Rights (Northern Territory) Act, 1976 (Austl.).

46. See *id.* §§ 10-12.

certain lands outside of town boundaries,⁴⁷ giving Aborigines a nearly irrefutable veto power on all requests for mine development,⁴⁸ and the establishment of representative land councils using funds from mining on Aboriginal land.⁴⁹ This Act has led to the transfer of nearly fifty percent of the Northern Territory to Aborigines as inalienable freeholds, either through outright transfers or through the land claims process.⁵⁰ The Aboriginal Land Rights (Northern Territory) Act is commonly viewed as the high point of legislative recognition of Aboriginal land rights.⁵¹

In 1979, Paul Coe, an Aborigine, filed suit in an attempt to gain judicial recognition of the existence of native title.⁵² Unfortunately, Coe filed suit on behalf of all Aborigines, claiming a right to Australia *in toto* on the theory of native title.⁵³ While the Court dismissed the claim, calling it "absurd and vexatious,"⁵⁴ some of the Justices also hinted that there may have been valid legal claims buried in the complaint.⁵⁵ All that Coe's claims needed were proper formulation and support, both of which the court found in *Mabo v. Queensland*.

B. Mabo v. Queensland

In 1982, Eddie Mabo, along with four other Torres Strait Islanders, filed suit for native title to the Torres Strait Islands in the Queensland courts. The Queensland Parliament responded to the filing by passing the Queensland Coast Islands Declaratory Act of 1985.⁵⁶ The Act was an attempt to remove the action from the courts' jurisdiction by declaring that title to the Murray Islands had vested in the Crown at the time of annexation. The

47. See *id.* § 20.

48. See *id.* § 40.

49. See *id.* § 63(2).

50. See Gallarwuy Yunupingu, *Introduction to OUR LAND IS OUR LIFE*, *supra* note 1, at xv, xviii.

51. This is true despite the Commonwealth's passage of the Native Title Act, 1993. For an example of strong Aboriginal criticism of the Native Title Act, 1993, see Aden Ridgeway, *Rights of the First Dispossessed: The New South Wales Situation*, in *OUR LAND IS OUR LIFE*, *supra* note 1, at 63.

52. *Coe v. Commonwealth* (1979) 24 A.L.R. 118 (Austl.).

53. See *id.* at 120-27 (repeating plaintiff's complaint in full).

54. *Id.* at 131.

55. See *id.* at 137 ("The claim to rights over land or compensation for loss of such rights is capable of being formulated and presented in an intelligible way." (opinion of Murphy, J.)).

56. Because the Act was invalidated in *Mabo*, it no longer retains a statutory citation.

Act also "retroactively validated all dispositions of land."⁵⁷ This legislation, if valid, effectively eliminated the controversy from the *Mabo* suit.

For the plaintiffs, the legislation turned out to be the best thing that the Parliament could have done. The legislation dismissed the suit, but the Queensland government had created a constitutional issue that was immediately appealable to the High Court.⁵⁸ The High Court declared the Act violated the Racial Discrimination Act of 1975 and was therefore void.⁵⁹ "This decision assumed, without actually deciding the issue, that the Islanders' alleged rights existed and were recognized under Australian common law,"⁶⁰ and the High Court remanded for factual findings on the nature of the plaintiffs' title at the time of annexation.⁶¹

The case returned to the High Court for a final decision in 1992. By a six-to-one majority, the Court overruled *Milirrpum*, rejected the doctrine of *terra nullius*, and acknowledged the existence of native title in the common law.⁶² The Court also rejected the requirements for establishing native title set forth by Justice Blackburn.⁶³ Instead, it required only that the community existed at the time of annexation, and that the connection between the community and the land in question had not been extinguished.⁶⁴ This included extinguishment by state action.⁶⁵ The majority agreed that the Torres Strait Islanders had

57. Gary D. Meyers & John Mugambwa, *The Mabo Decision: Australian Aboriginal Land Rights in Transition*, 23 ENVTL. L. 1203, 1209 (1993).

58. See BRENNAN, *supra* note 13, at 12.

59. See *Mabo v. Queensland* (1988) 83 A.L.R. 14, 33-34 (Austl.).

60. Meyers & Mugambwa, *supra* note 57, at 1209.

61. See *id.*

62. According to Justice Brennan, "[t]he 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." *Mabo v. Queensland* (1992) 107 A.L.R. 1, 28 (Austl.). Justice Brennan also formulated the rejection of *terra nullius* as follows:

The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.

Id. at 41.

63. See Meyers & Mugambwa, *supra* note 57, at 1217-18.

64. See *Mabo* (1992) 107 A.L.R. at 42-43.

65. See *id.* at 42-52. *Mabo* did not change the two essential methods at a State's disposal for extinguishing native title. The first method involves granting land to other persons with the power to exclude traditional owners (i.e., freehold estates). This includes the kind of governmental reclamation of land that requires compensation to property holders deprived of title. The other method involves the

proven their right to the three islands in question based on this doctrine and ordered the land be returned to them.⁶⁶

Beyond the immediate disposition of the case, however, the Court did not completely agree on anything. The majority filed three separate opinions, with the opinion of Justice Brennan generally regarded as the authoritative statement of the law.⁶⁷ The concurring opinions differ over a wide range of issues, including evidentiary requirements, the right to compensation for the loss of native title, and the legal rationale for establishing native title. A majority did agree on the essentials of native title, which are: "1) title is based on the customary usage by the group as evidenced by a continuous connection to or use of the land; 2) title is alienable only to the Crown; and 3) title is qualified by the Crown's right to limit, regulate, or extinguish it."⁶⁸ The Crown's right to extinguish native title was subject to the requirement that the State or Commonwealth enactment evidence a "clear and plain intention to do so."⁶⁹

The Court also refused to restrict its holding to the specific facts of the case. Eddie Mabo had originally brought his claim partly in response to one of the hurdles erected by Justice Blackburn in the *Gove* case. Mabo's argument was that Torres Strait Islanders were different than mainland Aborigines because they *could* lay claim to plots of land as individuals.⁷⁰ The Islanders lived essentially as vegetable gardeners, rather than in the hunter/gatherer communities prevalent on the mainland.⁷¹ The Court explicitly rejected the mainland/Islander distinction,

government dealing with the land in such a manner as to be inconsistent with the assertion of native title. However, both of these methods are subject to the restrictions of the Racial Discrimination Act, which require that such grants and takings not be performed in a discriminatory manner. See BRENNAN, *supra* note 13, at 17. "The test is always whether or not the third party granted a right or interest by the Crown has the capacity to exclude traditional owners from their access and use of land." *Id.* at 18.

66. See *Mabo* (1992) 107 A.L.R. at 56.

67. Justice Brennan's opinion was used as the basis for subsequent political responses to the *Mabo* decision, presumably because it was the most restrictive of the majority opinions. "On most ambiguous questions, the Brennan judgment can be taken as the minimal exposition of Aboriginal rights enjoying majority support from the present High Court." See BRENNAN, *supra* note 13, at 18. Additionally, with Chief Justice Mason and Justice McHugh concurring with Justice Brennan, the opinion constitutes a plurality. See *Mabo* (1992) 107 A.L.R. at 7.

68. Meyers & Mugambwa, *supra* note 57, at 1221.

69. *Mabo* (1992) 107 A.L.R. at 46. In adopting this standard, the Court followed precedent from Canada and the United States. See *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313, 404 (Can.); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353-54 (1941).

70. See BRENNAN, *supra* note 13, at 9.

71. See *id.*

and in the words of Justice Brennan, "there may be other areas of Australia where native title has not been extinguished and where an Aboriginal people, maintaining their identity and their customs, are entitled to enjoy their native title."⁷² The Court also rejected the theory that the common law could not recognize communal rights to native title.⁷³ These decisions potentially opened the door for land rights claims by mainland Aborigines whose native lands encompassed vast tracts in Australia.

Because the plurality, concurring, and dissenting opinions represent the middle and two extremes of the native title issue, respectively, it is worth discussing how they disagree. There were two main points of contention between the Justices. The first issue involved the role of the State as titleholder to the land in question. Justice Dawson, as the lone dissenter, agreed with the State of Queensland's argument that the State held exclusive right of title to land and that any other title acquired must be granted by the State on that basis.⁷⁴ This included native title. Although Aboriginal claims preceded the Crown's rights chronologically, the State's argument required the State to acknowledge Aboriginal rights to land subsequent to annexation in order for those rights to become legally binding.⁷⁵ The majority

72. *Mabo* (1992) 107 A.L.R. at 50. In response, S.E.K. Hulme, legal counsel for the Western Australian government during post-*Mabo* debates, stated:

With no mainland issue, with no evidence as to the mainland, with no parties concerned with any mainland issue, without argument as to any mainland issue, the High Court proceeded to destroy what [Justices Deane and Gaudron] described as "a basis of the real property law of this country for more than a hundred and fifty years".

S.E.K. Hulme, *Aspects of the High Court's Handling of Mabo*, in THE HIGH COURT OF AUSTRALIA IN MABO 23, 24 (Association of Mining & Exploration Companies, Inc. ed., 1993).

73. See *Mabo* (1992) 107 A.L.R. at 36.

74. "After the Crown has assumed sovereignty and acquired the radical title to the land, any pre-existing 'title' must be held, if it is held at all, under the Crown." *Id.* at 98 (opinion of Dawson, J.).

75. Justice Dawson stated the argument as follows:

This new title is therefore not merely the continuation of a title previously held, notwithstanding that it may be identifiable by reference to the previous title. If the new title is to be held under the Crown, the Crown must obviously accept it. Such acceptance may be by way of acquiescence in the continued occupancy of land by the Aboriginal inhabitants, and, if the native interests are accepted in this manner by the Crown, the nature of those interests can then only be determined by reference to the nature of the former occupancy by the aboriginal inhabitants. The appearance (although not the fact as a matter of law) is, then, that these native interests continue undisturbed.

Id.

rejected the idea that annexation extinguished native title rights,⁷⁶ although the plurality opinion expressed the view that the sovereign had the power to subsequently wipe them out.⁷⁷

The second issue, regarding an Aboriginal right to compensation, split the majority. Justices Deane and Gaudron and Justice Toohey, in separate concurrences, took a much more sympathetic view to the Aborigines' plight than either the majority or dissent. Not only did they acknowledge the existence of native title, they felt it necessary to offer some form of compensation to those parties who could show that they had been improperly excluded from their original land, no matter how far back chronologically the exclusion had occurred.⁷⁸ The plurality refused to discuss the issue because the parties had not placed it before the court,⁷⁹ while the dissent "assert[ed] that there is no general rule, either in law or in history, favoring compensation for loss of native title."⁸⁰ The disagreement over compensation rights highlights an area ripe for interpretation not by the courts but by the parties themselves through some sort of negotiation process.

C. Post-Mabo Political and Judicial Activity

Following the High Court's decision in *Mabo*, both the political and legal communities responded quickly. The Court addressed issues involving native title on several subsequent occasions, most recently in *Wik Peoples v. Queensland*,⁸¹ and has done little to limit the scope of its holding in *Mabo*. But even before the Court affirmed its *Mabo* ruling, the Commonwealth

76. According to Justice Brennan, "[the] view that the rights and interests in land possessed by the inhabitants of a territory when the Crown acquires sovereignty are lost unless the Crown acts to acknowledge those rights is not in accord with the weight of authority." *Id.* at 40.

77. *See id.* at 51-52.

78. "[T]he power of the Crown wrongfully to extinguish the native title by inconsistent grant will remain but any liability of the Crown to pay compensatory damages for such wrongful extinguishment will be unaffected." *Mabo* (1992) 107 A.L.R. at 84 (opinion of Deane & Gaudron, JJ.).

79. Justice Brennan stated, "We are not concerned here with compensation for expropriation." *Id.* at 40. However, as one commentator has noted, the majority judgments all alluded to the Commonwealth Constitution as controlling the extinguishment of native title. The Constitution's requirement of acquisition of property on "just terms" arguably leaves some breathing room for future parties to claim a right to compensation based on past expropriation. *See* Gordon Brysland, *Rewriting History 2: The Wider Significance of Mabo v. Queensland*, 17 ALTERNATIVE L.J. 162, 165 (1992).

80. Meyers & Mugambwa, *supra* note 57, at 1230.

81. *Wik Peoples v. Queensland* (1996) 141 A.L.R. 129 (Austl.).

government set the political process in motion to establish a compromise.⁸²

Recognizing the significance of the *Mabo* decision, Prime Minister Keating searched for a method to diminish the potential impact of the newly recognized theory of native title. However, because the federal government faced national election in early 1993, its ability to promise and effectuate lasting change was conditioned on reelection. Nevertheless, in September 1992, Keating called for a one-year consultation period that would involve "discussion among major stakeholders including Aborigines, miners, pastoralists and State governments."⁸³ On December 10, 1992, Keating launched the ambitious International Year of the World's Indigenous Peoples,⁸⁴ thereby setting native rights at center stage in the upcoming election. Following reelection, the Keating government was consumed for the remainder of 1993 by the native title debate.

October 1993 marked the climax of the ongoing native title debate. Following months of negotiation, talks broke down on October 8, a day that came to be known as "Black Friday."⁸⁵ The main disagreement was over a twenty-one-point list of demands offered by the Aborigines, which included a demand that the Federal government not suspend the Racial Discrimination Act⁸⁶ in order to validate past titles granted to non-Aboriginal owners.⁸⁷ Without governmental compromise on issues such as this, Aborigines felt their chances would be better if they just returned to court.⁸⁸

Fortunately, the government was willing to compromise. The two sides reached an agreement on Tuesday, October 18, also known as "Ruby Tuesday."⁸⁹ The basic compromises that led to the agreement constitute the backbone of the Federal Native Title Act, 1993,⁹⁰ which was signed into law December 24, 1993.⁹¹

A number of provisions in the Act are worth noting. First, while Aborigines were able to convince the government not to suspend the Racial Discrimination Act to validate past grants of

82. For a more thorough discussion of the political processes involved in determining native title rights in 1993, see BRENNAN, *supra* note 13, at 38-80.

83. *Id.* at 41.

84. *See id.*

85. *See id.* at 66.

86. *See supra* notes 41-44 and the accompanying text.

87. *See* BRENNAN, *supra* note 13, at 66.

88. *See id.* at 65.

89. *See id.* at 67.

90. Native Title Act, 1993 (Austl.).

91. *See* BRENNAN, *supra* note 13, at 79. The Act took effect on January 1, 1994.

interests in land,⁹² the Act does validate all interests in land made before November 1, 1975, the date of passage of the Racial Discrimination Act.⁹³ However, the Act provides for compensation to any Aborigines who would have a valid native title claim but for the grant.⁹⁴ The Act also provides procedures to ensure that native title cannot be extinguished without notifying native titleholders⁹⁵ and involving them in the appropriate negotiations.⁹⁶ As part of these procedures, the Act established the National Native Title Tribunal,⁹⁷ which has authority to recognize native title rights⁹⁸ and encourage mediation of native title claims.⁹⁹ Moreover, while Aborigines lost their potential veto power through the political process, the Act provides for a right to negotiate with private parties over development proposals on land subject to native title claims.¹⁰⁰

Many Aborigines feel the Native Title Act, 1993 does not adequately represent Aboriginal interests in native title.¹⁰¹ Compounding this perception is the current political climate in Australia, where the Howard Government has passed substantial curtailment amendments to the Act.¹⁰² However, the High Court continues to be sympathetic to Aboriginal claims, as evidenced by two landmark cases that followed the passage of the Native Title Act, 1993.

Before the Commonwealth passed the Native Title Act, 1993, Western Australia implemented native title legislation of its

92. Native Title Act, 1993, § 7 (Austl.).

93. *See id.* §§ 14-15. The definition of "past act" in the Act sets the date at January 1, 1994, but the practical effect of the Racial Discrimination Act is to provide certainty only for those grants issued prior to November 1, 1975. *See id.* §§ 228-32 (defining the different types of "past acts").

94. *See id.* §§ 17-20.

95. *See id.* § 29.

96. *See id.* § 31.

97. *See id.* § 107.

98. *See id.* § 13. However, § 165 states that Tribunal determinations, other than in relation to a right to negotiate application, "is not binding or conclusive." *Id.* § 165. Presumably, this merely allows room for appeal to the Federal Court.

99. *See id.* § 72.

100. *See id.* § 75.

101. Aboriginal leader Aden Ridgeway wrote:

[N]o other Act in the modern history of this country has had such far-reaching consequences—in one fell swoop, all past illegal acts of government were validated and Aboriginal native title rights were extinguished. It is a shameful period in the history of this country where the conception of native title by the High Court in 1992 was quickly aborted by the Commonwealth Government of the day in 1993.

Ridgeway, *supra* note 51, at 66.

102. *See* Native Title Amendment Act, 1998 (Austl.).

own.¹⁰³ The Western Australian scheme replaced *Mabo* native title rights with statutory rights that generally were to be "equivalent in extent to the rights and entitlements that they replace."¹⁰⁴ While the Act originally granted Aborigines strictly non-proprietary interests,¹⁰⁵ the legislature removed such language out of fear that the Racial Discrimination Act would invalidate the legislation.¹⁰⁶ However, the legislation also omitted any involvement by an independent tribunal for determining claims.¹⁰⁷ Instead, the Act adopted an administrative structure designed to ensure continued grants of mining development leases and to keep administrative decisions regarding native title away from judicial scrutiny.¹⁰⁸

With Commonwealth and State legislation in conflict, a showdown was inevitable. As Western Australia processed and granted thousands of mining and development applications, the Western Australia government simultaneously brought suit to determine the validity of its legislation. The suit culminated in the High Court's unanimous 1995 decision striking down Western Australia's Land (Titles and Traditional Usage) Act 1993 and upholding the Native Title Act, 1993.¹⁰⁹ As a result, all development grants made under the Western Australian legislation were immediately subject to native title claims, if applicable, leaving developers with title validity concerns.¹¹⁰

The second landmark decision of the High Court following implementation of the Native Title Act, 1993 resolved a question of national importance dealing with the issue of native title and pastoral leases.¹¹¹ The pastoral industry is an uniquely Australian feature that grew out of ranchers' needs for vast tracts of land to adequately graze their livestock in the mostly arid Australian outback. Currently, forty-two percent of the

103. The Land (Titles and Traditional Usage) Act, 1993 was invalidated in the case and is no longer available in statutory form.

104. BRENNAN, *supra* note 13, at 105 (quoting original statutory language of § 7(2)).

105. These interests preclude the possibility of owning the land using common law native title.

106. See BRENNAN, *supra* note 13, at 106.

107. See *id.* at 107.

108. See *id.*

109. See *Western Australia v. Commonwealth* (1995) 128 A.L.R 1 (Austl.).

110. See BRENNAN, *supra* note 13, at 108-09.

111. For a pre-*Wik* analysis of the clash between native title and pastoral leases, see Henry Reynolds, *Native Title and Pastoral Leases*, in *MABO: A JUDICIAL REVOLUTION—THE ABORIGINAL LAND RIGHTS DECISION AND ITS IMPACT ON AUSTRALIAN LAW* 119 (M.A. Stephenson & Suri Ratnapala eds., 1993) (hereinafter *MABO: A JUDICIAL REVOLUTION*).

Australian mainland is subject to pastoral leases.¹¹² These are invariably the same lands nomadic Aboriginal bands roamed before European settlement. Conceivably, many of these lands may be subject to native title claims under the *Mabo* standard and the Native Title Act, 1993, especially considering that neither legal enactment specifically dealt with this issue.

The High Court dealt with the issue in *Wik v. Queensland*.¹¹³ The Wik and Thayorre peoples are two Aboriginal tribes who claimed land on Cape York in Queensland under *Mabo*.¹¹⁴ Both areas claimed were subject to long-standing pastoral lease arrangements.¹¹⁵

The major issue the High Court grappled with in *Wik* involved the nature of pastoral lease grants in general. If the leases were common law grants of interests in land, the exclusive nature of such grants precluded any other form of title from coexisting with them, including native title.¹¹⁶ If, on the other hand, pastoral leases were statutorily granted, the statute granting them would determine the exclusivity of possession or lack thereof.¹¹⁷

In a four-to-three decision, the Court held that pastoral leases were statutorily granted and therefore did not automatically extinguish native title on lands subject to the leases.¹¹⁸ Had the Court decided that pastoral leases carried with them the exclusive possession element of common law leases, native title would have been extinguished on all land subject to a pastoral lease. Because of the Court's holding, the question of extinguishment of native title must now be determined on a case-by-case basis by the courts.¹¹⁹

In making its determination, a court must interpret the statute granting the lease and the terms of the lease agreement. The court must also determine the extent of native title rights on the land, if any, and the incidents that accompany such native title. In the event a court holds native title exists on the land in question, the question becomes the extent to which the two interests conflict. When this happens, according to the majority

112. See Peter H. Russell, *High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence*, 61 SASK. L. REV. 247, 267 (1998).

113. *Wik v. Queensland* (1996) 141 A.L.R. 129 (Austl.).

114. See *id.* at 136.

115. See *id.*

116. See *id.* at 226 (judgment of Gummow, J.) ("The extinguishment of existing native title readily is seen as a consequence of a grant in fee simple.").

117. See *id.* at 190 (judgment of Toohey, J.) ("Whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established.").

118. See *id.* at 189-90 (judgment of Toohey, J.).

119. See *id.*

in *Wik*, the native title rights must yield.¹²⁰ However, the implication by the *Wik* Court on this matter is that yielding is not the same thing as extinguishment, and that native title survives the granting of a pastoral lease and reasserts itself upon the conclusion of the lease.¹²¹

Both the Aboriginal and European communities felt the Court's decision in *Wik* was inadequate for resolving the pastoral lease issue. Aborigines wanted the Court to uphold the validity of native title claims on land subject to pastoral leases, while Europeans felt the ad hoc decisionmaking procedure implemented by the Court involved too much uncertainty.

The political fallout from *Wik* threatened to eclipse even the impact of *Mabo*. The Commonwealth Government's response was the submission of a Ten Point Plan to Parliament that essentially extinguished native title on pastoral lease land unless the native population held current physical access to the land.¹²² The Plan also sought to give the States and Territories the ability to diminish native title holders' rights to negotiation as granted by the Native Title Act, 1993.¹²³ The motivations behind the Plan led to the passage of amendments to the Native Title Act, 1993, in 1998.¹²⁴ Provisions in the amendments include: blanket validation of pastoral leases granted between January 1, 1994, and the date of enactment;¹²⁵ removal of the right to negotiate from, among other areas, compulsory acquisition of native title rights in a town or city;¹²⁶ removal of government obligation to negotiate in good faith;¹²⁷ retention of the physical access test articulated in the Ten Point Plan;¹²⁸ and a list of grants extinguishing native title, irrespective of the common law, that includes freehold grants, commercial leases, exclusive

120. See *id.* at 190 (judgment of Toohey, J.).

121. See *id.* at 275 (judgment of Kirby, J.) ("In some cases the grant of such legal rights will have the inevitable consequence of excluding any competing legal rights, such as to native title. But in other cases, although the native title may be impaired, it may not be extinguished.")

122. See Senator Nick Minchin, *Federal Government's Response to the Wik Decision: The Ten Point Plan* (Department of Prime Minister and Cabinet ed., 1997) (visited Feb. 22, 1999) <<http://www.atsic.gov.au/native/10point.htm>> (website no longer available, copy on file with author).

123. See *id.*

124. Native Title Amendment Act, 1998 (Austl.).

125. See *id.* § 21.

126. See *id.* § 26(2)(f).

127. See *Aboriginal and Torres Strait Islander Commission, Proposed Amendments to the Native Title Act 1993: Issues for Indigenous Peoples* (revised Oct. 1998) <<http://www.atsic.gov.au/>> [hereinafter *Aboriginal and Torres Strait Islander Commission*].

128. See Native Title Amendment Act, 1998, § 44 (Austl.).

agricultural/pastoral leases, residential leases, and community purpose leases.¹²⁹

Actual and potential native titleholders received a few concessions in the Act.¹³⁰ One is the lack of a sunset clause for bringing native title claims, despite its inclusion in the Ten Point Plan. This is small consolation, however, because the original Native Title Act, 1993 did not include a sunset clause either. Another amendment specifies the application of the Racial Discrimination Act to the revised Native Title Act and requires any state legislation to operate in a non-discriminatory manner.¹³¹ However, the amendments do not allow native titleholders any room to challenge the Act as inconsistent with the Racial Discrimination Act.¹³²

Fortunately for native titleholders, there may not be any need to challenge the Act as inconsistent with the Racial Discrimination Act. On March 18, 1999, the U.N. Committee on the Elimination of Racial Discrimination (CERD), responding to an inquiry by the Australian government, called on Australia to suspend implementation of the Amendments.¹³³ "CERD expressed concern over the compatibility of the amended Native Title Act 1993 . . . with Australia's international obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (Racial Discrimination Convention)."¹³⁴ The Racial Discrimination Convention was implemented in part through the Racial Discrimination Act 1975 and constitutes directly applicable Australian law.¹³⁵ As such, the concerns of the CERD may ultimately prove fatal to the implementation of the Amendments, which the Australian government will have the opportunity to defend when it appears before the Commission in March 2000.¹³⁶ Should Australia be required or choose to throw out the Amendments and start over, one of the conditions of returning to the drawing board will invariably be the inclusion of

129. See *id.* § 23B.

130. See NATIONAL INDIGENOUS WORKING GROUP ON NATIVE TITLE, *supra* note 12 (articulating Aboriginal response to the 10 Point Plan and proposed Amendments, and suggesting alterations to the Amendments).

131. Native Title Amendment Act, 1998 § 7.

132. See *Aboriginal and Torres Strait Islander Commission*, *supra* note 127.

133. See COMMITTEE ON ELIMINATION OF RACIAL DISCRIMINATION CONCLUDES FIFTY-FOURTH SESSION, U.N. PRESS RELEASE NO. RD/893, Mar. 19, 1999, at 7.

134. Gillian Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)*, 23 MELB. U.L. REV. 372, 373 (1999).

135. See *id.* at 376.

136. See *id.* at 374 & n.10.

aboriginal voices in the drafting of any changes to the Native Title Act, 1993.¹³⁷

The end result of native title jurisprudence and legislation in Australia is the tenuous recognition of native land rights. The debate over native title is likely to intensify in the next few years as Australia looks to their celebration of a century of Federation in 2001 as a reason to rewrite the nation's Constitution. Regardless of the results of that debate, the result will still likely fall short of the approach in Canada, which, as will be seen below, involves constitutional entrenchment of native title rights.¹³⁸

IV. CANADA

The long-standing history of Canadian Aboriginal rights stands in stark contrast to Australia's only recent developments in recognizing and defining Aboriginal rights. While unable to resolve all conflicts, historic use of treaties between European settlers and indigenous populations over much of what is now Canada has proven an effective means of providing some degree of certainty to the area of land titles. The Indian, Inuit, and Metis¹³⁹ populations have been viewed as a part of the Canadian political and geographical landscape from the time of European settlement, primarily because of the treaty process.¹⁴⁰ As a result, issues of self-government, and not exclusively land rights,

137. The lack of aboriginal inclusion in the amendment writing process was one of the main concerns expressed by CERD in its decision. See COMMITTEE ON ELIMINATION OF RACIAL DISCRIMINATION CONCLUDES FIFTY-FOURTH SESSION, *supra* note 133, at 7. See also Cappio, *supra* note 36 (documenting the fundamental changes in negotiation rights articulated in the Amendments, and arguing for joint drafting should the Amendments be struck down or voluntarily discarded).

138. See *infra* notes 154-65 and accompanying text (discussing the Constitution Act, 1982).

139. While the term "First Nations" is usually applied when referring to Canadian Indians, this Note will use the terms "Aboriginal" and "indigenous populations" when referring to Canadian Aboriginal peoples for two reasons. First, the terminology is accepted in academic circles and consistent with its usage in relation to Australian Aborigines throughout this Note. Second, the Inuit (known in America as Eskimos) and Metis are not usually included under the "First Nations" heading, even though their Aboriginal rights are constitutionally guaranteed to the same extent as Canadian Indians. See *infra* notes 154-65 and the accompanying text for a discussion of the constitutional entrenchment of Aboriginal rights. Any reference to First Nations in this Note is intended to apply solely to that group of Canadian Indians who are so classified.

140. Since the Metis are distinctly separate descendants of the original inhabitants of Canada, this statement is not entirely true as to them. However, their inclusion in § 35(1) of the Constitution Act, 1982 indicates a political importance at least equal to that of the Indian and Inuit populations.

tend to be at the forefront of Canadian native rights debates. However, Aboriginal land rights in Canada have returned to both the forum of public debate and the court room for two reasons. First, treaties, primarily those of a historical¹⁴¹ nature, have shown interpretational problems for the courts to resolve. Second, in the areas not covered by treaty—namely most of British Columbia—indigenous populations are beginning to press for both land rights and self-government. As the landmark case *Delgamuukw v. British Columbia*¹⁴² indicates, these populations are very willing to go to court to determine their Aboriginal rights.

A. *From Sui Generis to the Constitution Act, 1982*

Aboriginal rights in Canada have developed both through the use of negotiated treaties and through judicial recognition of Aboriginal rights in the common law. Regardless of the source of the rights, however, the interpretation of these rights has been guided by the understanding that all Aboriginal rights are *sui generis*.¹⁴³ Academicians and courts alike emphasize the uniqueness of Aboriginal rights.¹⁴⁴ The logical, and sometimes unfortunate, results of labeling Aboriginal rights as *sui generis* are the interpretive difficulties inherent in applying a body of law that stands somewhat outside historical precedent. This application ultimately leads to difficulties in articulating and applying comprehensive and consistent tests, as Canadian case law readily indicates.

141. The term "historical" is derived from the fact that the reinstatement of a policy of treaty-making in 1973 occurred more than fifty years after the cessation of such a practice. See Brad W. Morse, *A View From the North: Aboriginal and Treaty Issues in Canada*, 7 ST. THOMAS L. REV. 671, 673-75 (1995). The treaties signed since 1973 tend not to contain the same degree of ambiguity resulting from differences in understanding of language. As a result, only those treaties that are properly viewed as "historical" are being subjected to judicial interpretation. See generally James [sákéj] Youngblood Henderson, *Interpreting Sui Generis Treaties*, 36 ALTA. L. REV. 46 (1997) (discussing differences in language in Aboriginal and European cultures that lead to interpretive difficulties, as well as suggestions for proper interpretive devices courts should use in resolving these disputes). See also Bradford W. Morse, *Common Roots But Modern Divergences: Aboriginal Policies in Canada and the United States*, 10 ST. THOMAS L. REV. 115, 128 (1997) (using the term "historical" to refer to treaties signed before World War II).

142. *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (Can.).

143. *Sui generis* is defined as "of its own kind or class." BLACK'S LAW DICTIONARY 1434 (7th ed. 1999).

144. See, e.g., John Borrows & Leonard I. Rotman, *The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?*, 36 ALTA. L. REV. 9 (1997) (tracing the history of Aboriginal rights as *sui generis* and the application of the *sui generis* concept in Canadian courts).

The seminal modern Aboriginal rights case in Canada is *Calder v. Attorney-General of British Columbia*.¹⁴⁵ In *Calder*, the Nisga'a people (spelled Nishga in the opinion) sought a declaration of Aboriginal title over their native lands in northwest British Columbia.¹⁴⁶ While the Nisga'a lost the case in a four-to-three decision, all six justices who reached the question of Aboriginal title¹⁴⁷ recognized its existence in Canadian common law.¹⁴⁸ The decision turned on whether the Nisga'a claim of Aboriginal title had been extinguished. Justice Hall, writing for the dissent, first articulated the "clear and plain intention" test¹⁴⁹ that a majority of the Court eventually adopted.¹⁵⁰ The Court had no doubt that the Crown could extinguish native title, but Justice Hall's test required any act or document purporting to do so evidence a clear and plain intention that extinguishment was intended.

Calder created a near about-face in political acceptance of Aboriginal native title. Just four years earlier, the Canadian Department of Indian Affairs and Northern Development issued its *Statement of the Government of Canada on Indian Policy*, which came to be known as "The White Paper."¹⁵¹ In this paper, the Trudeau Government expressed its willingness to accept "native people as individuals to enjoy all the rights and opportunities of Canadian citizens but repudiated their rights as Aboriginal peoples."¹⁵² Following *Calder*, the Government adopted a policy of negotiation with Aboriginal people where their rights had been neither superseded by law nor extinguished by treaty.¹⁵³

The culmination of this political turnaround is found in the constitutional entrenchment of Aboriginal rights in the Canada Act 1982,¹⁵⁴ essentially a redrafting of the Canadian Constitution. While the Canada Act 1982 consisted of only four sections, its ambitious purpose was to terminate the power of the

145. *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313 (Can.).

146. *See id.* at 317.

147. Justice Pigeon dismissed the appeal on procedural grounds. *See id.* at 426-27.

148. Because of Justice Pigeon's dismissal on procedural grounds, the determination of extinguishment resulted in a three-to-three tie.

149. *Calder* [1973] S.C.R. at 404.

150. *See infra* notes 168-71 and accompanying text (discussing *Guerin v. The Queen*).

151. The White Paper proposed a number of drastic measures in relation to indigenous populations, including the termination of treaties, the abolishment of Indian status, the granting of reserve lands to individual members in fee simple, and the abolishment of the Indian Department.

152. Russell, *supra* note 112, at 260.

153. *See id.* at 259.

154. Canada Act, 1982 (U.K.).

British Parliament to legislate for Canada.¹⁵⁵ Section 1 of the Canada Act 1982 also enacted the Constitution Act, 1982,¹⁵⁶ which contains the bulk of the constitutional changes. Section 35(1) of the Constitution Act, 1982 states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."¹⁵⁷ Section 35(2) defines "aboriginal peoples of Canada" as including the Indian, Inuit, and Metis peoples.¹⁵⁸

While the Act left the interpretation of terms such as "existing," "recognized," and "affirmed" to future court decisions, a number of striking elements pertaining to native rights were noticeable from the time of enactment. Sections 1 through 34 of the Act comprise the *Canadian Charter of Rights and Freedoms*,¹⁵⁹ a collection of rights somewhat analogous to the Bill of Rights in the U.S. Constitution. Because § 35 falls outside the Charter, it is not subject to the limitation of § 1, which states, "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."¹⁶⁰ However, the placement of native rights in the Act also removes them from the jurisdiction of § 24.¹⁶¹ This section provides standing for anyone whose Charter rights or freedoms have been infringed to seek a remedy in the court system.¹⁶² Finally, § 25 of the Act protects those Aboriginal rights recognized by the Royal Proclamation of October 7, 1763,¹⁶³ or those acquired through a process of land claims settlement from abrogation or derogation.¹⁶⁴ The end result of these sections is the first constitutional entrenchment of native rights in a former English colony.¹⁶⁵

155. *See id.* § 2.

156. *See id.* § 1.

157. CAN. CONST. (Constitution Act, 1982), § 35(1).

158. *Id.* § 35(2).

159. *Id.* pt. I (Canadian Charter of Rights and Freedoms) §§ 1-34.

160. *Id.* § 1.

161. *See* PETER W. HOGG, CANADA ACT 1982 ANNOTATED 82-83 (1982) (discussing the rights conferred by § 35 and possible interpretations of the vague language contained therein).

162. CAN. CONST. (Constitution Act, 1982), § 24(1).

163. *See id.* § 25(a). The Royal Proclamation of October 7, 1763 divided up British land in Canada and made express grants of land to the various Indian nations. The Proclamation also provided other protections for indigenous populations, including forbidding the taking or purchase of any Indian land.

164. CAN. CONST. (Constitution Act, 1982), § 25(b).

165. *See* Russell, *supra* note 112, at 260.

B. *The Post-Constitution Act, 1982 "Roller Coaster Ride"*

Following the passage of the Constitution Act, 1982, both the political and judicial processes have played integral roles in defining the scope of Aboriginal rights. While the Supreme Court has issued a series of cases that one commentator describes as "a roller coaster ride in its treatment of Aboriginal rights,"¹⁶⁶ the Canadian political machinery has been actively involved in treaty-making and land claims settlements. Through the political process, the Canadian Government and the Inuit peoples have agreed to the creation of Nunavut, a new Territory in Northern Canada and the largest indigenous land claim settlement in history.¹⁶⁷

The first major post-Constitution Act, 1982 case dealing with Aboriginal rights came in 1984 with *Guerin v. The Queen*.¹⁶⁸ *Guerin* established two broad principles in dealing with Aboriginal title. First, the *Guerin* court described Aboriginal title as "a legal right derived from the Indians' historic occupation and possession of their tribal lands."¹⁶⁹ Second, the Court articulated a fiduciary duty owed by the Crown to indigenous populations to protect their Aboriginal rights.¹⁷⁰ The Court also adopted the term *sui generis* in relation to Aboriginal rights for the first time.¹⁷¹

In 1990, the Supreme Court issued its decision in *R. v. Sparrow*.¹⁷² This case involved a direct conflict between an asserted Aboriginal right to fish and federal regulatory fishing legislation.¹⁷³ The Court unanimously held that legislation could limit Aboriginal rights, but only in certain circumstances. In making its determination, the Court articulated a justificatory test for abridging or destroying Aboriginal rights similar to the American constitutional law "compelling interest" test.

The *Sparrow* justificatory test allows limitation of Aboriginal rights only when the government has a valid legislative objective.¹⁷⁴ The objective must be "compelling and substantial,"¹⁷⁵ and the legislation must be "required to

166. *Id.* at 270.

167. *See infra* notes 205-12 and accompanying text.

168. *Guerin v. The Queen* [1984] 2 S.C.R. 335 (Can.).

169. *Id.* at 376 (citing *Calder v. Attorney General of British Columbia* [1973] S.C.R. 313).

170. *See id.* at 383-88.

171. *See id.* at 382.

172. *R. v. Sparrow* [1990] 1 S.C.R. 1075 (Can.).

173. *See id.* at 1083.

174. *See id.* at 1113.

175. *Id.*

accomplish the needed limitation.”¹⁷⁶ The Court held that the objective of “public interest” is overly broad and impermissibly vague to meet this test,¹⁷⁷ although the Court has since seemed to undercut this restriction.¹⁷⁸ Additionally, the legislation must be consistent with the fiduciary relationship between the Crown and the Aboriginal peoples.¹⁷⁹ This means that Aboriginal peoples are entitled to consultation, minimal infringement with Aboriginal rights in effecting the legislative objective, and, where appropriate, compensation.¹⁸⁰ While *Sparrow* involved Aboriginal rights conferred by the common law, the *Sparrow* justificatory test has since been applied equally to Aboriginal rights created or affirmed by treaty.¹⁸¹

In 1996, the Supreme Court’s “roller coaster ride” took a downward turn, from the Aboriginal perspective, in the *Van der Peet* trilogy.¹⁸² In *R. v. Van der Peet*, a member of the Sto:lo tribe was arrested for selling fish caught under a native food fish license.¹⁸³ The Supreme Court dismissed the defendant’s appeal in a seven-to-two decision.¹⁸⁴ The majority recognized that any ambiguities in § 35(1) of the Constitution Act, 1982 must be resolved in favor of Aboriginal peoples.¹⁸⁵ However, to decide whether an asserted right is protected by § 35(1), the Court established the “integral to a distinctive culture” test.¹⁸⁶ To meet the standards of the test, Aboriginal claimants must show that the practice, custom, or tradition is of “central significance” to the particular Aboriginal society involved.¹⁸⁷ This includes a showing that the practice, custom, or tradition existed prior to European

176. *Id.* at 1121.

177. *Id.* at 1113.

178. See *R. v. Gladstone* [1996] 2 S.C.R. 723, 775 (Can.) (applying the *Sparrow* test to apparently sanction “public interest” as a valid legislative objective).

179. *Sparrow* [1990] 1 S.C.R. at 1114.

180. *Id.* at 1119.

181. See *R. v. Badger* [1996] 1 S.C.R. 771, 812-14 (Can.) (applying the *Sparrow* justificatory test to treaties for the first time). For an argument that the distinction between Aboriginal rights and treaty rights should preclude application of the *Sparrow* justificatory test to treaties, see Leonard I. Rotman, *Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test*, 36 ALTA. L. REV. 149 (1997).

182. *R. v. Van der Peet* [1996] 2 S.C.R. 507 (Can.); *R. v. N.T.C. Smokehouse Ltd.* [1996] 2 S.C.R. 672 (Can.); *Gladstone* [1996] 2 S.C.R. 723. Due to the similar issues involved in the three cases, this Note discusses the reasoning in *Van der Peet* as representative of the reasoning in *N.T.C. Smokehouse* and *Gladstone*.

183. *Van der Peet* [1996] 2 S.C.R. at 527.

184. See *id.* at 525.

185. See *id.* at 537.

186. *Id.* at 549.

187. *Id.* at 553.

contact.¹⁸⁸ In *Van der Peet*, the Court held that the sale of fish was not an integral part of the distinctive Sto:lo culture prior to contact and was therefore not protected by § 35(1).¹⁸⁹

The most recent major Aboriginal rights case to be decided by the Supreme Court is *Delgamuukw v. British Columbia*.¹⁹⁰ In *Delgamuukw*, two separate Aboriginal peoples, the Gitksan (spelled Gitksan in the opinion) and the Wet'suwet'en, claimed Aboriginal title to approximately 58,000 square kilometers (22,000 square miles) in northwest British Columbia.¹⁹¹ While the Court did not definitively decide the merits of the claims, it reinforced the validity of Aboriginal title.¹⁹² Unlike in Australian jurisprudence, it articulated the restriction that such rights can only be held communally.¹⁹³

The trial court in *Delgamuukw* rejected the tribes' oral evidence of attachment to the land¹⁹⁴ that constituted one of the primary reasons the Supreme Court remanded for a new trial.¹⁹⁵

In making its determination, the Court articulated the test for proving Aboriginal title. First, the Aboriginal population making the claim must have occupied the land in question at the time of the Crown's assertion of sovereignty over the territory.¹⁹⁶ Second, if present occupation of the land is provided as evidence of occupation at the time of the Crown's assertion of sovereignty, the Aboriginal population must also show a continuity between the two times of occupation.¹⁹⁷ Third, the occupation at the time the Crown asserted sovereignty must have been exclusive.¹⁹⁸

188. See *id.* at 555.

189. See *id.* at 571.

190. *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (Can.).

191. See *id.* at 1028-29.

192. See *id.* at 1080-81.

193. See *id.* at 1082. As indicated earlier, Justice Blackburn held in the *Gove* case that the common law precluded the possibility of a community collectively owning land. See *supra* note 36 and accompanying text. While the High Court in *Mabo* overturned this ruling, it retained the possibility of individual native title to land. See *supra* note 73 and accompanying text. It is this possibility of individual native title rights that the Supreme Court of Canada rejected in *Delgamuukw*.

194. See *Delgamuukw* [1997] 3 S.C.R. at 1034. Evidence of attachment can include evidence of use for living or sustenance, spiritual significance, or any other historical connection to the land in question.

195. See *id.* at 1074-76. According to one commentator, the fact that the case was remanded means "all the Court's reasons on substantive issues, from aboriginal title to § 35(1) of the Constitution Act, 1982 were technically *obiter dicta*." David W. Elliott, *Delgamuukw: Back to Court?*, 26 MANITOBA L.J. 97, 101 (1998).

196. See *Delgamuukw* [1997] 3 S.C.R. at 1097.

197. See *id.* at 1102.

198. See *id.* at 1104.

The political response to *Delgamuukw* was one of apprehension.¹⁹⁹ Despite the fact that new treaties were and are being negotiated in British Columbia,²⁰⁰ much of the province remains uncovered by treaty agreements.²⁰¹ The First Nations Summit, as representative for approximately seventy percent of British Columbia's Indians, sent a letter to federal and provincial governments asserting "our aboriginal title to all of B. C."²⁰² One article compared the effect of *Delgamuukw* in British Columbia to the effect of *Brown v. Board of Education*²⁰³ in the American South.²⁰⁴

Underlying the political apprehension surrounding *Delgamuukw* is the potential stabilizing effect of negotiation, treaty-making, and the political process in general. While the ongoing treaty process in British Columbia was insufficient to keep the *Delgamuukw* claims out of court, other negotiation attempts have been more successful.

The prime example is the creation of a new, Aboriginal-governed Territory called Nunavut²⁰⁵ over the eastern half of the current Northwest Territories.²⁰⁶ The Territory was created following fifteen years of occasionally difficult negotiations between the government and the Inuit of the Northwest Territories.²⁰⁷ In exchange for surrendering their land claim, the Inuit will receive over one billion dollars²⁰⁸ and control of nearly

199. See Jeffrey Simpson, Editorial, *Native-Lands Ruling Has B.C. Nervous*, SEATTLE TIMES, Mar. 26, 1998, at B5 ("At best, the judgment will force negotiations leading to new relationships between aborigines and non-aborigines. At worst, *Delgamuukw* will unleash fierce political passions, frustrate negotiations, induce more litigation and tie British Columbia in knots for many years.").

200. See Morse, *A View From the North*, *supra* note 141, at 682 ("New treaties are being negotiated in British Columbia involving 47 separate negotiating tables representing over 120 First Nations."); see also BC TREATY COMMISSION: ANNUAL REPORT 1998, at 12 (indicating that, as of May 31, 1998, 51 separate negotiating tables were in various stages of progress); Douglas Sanders, "We Intend to Live Here Forever": A Primer on the Nisga'a Treaty, 33 U.B.C.L. REV. 103 (1998) (providing a detailed analysis of the Nisga'a treaty, which conveyed both aboriginal title and aboriginal self-government rights to an indigenous group in August, 1998).

201. See Randall Palmer, *Canadian Indians Win Historic Decision*, SUN-SENTINEL (Ft. Lauderdale), Dec. 12, 1997, at 20A.

202. Simpson, *supra* note 199, at B5.

203. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

204. See Simpson, *supra* note 199, at B5.

205. Nunavut means "Our Land" in the Inuit language. See Darcy Henton, *A Land the Inuit Can Call Their Own*, TORONTO STAR, May 2, 1992, at D1.

206. See Darcy Henton, *Cliffhanger Vote Okays Boundary for New Territory*, TORONTO STAR, May 6, 1992, at A5.

207. See William Walker, *One-Fifth of Canada to Be New Inuit Zone*, TORONTO STAR, Dec. 16, 1991, at A1.

208. See *id.*

two million square kilometers (772,260 square miles) from the treeline to the North Pole.²⁰⁹ The agreement, which was ratified by Northwest Territories residents in May 1992, includes exclusive title to approximately 135,145 square miles and mineral rights to approximately sixteen percent (21,748 square miles) of that area.²¹⁰ It is easily the largest land claims settlement in the world.²¹¹ While initial administrative difficulties threatened to delay the official separation date of April 1, 1999,²¹² the successful negotiation process should provide incentive for negotiations to take place in other areas of Canada.

Nunavut's success is complemented by the Canadian government's express willingness to negotiate not just aboriginal title claims but the more important claims involving aboriginal self-government. In its official policy guide on the matter of aboriginal self-government,²¹³ the Canadian government has stated:

The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982. . . .

The Government acknowledges that the inherent right of self-government may be enforceable through the courts and that there are different views about the nature, scope and content of the inherent right. However, litigation over the inherent right would be lengthy, costly and would tend to foster conflict. In any case, the courts are likely to provide general guidance to the parties involved, leaving it to them to work out detailed arrangements.²¹⁴

For these reasons, the Government is convinced that litigation should be a last resort. Negotiations among governments and Aboriginal peoples are clearly preferable as the most practical and effective way to implement the inherent right of self-government.²¹⁵

209. See Henton, *Cliffhanger Votes Okays Boundary*, *supra* note 205, at A5.

210. See *id.* at A5.

211. See Galen Rowell, *The Last Frontier*, HOUSTON CHRON., Mar. 22, 1998, at Travel 1.

212. See Darcy Henton, *Inuit's Dream of Home Rule Coming True . . . But Slowly*, TORONTO STAR, Mar. 5, 1998, at A7.

213. FEDERAL POLICY GUIDE, ABORIGINAL SELF-GOVERNMENT: THE GOVERNMENT OF CANADA'S APPROACH TO IMPLEMENTATION OF THE INHERENT RIGHT AND THE NEGOTIATION OF ABORIGINAL SELF-GOVERNMENT (published under the authority of the Honorable Ronald A. Irwin, Minister of Indian Affairs and Northern Development, 1995) [hereinafter FEDERAL POLICY GUIDE].

214. *Id.* at 3.

215. See *id.* The FEDERAL POLICY GUIDE also indicates the Canadian Government's willingness to constitutionally protect any land settlements reached through the treaty-making process. See *id.* at 8.

This express willingness to engage in meaningful negotiations will almost certainly provide incentive for Aboriginal populations to resolve their disputes over the bargaining table.

V. LEGAL AND EXTRALEGAL JUSTIFICATIONS FOR NEGOTIATION INSTEAD OF LITIGATION

The advantages of negotiation over litigation are numerous. While many of these advantages may be viewed as arguments advocating negotiation in any situation, they are of particular importance in the area of native rights. This section will utilize specific examples from the political and legal processes involved in native rights in Australia and Canada to emphasize this importance.

Two classifications are necessary to determine the potential impact of a negotiation process on indigenous populations' land rights. First, the legal reasons involve inherent functions and restrictions of the common law court system that make it ill-equipped to deal with this particular issue. This Note stresses the common law court system for three reasons: (1) the most visible native rights movements are currently found in Canada and Australia, both common law countries, (2) the common law's reliance on precedent combined with the recent court victories for native rights make these jurisdictions particularly ripe for extended litigation in this area, and (3) the practical necessity of focusing on a small number of jurisdictions as representative of the problem as a whole.

Second, while the legal impact of negotiation is the primary focus of this Note, the extralegal justifications for employing negotiation are of profound importance for those parties who will be involved in the process. These reasons emphasize the incompatibility of native and European-based legal structures, the restrictions on indigenous populations that could keep them from adequately presenting their case to the courts, and, once again, the inherent restrictions of the common law court system that make it ill-equipped to deal with native rights.

A. *Legal Justifications*

1. Structure and Nature of the Common Law Court System

Common law courts, by their nature, have fundamental structural characteristics that are inadequate for meeting the challenges of native land rights issues. Common law courts can

only decide those disputes and issues brought before them. As a result, there will always be necessary ancillary issues that the courts will need to discuss in order to decide specific questions such as who owns what land. However, the courts are forbidden to actually render judgment on these points, unless they were redressable issues put forward by the parties involved. Asking a court to essentially determine the structure of all future relationships between Aboriginal and European descendants, which is ultimately what is required to resolve these issues, is neither an appropriate use of the court system's time nor a practical possibility from the view of the parties involved. This is a practical impossibility because of the requirement on common law courts to only address those issues that are properly brought before them. The procedural and pleading requirements inherent in the common law are designed to promote certainty, not flexibility. Given the length of most native title negotiations and the amount of compromise that is inevitably required, flexibility in the process appears to be a necessity for resolving any issues that go beyond the granting of land rights to one party versus another. The inflexibility of the common law court system is therefore the exact opposite to what is required to achieve an appropriate solution.²¹⁶ Common law courts are not a part of the political process for good reasons, yet they must always be aware of the potential political impact of their decisions and be prepared to deal in dicta with possible solutions to these ancillary issues.²¹⁷

While the common law court system tends to regard itself as capable of handling any issue, no matter how complex, determining the entire scope of the rights and responsibilities of two separate cultures may be beyond its capacity. Professor Elliott has stated:

In some areas addressed in *Delgamuuku*, such as aboriginal self-government, we may be reaching the limits of judicial effectiveness. Ultimately, the law of aboriginal rights and title is a highly discretionary balancing act between aboriginal and non-aboriginal interests. Beyond a point, greater judicial involvement produces not less but greater uncertainty, and greater uncertainty leads to more litigation.²¹⁸

216. "[T]here are limits to what courts can do with aboriginal rights. Claims derived from life hundreds of years ago, in very different societies, are not good material for the adversarial trial process." Elliott, *supra* note 195, at 131.

217. For an argument that the Australian High Court stepped outside its constitutional role into the political arena in deciding *Mabo*, see Gabriél A. Moens, *Mabo and Political Policy-Making by the High Court, in MABO: A JUDICIAL REVOLUTION*, *supra* note 111, at 48.

218. Elliott, *supra* note 195, at 131. Implicit in Professor Elliott's statement is the idea that "discretionary balancing" is a political activity, not a judicial one.

For this reason, tribunals and a series of negotiations may be the only logical way to proceed in deciding these issues. If, through the course of negotiation, the parties are still unable to agree, the judicial process remains a viable alternative. However, the courts should always be a last resort when such multifaceted issues involving broad public policy implications are in dispute.

As a structural and practical matter, once the court decides an issue, it is unlikely that the parties would go back and start the process over. Due to the adversarial nature of common law court proceedings, the winning side is usually satisfied with the decision and has no incentive to then return to the bargaining table to determine an outcome that is more equitable to both sides. As stated by Professor Kent McNeil:

[W]hat incentive is there for governments to reach agreements which give effect to "the aspirations of the aboriginal peoples" after the courts have reduced the already limited bargaining power of those peoples by embracing a narrow definition of their Aboriginal rights? Court decisions can have a powerful influence on the positions governments adopt at the bargaining table. Moreover, public support for negotiated agreements can also be influenced by judicial pronouncements on the nature of Aboriginal rights.²¹⁹

On the other hand, if the negotiation process fails, the courts are always available as a last resort.

Additionally, because negotiations of this magnitude inevitably require involvement by the state or federal government, going to court first will almost certainly preclude this necessary inclusion. Again, the party who "won" in court will have no reason to then negotiate, and the Government is justifiably hesitant to interfere in the matter once the courts have made their decision.

Due to the ongoing nature of this problem, the more that can be resolved outside the courtroom, the greater the possibility that all issues will eventually be addressed and resolved. Court involvement may be beneficial and even inevitable at certain stages of the process. However, the odds of arriving at a swift and equitable resolution are better if such involvement is limited to those issues that absolutely require it.

Finally, the cost and time involved in bringing claims such as these to court are generally more than either party can bear. "It has been estimated that the Government has spent millions and millions of dollars in unsuccessful legal challenges. . . . This has

219. Kent McNeil, *The Meaning of Aboriginal Title*, in *ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUITY, AND RESPECT FOR DIFFERENCE* 135, 152 (Michael Asch ed., 1997) (quoting Judge Macfarlane from the British Columbia Court of Appeals opinion in *Delgamuukw*) (footnotes omitted).

contributed to what has been a painfully slow process.”²²⁰ In particular, indigenous populations are generally hampered by a lack of financial resources to conduct extended litigation proceedings. However, they may collectively be willing to wait to acquire rights to land when those rights have been denied them for over two hundred years.²²¹ Current landowners, on the other hand, may very well have the financial resources necessary to bring the suit to court, but the uncertainty of the outcome may restrict them from utilizing the land to its full potential during the course of the proceedings.²²² For example, the filing of the *Wik* claim to land, “even if it did not succeed . . . caus[ed] such uncertainty in the market as to place at risk a planned \$1.75 billion expansion of the mining and smelting operation [of Comalco] in Queensland.”²²³ Based on the extended nature of both *Mabo* and *Delgamuukw*,²²⁴ these periods of economic stagnation could have a potentially devastating effect on the landowners.

Negotiation has the potential to utilize the parties’ time more effectively. One long negotiation session can resolve a great deal of all potential conflicts, whereas all one case can do is help to eliminate a small amount of adverse legal precedent.²²⁵ Courts may be the final arbiters of the law, but individuals in cooperation can still provide the structure of societies. Based on these arguments, in terms of time and money, both sides would be better off to negotiate.

220. Yunupingu, *supra* note 7, at 10.

221. See BRENNAN, *supra* note 13, at 65 (“[Aborigines] would be far more patient enduring the uncertainty of unregistered titles than would big business, foreign investors or the State governments wanting access to their lands.”) Despite this collective patience, individual claimants will inevitably find such a process unduly frustrating. As Galarwuy Yunupingu stated, “[m]any claimants have died, heartbroken, after waiting more than a decade for the outcome of their land claim.” Yunupingu, *supra* note 7, at 10.

222. Usually, private individuals’ funds were not on the line at all. “Hundreds of thousands, almost undoubtedly, millions of dollars of public funds, taxpayers’ money, was used to try to stop peoples’ legitimate claims to their land.” David Ross, *Future Directions—It’s About Rights!*, in *OUR LAND IS OUR LIFE*, *supra* note 1, at 125, 127.

223. BRENNAN, *supra* note 13, at 26.

224. For example, both *Mabo* and *Delgamuukw* involved ten years of litigation, and *Delgamuukw* still has the possibility of returning to court.

225. See Ross, *supra* note 222, at 133 (“[W]e will not agree to relinquish our rights. . . . If forced to, we will fight for them. That presents the prospect of arguing it out in the courts for the next 20 or 30 years, cobbling together a picture of indigenous rights through a series of disjointed legal decisions.” (emphasis in original)).

2. Devastating Potential Impact

It should be obvious that the amount of land now up for grabs because of recent court decisions could have a potentially devastating impact on the geography and economies of both Canada and Australia. Shortly after the *Mabo* decision, one commentator estimated that as much as ten percent of Australian land, most of it in Western Australia, was open to native land rights claims.²²⁶ While a land rights case makes its way through the court system, title to the land is in doubt, and only one party can "win" the rights to the land when the case is decided.

Part of the proper role of the courts is to decide issues brought before it in favor of one of the parties. On the other hand, the express purpose of negotiation is to arrive at an amicable solution agreeable, or at least tolerable, to all parties involved. During the course of a negotiation process, current landholders can rest assured that the intent of the process is not to completely divest them of their land but rather to come to a compromise that factors in their input. The participants of a negotiation process can also be assured that the decision arrived at is binding on both parties. As stated by a leading Aboriginal activist:

As everyone knows, mining is a risky business. A lot of holes are dug, and they don't always find something. We can't help them with that. Where we can help, however, is that through the land rights process if we reach an agreement, then the company knows that the terms of the agreement are certain and binding.²²⁷

Losing some land through a bargaining process is better than the possibility of losing all of it through judicial decree.

Additionally, now that aboriginal or native title rights have been recognized in the court systems of both Canada and Australia, the more difficult questions of the nature and extent of aboriginal self-government await resolution. Taking these issues to the courts will result in the same uncertainty over the same lands for perhaps even longer than the initial round of cases that established aboriginal or native title rights in the first place. According to one commentator, should courts continue to tackle the increasingly complex aboriginal self-government issue, the result "could well be economic paralysis, judicial backlogs,

226. Meyers & Mugambwa, *supra* note 57, at 1205-06 (citing Deanie Carbon & Peter Wilson, *10pc of Land Up for Mabo Claims*, WEEKEND AUSTRALIAN, Dec. 5-6, 1992, at 1).

227. Yunupingu, *supra* note 7, at 11.

deterioration in aboriginal and non-aboriginal community relations, and yet more legal uncertainty."²²⁸

B. *Extralegal Justifications*

1. Negotiation as an Equal Forum in Practice and Perception

While the common law court system is the primary adjudicator of rights in those jurisdictions that utilize it, it is certainly not the sole means of achieving just ends. Negotiation is an equally viable alternative to the litigation process.²²⁹ In some ways, and particularly for some issues, it is even fairer than litigation because it provides the contesting parties with potentially neutral ground on which to bargain.

A number of reasons emphasize at least the potential for a negotiation process that is more fair than trial by a court. First, there are no preexisting guidelines in a negotiation process. The participants are free to agree on an objective and employ whatever means they see fit to meet it. In the indigenous land rights area, this is important because the process will then match the current state of the issue. Because the theory of native title has only recently gained recognition in the common law legal tradition, a large amount of creative problem-solving will be necessary to both understand and integrate solutions to native title problems into the common law. The participants in a case such as this will be better served to employ a process that is conducive to a free exchange of ideas, rather than one that involves hundreds of years of restrictive procedural requirements. These requirements are necessary and effective in cases involving fine-tuning of existing law. However, they are decidedly ineffective when it comes to creating completely new areas of law.

Along with the hundreds of years of restrictive procedural requirements come an equal number of precedent rulings.²³⁰ In general, these rulings favor the European view of native rights to

228. Elliott, *supra* note 195, at 129. In the same article, Professor Elliott stated, "In light of [the] potential consequences . . . courts may find it necessary to defer final rulings on injunctions or compensation until governments and claimants have had an opportunity to settle matters through negotiation." *Id.*

229. For a description of one negotiation session involving native title that appears to have been a success, see John Ah Kit, *Land Rights at Work—Aboriginal People and Regional Economies*, in *OUR LAND IS OUR LIFE*, *supra* note 1, at 52, 56-57.

230. The effect of precedent, particularly in emerging legal fields, may not be that strong in Australia because of its decision to remove itself completely from the English legal tradition. See Australia Act, 1986, ch. 2 (Eng.).

land. As discussed in prior sections, it is only in the last few decades that the momentum has begun to swing the other way. It is this shift in the balance that should tell both sides of the conflict that now is the time to negotiate. European descendants should have incentive to negotiate because they can no longer comfortably rely on favorable precedents. On the other hand, indigenous populations have the law somewhat on their side for the first time, but the inherent volatility of the native title issue indicates that they too would be best served by stable, comprehensive, and legally enforceable negotiated settlements. Inevitably, no matter how favorable native positions are viewed by the courts, some indigenous claim to land will be rejected, and the momentum will almost certainly swing the other way. The optimal time for resolution is when both sides are equally unsure of their stability.²³¹ Given the current legal and political climate, that time is now.

Finally, negotiation may be fairer in practice than litigation because it has the potential to remove the issues from an adversarial process. The parties involved are free to choose any method they see fit to meet the problem at hand. While this choice could be for an adversarial negotiation process, many parties agree to negotiation for the purpose of avoiding the adversarial nature of the court system. In an issue such as native land rights, lawyers will almost certainly be a necessary component of the negotiation process. However, just because lawyers are involved does not lead to the conclusion that their role must be an adversarial one. Their role should more appropriately be that of reference, to provide insight into possible legal ramifications of proposed courses of action. Other than providing a sounding board for feasibility, the involvement of lawyers should be kept to a minimum to allow the parties to arrive at solutions and suppress opportunities for lawyer advocacy.

231. The role that international law is playing in this area, while almost entirely outside the scope of this Note, cannot be overstated. The growing importance of racial and social justice generally, and aboriginal rights specifically, is reflected in, for example, the expanding body of U.N. documents devoted to preserving racial and social equality. See, e.g., International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3; International Convention on the Elimination of All Forms of Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195; Universal Declaration of Human Rights, G.A. Res. 217(III).A, U.N. GAOR, 3d Sess., Resol. Pt. 1, 183 mtg., at 135, U.N. Doc. A/810 (1948). Agreements such as these indicate a general trend toward protection of aboriginal interests that stands in opposition to common law precedent. The opposing poles of international public policy and *stare decisis* strengthen the possibility of instability in judicial decisions.

In the area of native land rights, the perception that the negotiation process is fair may be even more important than the fact that it truly is fair, particularly to the indigenous populations who will participate. In their view, the parties will meet on equal footing, perhaps for the first time in history.²³² For a population that has been viewed from both sides of the equation as standing somewhere outside the political and legal process, the very fact of inclusion may be seen as a step in the right direction. Indigenous populations seem to be striving not only for their land, but also for recognition of their way of life. They are searching for an identity that fits within the system, as opposed to one that constantly occupies the fringe.

What this issue deals with is not just opposing viewpoints but potentially irreconcilable cultural worldviews. In *Mabo*, the High Court rejected the previously upheld assertion that native title rights were "limited to interests which were analogous to common law concepts of estates in land or proprietary rights, [or were] . . . determined by reference to European legal usages alien to native societies."²³³ Native cultures have abided by European legal standards because they had no other choice.²³⁴ Indigenous populations may understandably view the court system as a forum to which they have repeatedly been invited and in which they have almost consistently suffered losses. While cases like *Mabo* and *Delgamuukw* may indicate a reversal of this trend, it may take many more favorable decisions before indigenous people feel truly comfortable taking their cases to court.²³⁵

232. "[T]he recognition of native title has allowed Aboriginal and Torres Strait Islander peoples to come to the negotiating table with legally recognised traditional rights to land and resources for the first time in the recent 200-year history of this country." Ridgeway, *supra* note 51, at 65.

233. Meyers & Mugambwa, *supra* note 57, at 1217-18. As Justice Toohey stated in the *Mabo* decision, "it would defeat the purpose of recognition and protection if only those existing rights and duties which were the same as, or which approximated to, those under English law could comprise traditional title." *Mabo v. Queensland* (1992) 107 A.L.R. 1, 146 (Austl.) (opinion of Toohey, J.). This statement stands in direct contrast to Justice Blackburn's application of European common law notions of property in the *Gove* case. See *Milirrpum v. Nabalco Pty. Ltd.* (1971) 1972-1973 A.L.R. 65 (Austl.).

234. "We have suffered the consistent invalidation and devaluation of our world view and experience. The arrogance of presuming that one world view is more valid than another can only be maintained by the force of the law of the state. The force of one legal system denying another." Dodson, *supra* note 1, at 42.

235. Justice Brennan succinctly summarized 200 years of common law treatment of indigenous populations in *Mabo*:

[T]he common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the

2. Courts Are Not the Proper Forum for Moral Issues

The entire issue of native rights to land involves not only a shift in the legal structure but also an implicit reparation for hundreds of years of moral wrongs. Australia's Native Title Act, 1993 acknowledges this when it states that one of the purposes of the Act should be to "rectify the consequences of past injustices."²³⁶ Common law courts are not designed to deal with moral or political problems. They are structured in such a way as to avoid influence by the political whims of the present. Some of the safeguards imposed to insure insulation from politics include life tenure for federal justices, multiple seats in the highest court of the land, and the requisite background in law.

Legislatures represent society as a whole, including current moral and political views, and it is through some form of legislative process that these issues must ultimately be resolved.²³⁷ The creation of Nunavut in Canada is a prime example of the results that this sort of process can reach. Whether one views legislation as a necessary component of the negotiation process or negotiation as a necessary component of the legislative process is irrelevant. Neither will achieve results without the parties first agreeing to meet on neutral terms in an attempt to arrive at an amicable solution.

Justice Brennan, in the plurality opinion in *Mabo*, made two statements that highlight the difficulty courts face in subjecting moral values to judicial standards. In articulating the need for greater judicial activism, Justice Brennan stated that, "it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination."²³⁸ However, Justice Brennan also recognized the need for common law courts to maintain their objectivity and conform their

land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live.

Mabo (1992) 107 A.L.R. at 18.

236. Native Title Act, 1993, preamble (Austl.).

237. Unfortunately, the parties involved in an extended negotiation process always run the risk that the very political whims courts are designed to avoid may ultimately be the downfall of the process. In response to the Howard Government's attempts to restrict the application of the Native Title Act, 1993, David Ross wrote, "[i]n 1993 we made an agreement with Government in good faith and as far as we're concerned, a change in the political colour of Government should make no substantial difference to the validity of the agreement which was made with us as indigenous peoples with unique rights in land." Ross, *supra* note 222, at 131.

238. *Mabo* (1992) 107 A.L.R. at 28.

decisions with existing rules of law: "[T]his Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency."²³⁹

Professor Gabriël Moens argued that while the Court's actions in *Mabo* did not "fracture" Brennan's "skeleton of principle," the Court's reasoning "may have profound negative implications for the constitutional position of the judiciary and, indeed, for the administration of the law of the land."²⁴⁰ Professor Moens expressed two concerns:

Firstly, in my view, the majority departed from the traditional common law approach of responding cautiously to changes in community values and attitudes. In overturning long standing precedents, the majority acted on insufficient evidence of current community attitudes to the problem at hand, taking their cues from international treaties ratified or accepted by Australia's political leaders. Secondly, in reversing longstanding precedents, the Court retrospectively altered legal relations established by those precedents, thereby potentially defeating legitimate expectations founded on them.²⁴¹

These concerns retain validity anytime the courts take on what is essentially a moral issue.

VI. CONCLUSION

Common law courts have dealt with Aboriginal or native title claims in as fair a manner as they would any other legal issue. However, in both Australia and Canada, the judgments of the courts have emphasized the uniqueness of Aboriginal claims to land. It is this uniqueness that causes the courts no small degree of consternation in attempting to deal with this issue.²⁴²

At various times, both the parties involved and the courts themselves have articulated the need to negotiate, rather than litigate, Aboriginal claims to land. Following the *Delgamuukw* decision, one of the Gitksan chiefs stated, "We're quite happy with the decision and hopefully we can work together from now on, instead of going to the court."²⁴³ On the other hand, even when

239. *Id.* at 18.

240. Moens, *supra* note 217, at 50.

241. *Id.*

242. For example, the High Court in *Mabo* wrote four separate opinions in a six-to-one decision articulating the validity of native title. *Mabo* (1992) 107 A.L.R. at 1.

243. Palmer, *supra* note 201, at 20A (quoting Gitksan chief George Muldoe).

the parties employ negotiation, the results are not always favorable to all who are or could potentially be involved. Following the creation of Nunavut, many Dene Indians in the Northwest Territories strongly opposed the western boundary line because they felt it incorporated traditional Dene lands into government-approved Inuit territory.²⁴⁴ This points out that the settlement of one land claim invariably precludes the possibility of another Aboriginal population attempting to prove title to the same lands.²⁴⁵

To their credit, both the Australian and Canadian governments have emphasized the need for negotiation in this area. The Australian government included the right to negotiate in the Native Title Act 1993.²⁴⁶ As indicated earlier,²⁴⁷ while the 1998 Amendments removed this right, the United Nations has since declared the Amendments discriminatory and violative of the Racial Discrimination Convention, of which Australia is a party.²⁴⁸

One of the strongest arguments for negotiation was made by the majority judgment in *Delgamuukw*. After remanding for a new trial, the author of the majority opinion stated the following in dicta:

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, s. 35 (1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet* to be a basic purpose of s. 35(1)—"the reconciliation of the pre-existence of

244. See Henton, *A Land the Inuit Can Call Their Own*, *supra* note 205, at D1.

245. See *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, 1123 (Can.) (articulating the need for any Aboriginal populations whose rights may be affected by a suit for land rights to intervene or be joined in the proceedings to provide proper closure and certainty for all involved).

246. See *supra* notes 90-100 and accompanying text (discussing the Native Title Act).

247. See *supra* notes 123-29 and accompanying text (discussing validity of Native Title Amendment Act in view of international law).

248. See International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 231.

the aboriginal societies with the sovereignty of the Crown." Let us face it, we are all here to stay.²⁴⁹

This raises the ultimate question—if everyone agrees these issues should be negotiated, why are they still going to court?

*Geoffrey Robert Schiveley**

249. *Delgamuukw* [1997] 3 S.C.R. at 1123-24 (citations and internal cross-references omitted).

* I would like to thank my wife, Amy, for her undying patience, love, and support, my family, Mark, Tudy, Steve, and Gregg, for having this bad habit of always forcing me to think, and the *Journal* Staff and Editorial Board, for showing yet again how much time and energy it takes to do this job as well as they do.

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