

9. Native Title: Comparisons with Common Law Jurisdictions

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Summary

9.1 In the latter part of the 20th century, Indigenous peoples across the globe sought legal rights to their ancestral lands and waters. The responses to these claims have taken different legal shape in different places but share many commonalities. In Australia, Canada and New Zealand customary rights to traditional territories have been recognised at common law.¹ The recognition of indigenous rights developed from a shared jurisprudential basis in the common law. There were some divergences due to the specific circumstances in each country, for example, the existence of treaties in New Zealand and Canada.² As the analysis in this chapter demonstrates, many of the same features have emerged in the development of the law.

9.2 At the same time as Australian courts have fashioned the law of native title, superior courts in other Commonwealth jurisdictions have been establishing principles for the recognition of the rights to land of their own Indigenous peoples.³ In the period since native title was initially recognised in *Mabo v Queensland [No 2]* ('*Mabo [No 2]*'), Australia's jurisprudence has developed with limited reference to these

1 For a general discussion of these trends in common law countries see Paul G McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011). For the importance of the comparative perspective see: AIATSIS, *Submission 36*.

2 Gummow J noted that in Canada the basic legal framework developed quite differently. *Wik Peoples v Queensland* (1996) 187 CLR 1, 182.

3 A form of native title has been recognised in many former British colonies, eg South Africa and Malaysia.

Commonwealth comparators.⁴ Australia has developed a major statutory regime for native title claims resolution, and as Chapter 3 has demonstrated, it has moved forward rapidly with consent determinations for native title.

9.3 Some of the matters identified in Chapter 2 which have led to the necessity to consider reform of the *Native Title Act 1993* (Cth) (*'Native Title Act'*) have parallels in other jurisdictions. The frameworks within which jurisprudence has developed in other jurisdictions—most relevantly Canada and New Zealand—differ in some respects from those in Australia. Australian courts have noted the different position in other jurisdictions.⁵

9.4 This remains so, at the level of general principle, whether there is a statutory framework and judicial exposition around that framework (as in Australia and New Zealand) or whether the development of the law is left entirely to judges.⁶ In particular, all require some kind of connection to be established between the claimant Indigenous peoples and land, and continuity between pre-sovereign and contemporary practices or uses of land, although the emphasis on the degree of 'continuity' varies in each country. In each situation, tensions have emerged around, whether and how, the question of change to Indigenous societies can be accommodated in the law.

9.5 Robust law reform is enhanced by a consideration of comparable law as it operates in common law countries. Comparisons with the manner in which the law has developed in New Zealand and Canada are particularly relevant due to the initial 'judicial borrowings' between these jurisdictions and the similar common law framework.

9.6 Native title laws in Australia evolved from a shared common law heritage. While the *Native Title Act* is now the starting point for construing the definition of native title, it is important to acknowledge the rich jurisprudence in comparable jurisdictions that grapples with similar complex issues around indigenous rights and title to lands.

9.7 This chapter provides an overview of legal frameworks and jurisprudence in Canada and New Zealand in relation to Indigenous peoples' rights to land and waters.⁷ Where particular facets of this comparative jurisprudence are relevant to specific

4 See, eg, *Fejo v Northern Territory* (1998) 195 CLR 96. In that case, Kirby J argued that 'care must be observed in the use of overseas authority in this context because of the differing historical, constitutional and other circumstances and the peculiarity of the way in which recognition of native title came belatedly to be accepted by this Court as part of Australian law': [111]. See further Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) 33–35.

5 *Fejo v Northern Territory* (1998) 195 CLR 96, 130.

6 The relevance of whether a colony was regarded as ceded, conquered or settled, to the recognition of Indigenous rights in land is discussed in Ch 2.

7 In Australia, and overseas, Indigenous peoples have entered into agreements which may recognise native title, and which will also provide a range of other outcomes. In Australia, these have largely occurred under the framework of the *Native Title Act* through Indigenous Land Use Agreements. See Ch 3 for further discussion on settlements in Australia. In both Canada and New Zealand, governments have entered into comprehensive agreements with indigenous groups. These are not discussed in this chapter. See further Agreements, Treaties and Negotiated Settlements Project, *Agreement Making with Indigenous Peoples: Background Material* <www.atns.net.au>.

analyses of connection requirements or recommendations they are noted here, and incorporated as relevant in earlier chapters.

Canada

9.8 In Canada, First Nations peoples' rights exist on a continuum between exclusive rights (aboriginal title),⁸ and non-exclusive rights (aboriginal rights).⁹ Aboriginal title in Canada is based on the recognition of use and occupation pre-sovereignty, while aboriginal rights require the identification of rights integral to culture at the time of sovereignty. The similarities to the idea of 'traditional' in the Australian context are evident.

Recognition of aboriginal title rights and title

9.9 The initial recognition of aboriginal title can be traced to the decision in *Calder v Attorney-General for British Columbia* ('*Calder*') in 1971.¹⁰ However, aboriginal title is now understood to be a subset of the broader category of aboriginal rights protected by s 35(1) of the *Constitution Act, 1982*.¹¹ Somewhat confusingly these are known as aboriginal title rights to distinguish them from aboriginal rights. Both are a subset of the broader aboriginal rights.

9.10 Section 35(1) of the *Constitution Act, 1982* recognises and affirms aboriginal and treaty rights. This section provides constitutional protection to rights existing at common law, but which remained unextinguished, at the date that provision came into force (17 April 1982).¹² Rights existing at common law in 1982 cannot be extinguished, although they can be infringed by sufficiently justified governmental action.¹³

9.11 While the provision protects *existing* aboriginal rights, the development of, and rationale for, the doctrine of aboriginal rights after 1982 has in turn been affected by the purpose and scope of s 35(1). Aboriginal rights (in a broad sense) protected by s 35(1) comprise a 'spectrum' of rights. They include within their range:

- aboriginal rights: practices, customs and traditions integral to the distinctive culture of the group claiming the right;
- site specific rights to engage in particular activities on particular land; and
- aboriginal title: akin to a possessory title to the land.

The distinction between these rights is the degree of connection to the land. The first two will be founded on activities or practices which fall short of the degree of connection required to found title, but which will nevertheless be recognised and

8 *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia* 2014 SCC 44.

9 *R v Van der Peet* [1996] 2 SCR 507.

10 *Calder v Attorney-General of British Columbia* [1973] SCR 313.

11 *R v Adams* [1996] 3 SCR 101.

12 *R v Sparrow* [1990] 1 SCR 1075.

13 *Ibid*; *R v Van der Peet* [1996] 2 SCR 507.

affirmed by s 35(1).¹⁴ Where the degree of connection is less than that required to establish aboriginal title, claimants may make a claim of aboriginal rights (in a more restricted sense).

9.12 While both aboriginal rights and aboriginal title are recognised and protected by s 35(1), each has evolved a distinctive test and standard of proof. They are consequentially also characterised by distinctive approaches to the question of evolution of rights and possible economic dimensions.

Establishing aboriginal title

9.13 In the latter part of the 20th century, recognition of a legally enforceable right to land held by indigenous groups can be traced to the decision of the Supreme Court of Canada in *Calder*.¹⁵ According to Judson J in that decision, aboriginal title is sourced in the occupation of land prior to sovereignty. Similarly, in *Guerin v R*, Dickson J confirmed that aboriginal title was an independent legal right, based on historic occupation and possession and ‘supported by the principle that a change in sovereignty does not in general affect the presumptive title of the inhabitants’.¹⁶

9.14 Aboriginal title is a burden on the radical title of the Crown. It is an independent legal interest which gives rise to a fiduciary duty.¹⁷ In light of the enactment of s 35(1), *Constitution Act, 1982*, aboriginal title is now understood as a subset of the broader category of the ‘aboriginal rights’ protected by this section. While aboriginal rights are generally characterised as activities or practices, aboriginal title is characterised as a possessory right.¹⁸

9.15 In both *Calder* and the later case of *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (‘*Baker Lake*’), it was noted that the existence of an organised society was required to establish proof of occupation.¹⁹ This requirement might suggest that an inquiry should be made into the laws and customs of that society, as for native title in Australia.²⁰ However, proof of aboriginal title in Canada has focused on occupation and possession, rather than the customs and traditions of aboriginal law.²¹

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

15 *Calder v Attorney-General of British Columbia* [1973] SCR 313.

16 *Guerin v The Queen* [1984] 2 SCR 335; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399.

17 *Tsilhqot’in Nation v British Columbia* 2014 SCC 44. For further discussion of the Crown’s fiduciary duty, see below.

18 *Delgamuukw v British Columbia* [1997] 3 SCR 1010. The possessory right is however held to be inalienable.

19 *Calder v Attorney-General of British Columbia* [1973] SCR 313; *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR 3d 513.

20 See further Chs 4 and 5.

21 Kent McNeil, ‘The Meaning of Aboriginal Title’ in Michael Asch (ed), *Aboriginal Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (University of British Columbia Press, 1997) 135; *ibid*.

9.16 Significant clarification of the source and nature of aboriginal title was not provided until the decision of the Supreme Court of Canada in *Delgamuukw v British Columbia* ('*Delgamuukw*').²² In that case, Lamer CJ located the source of aboriginal title in the

physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law ... What makes aboriginal title sui generis is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward.²³

9.17 However, Lamer CJ went on to suggest that aboriginal law could be relied on to determine whether there was the occupation necessary to establish possession. The common law perspective relies on physical occupation as proof of possession, but the aboriginal perspective could, for example, look to patterns of land holding, allowable land uses, indigenous laws on trespass or rules on who can reside in the claim area in order to determine exclusive occupation.²⁴ Aboriginal title does not therefore rely on the content of aboriginal laws as such, but that content is relevant to determining whether there is exclusive occupation such as to point to 'title'.

9.18 Aboriginal title post-sovereignty reflects the fact of aboriginal occupancy pre-sovereignty. It includes all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group—most notably the right to control how the land is used.²⁵

9.19 The 2014 decision of the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia* ('*Tsilhqot'in Nation*') confirmed that, when considering the question of whether there has been sufficient occupation to ground aboriginal title, a 'culturally sensitive approach' is required.²⁶ Such a culturally sensitive approach is 'based on the dual perspectives of the Aboriginal group in question—its laws, practices, size, technological ability and the character of the land claimed—and the common law notion of possession as a basis for title'.²⁷

9.20 However, the perspective of an Aboriginal group to possession might conceive of possession of land in a somewhat different manner than did the common law.²⁸ McLachlin CJ stated:

a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is 'sufficient' use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.²⁹

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

23 *Ibid* [114].

24 *Ibid* [156]–[157].

25 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44 [75].

26 *Ibid* [41].

27 *Ibid*.

28 *Ibid*.

29 *Ibid* [42].

Continuity of occupation

9.21 Continuity between the present and the period prior to sovereignty becomes an issue for aboriginal title when a claimant group seeks to rely on present occupation in support of its claim. If direct evidence is provided of pre-sovereign use and occupation to the exclusion of others, ‘such evidence establishes Aboriginal title. There is no additional requirement that the claimant group show continuous occupation from sovereignty to the present-day’.³⁰

9.22 If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation. If such evidence is provided, any real need to show continuity—other perhaps than in the sense of showing that the modern group are the descendants of the original holders—is negated.

9.23 In *Delgamuukw*, the Court has recognised the difficulty of proving pre-sovereign occupation, holding that

an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. What is required, in addition, is a continuity between present and pre-sovereignty occupation, because the relevant time for the determination of aboriginal title is at the time before sovereignty.³¹

9.24 The Supreme Court added:

The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk “undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect” aboriginal rights to land.³²

9.25 In *Tsilhqot’in Nation*, McLachlin CJ elaborated on the notion of ‘continuity’, stating that ‘continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times’.³³

9.26 The nature of occupation may change between sovereignty and the present. This will not preclude a claim for aboriginal title as long as—referring to Brennan J in *Mabo [No 2]*³⁴—a ‘substantial connection between the people and the land is maintained’.³⁵ Continuity does not require an unbroken chain of continuity between present and prior occupation.³⁶

30 *Tsilhqot’in Nation v British Columbia* (Unreported, BCSC, 20 November 2007) 1700, [548].

31 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [152].

32 *Ibid* [153].

33 *Tsilhqot’in Nation v British Columbia* 2014 SCC 44 [46].

34 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [153].

35 *Ibid* [154].

36 *R v Van der Peet* [1996] 2 SCR 507 [65]; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [153]; *Tsilhqot’in Nation v British Columbia* 2014 SCC 44 [46].

Evolution of aboriginal title

9.27 Once aboriginal title has been established, it confers the right to full use of the land, analogous to the rights of the holder of a fee simple at common law. This means that activities on the land are not restricted to those undertaken prior to, or at, sovereignty. In *Tsilhqot'in Nation*, McLachlin CJ stated that, 'in simple terms, the title holders have the right to the benefits associated with the land—to use it, enjoy it and profit from its economic development'.³⁷ According to Lamer CJ in *Delgamuukw*:

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title.³⁸

9.28 However, the range of uses to which the land may be put is subject to an 'inherent limit': 'they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title'.³⁹

9.29 The scope of this inherent limit remains unclear. It rests on the importance of the continuity of the relationship of the group with the land. According to Lamer CJ, this 'relationship should not be prevented from continuing into the future'.⁴⁰ Thus, land cannot be used in a way which destroys its value for the practices on which occupation is based—for example, strip mining former hunting and fishing grounds, or turning lands with which the group has a special bond for ceremonial purposes into a parking lot.⁴¹ Therefore, the ability of claimant groups to use the land for economic development is not entirely unlimited.

Different sources of title in Canada and Australia: different outcomes

9.30 Although the source of aboriginal title is different from that of native title in Australia (the former based on occupation, the latter based on laws and customs), after *Tsilhqot'in Nation* the facts which found a claim to aboriginal title in Canada and native title in Australia may be similar. It is likely that the facts of *Mabo [No 2]* would have been likely to satisfy the test in *Delgamuukw* and *Tsilhqot'in Nation* to establish a right of aboriginal title.⁴²

9.31 However, the different bases for aboriginal title and native title may lead to differences in outcome. In particular, as aboriginal title in Canada is based on occupation, it founds a recognised possessory interest, a fee simple—it is a 'right to the

37 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44.

38 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [111].

39 *Ibid.*

40 *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia* 2014 SCC 44.

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

42 See discussion in Ch 2 of Toohey J's position in *Mabo [No 2]*.

land itself'.⁴³ In *Delgamuukw*, the Court noted it had taken pains to clarify that aboriginal title 'does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests.'⁴⁴

Establishing aboriginal rights

9.32 To establish an aboriginal right, short of title, the claimants must prove that the practices, uses or customs claimed as aboriginal rights are 'integral to the distinctive culture' of the claimants.

9.33 'Integral' emphasises practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society and therefore excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity.⁴⁵ The language used has resonance for the Australian law expounding what is understood as traditional law and custom, (see Chapters 4 and 5).

9.34 The practice, tradition or custom must be a defining feature which made the society what it was.⁴⁶ It need not, however, be necessarily the most important defining feature of that society. The test does not require the practice founding the aboriginal right to go to the core of the claimant group.⁴⁷ Nor need the culture be shown to be fundamentally altered without this practice.⁴⁸

9.35 The practice, use, or custom must have been integral prior to European contact.⁴⁹ Once an integral practice, custom or tradition has been identified, there must also be shown to be a reasonable degree of continuity between that practice and a modern practice or custom and a practice, tradition or custom.⁵⁰

9.36 In contrast to claims made under the *Native Title Act*, aboriginal rights doctrine focuses on activities rather than rights.⁵¹ Thus, what constitutes an aboriginal right might, for example, be the practice of fishing for subsistence purposes, rather than a right to fish. What is important is not the resource itself, but the practice by which it was extracted or harvested.

9.37 The majority of decisions of the Supreme Court of Canada relating to aboriginal rights have arisen in the specific context of rights claimed as a defence to breach of provincial legislation, generally resource legislation. The exception to the instances

43 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [140]. See Margaret Stephenson 'Resource Development on Aboriginal Lands in Canada and Australia' (2003) 9 *James Cook University Law Review* 21.

44 *Ibid* 113. For a discussion in the Australian context, see Noel Pearson, 'Land Is Susceptible of Ownership' (Paper Presented at High Court Centenary Conference, Canberra, 9-11 October 2003).

45 *Mitchell v Minister of National Revenue* [2001] 1 SCR 911, [12]; *R v Sappier*; *R v Gray* [2006] 2 SCR 686 [37].

46 *R v Van der Peet* [1996] 2 SCR 507 [56].

47 *R v Sappier*; *R v Gray* [2006] 2 SCR 686 [40].

48 *Ibid* [41].

49 *R v Van der Peet* [1996] 2 SCR 507 [60].

50 *Mitchell v Minister of National Revenue* [2001] 1 SCR 911, [12].

51 *R v Sappier*; *R v Gray* [2006] 2 SCR 686.

where aboriginal rights were argued as a defence was *Lax Kw'alaams Indian Band v Canada* ('*Lax Kw'alaams*') which was a claim for a declaration of aboriginal rights.⁵²

9.38 As s 35(1) of the *Constitution Act 1982* protects and affirms *existing* aboriginal rights, the demonstration of such a right can be a defence to a regulatory offence. The characterisation of the practice which founds an aboriginal right, and which therefore once proven provides a defence, is thus in part determined by what is required to establish the defence.⁵³

9.39 At a practical level, therefore, s 35(1) provides a similar defence to regulatory offences as s 211 of the *Native Title Act*.⁵⁴ However, s 35(1) protects and affirms all existing aboriginal rights. By contrast, s 211 is specifically limited to a particular prescribed class of activities found in s 211(3). Section 211 also only protects the class of activities where they are carried out for 'personal, domestic or non-commercial communal needs'.⁵⁵

Proof of continuity

9.40 Aboriginal rights require proof of continuity of the rights claimed. In *Delgamuukw* Lamer CJ discussed,

difficulties inherent in demonstrating a continuity between current aboriginal activities and the pre-contact practices, customs and traditions of aboriginal societies ... the requirement for continuity is one component of the definition of aboriginal rights.⁵⁶ Here, the 'continuity' may be physical, but also has a cultural dimension.⁵⁷

9.41 They are based on rights rather than occupation. According to *R v Marshall; R v Bernard*:

The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices.⁵⁸

9.42 In the case of aboriginal rights, continuity must be shown from pre-contact. According to the trial judge in *Lax Kw'alaams* 'the date of contact should be the date on which occurred the first direct arrival of Europeans in the area of the particular group of aboriginals'.⁵⁹ This is a question of fact.

52 *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535.

53 Ibid. See, eg, *R v Van der Peet* [1996] 2 SCR 507; *R v Pamajewon* [1996] 2 SCR 821.

54 See Ch 8 for further discussion of s 211 of the *Native Title Act*.

55 *Native Title Act 1993* (Cth) s 211(2)(a).

56 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [83].

57 Paul G McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011), 140.

58 *R v Marshall; R v Bernard* [2005] 2 SCR 220 [67].

59 *Lax Kw'alaams Indian Band v Canada (Attorney General)* (2008) 3 CNLR 158, [60].

9.43 A ‘reasonable degree’ of continuity is required. The question is whether the claimed modern right is demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice. In determining this, the court should take a generous but realistic approach to matching pre-contact to current practices.⁶⁰ A break in connection is not fatal. Inferences can be drawn as to the pre-contact practices based on modern practices.

9.44 With respect to aboriginal rights generally, the courts have noted that ‘to impose the requirement of continuity too strictly would risk “undermining the very purpose of s 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect” aboriginal rights to land’.⁶¹

Evolution of aboriginal rights

9.45 Aboriginal rights may evolve. Claimants must establish that there was some element of the practice prior to contact that supports a modern evolved right (for example, some kind of trade). In addition, there must be proportionality and sufficient continuity between the pre-contact and modern practices.

9.46 The doctrine of continuity was identified in early decisions as the mechanism by which a ‘frozen rights’ approach could be avoided. The Supreme Court held that ‘[t]he evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights’.⁶² Practices can evolve in terms of both subject matter and manner of exercising the right.⁶³

9.47 Canadian courts have consistently allowed evolution in the manner of exercising a right. In *R v Marshall*, McLachlin CJ referred to the possibility of ‘logical evolution’, stating that this means ‘the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology’.⁶⁴

9.48 In terms of evolution of the subject matter of a right, the Court has required some degree of proportionality and sufficient continuity between the pre-contact practice and the modern right claimed. Thus, in *R v Sappier; R v Gray*, a right to harvest wood for the construction of temporary shelters was recognised to have evolved into a right to harvest wood by modern means to be used in the construction of a modern permanent home.⁶⁵

9.49 However, in *Lax Kw’alaams*, the claimed aboriginal right to commercial harvesting and sale of all species of fish within their traditional waters was considered to be qualitatively and quantitatively out of proportion to the pre-contact practices.

60 *Lax Kw’alaams Indian Band v Canada* [2011] 3 SCR 535, [48].

61 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [153], quoting *R v Côté* [1996] 3 SCR 139, [53].

62 *R v Van der Peet* [1996] 2 SCR 507 [64].

63 *Lax Kw’alaams Indian Band v Canada* [2011] 3 SCR 535.

64 *R v Marshall; R v Bernard* [2005] 2 SCR 220 [25]. See also *Lax Kw’alaams Indian Band v Canada* [2011] 3 SCR 535, [7], [50].

65 *R v Sappier; R v Gray* [2006] 2 SCR 686.

While the band harvested a wide variety of fish resources, only trade in euchalon grease could be characterised as integral to their distinctive culture. Trade in euchalon grease could not found a modern right to commercially harvest and sell *all* fish species.⁶⁶ Binnie J gave the following examples:

A ‘gathering right’ to berries based on pre-contact times would not, for example, ‘evolve’ into a right to ‘gather’ natural gas within the traditional territory. The surface gathering of copper from the Coppermine River in the Northwest Territories in pre-contact times would not, I think, support an ‘Aboriginal right’ to exploit deep shaft diamond mining in the same territory.⁶⁷

9.50 The requirement that aboriginal rights be demonstrated to be integral to culture prior to contact operates to significantly limit what can be recognised as a modern right, and the form that right can take. It does not allow for rights that arose as a result of European influence to be recognised, regardless of their antiquity relative to European settlement. This is not dissimilar to the requirement in Australia that laws and customs be sourced in those acknowledged and observed prior to sovereignty, a requirement which has the same inherent limiting factor.

New Zealand

9.51 New Zealand jurisprudence also recognises a distinction between exclusive and non-exclusive rights—usually termed territorial or non-territorial aboriginal title. Each of these is given distinct form by legislation.⁶⁸

9.52 From the outset of formal British colonisation, the settlement of New Zealand proceeded on the basis that beneficial ownership of land remained with Maori and that customary title had to be extinguished by purchase prior to alienation to third parties.⁶⁹ However, by the late 19th century there was little Maori customary land left in New Zealand—a result of pre-emptive purchases of land by the Crown, as well as the conversion of customary title to Maori freehold land.⁷⁰ The result was that while several court decisions recognised that rights to Maori land could be recognised at common law, there was in practice no land onshore left to claim by way of native or aboriginal title.⁷¹

66 *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535, [7], [50].

67 *Ibid* [51]. See also *R v Gladstone* [1996] 2 SCR 723 [26]–[28].

68 *Foreshore and Seabed Act 2004* (NZ); *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ).

69 For a consideration of the position in Australia, see Ch 2.

70 Shaunnagh Dorsett, ‘Aboriginal Rights in the Offshore: Māori Customary Rights under the Foreshore and Seabed Act 2004 (NZ)’ (2006) 15 *Griffith Law Review* 74, 76.

71 Compensation may be available for loss and alienation of tribal lands through a claim made to the Waitangi Tribunal. The Tribunal investigates claims by Maori that they have been prejudiced by law, policy, act or omission of the Crown and that such law, policy, act or omission is inconsistent with the principles of the Treaty of Waitangi: *Treaty of Waitangi Act 1975* (NZ) ss 5–6; Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (‘Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown’).

Recognition of aboriginal title

9.53 In the mid-1980s debate arose about the availability of aboriginal title claims in New Zealand.⁷² In 1986, Maori customary rights were successfully pleaded as a defence to a charge of possessing undersized paua in tidal waters.⁷³ In *Te Runanga o Muriwhenua v Attorney-General* and *Te Runanganui o te Ika Whenua v Attorney-General*, Cooke P of the Court of Appeal confirmed that aboriginal title was part of the common law.⁷⁴

9.54 Cooke P, referring to cases including *Mabo [No 2]*, held that the Crown's radical title was subject to native rights, that these are generally, but not invariably communal, and the nature and incidents of aboriginal title are matters of fact dependent on the evidence in any particular case. He noted that they could only be extinguished by the free and informed consent of the holders of the title, although they could be compulsorily acquired with adequate compensation.⁷⁵

9.55 While other cases throughout the 1990s and early 2000s also mentioned the existence of aboriginal title, the first decision to significantly address this matter was the 2003 Court of Appeal decision in *Ngati Apa v Attorney-General* ('*Ngati Apa*').⁷⁶ The matter before that Court was not a claim for aboriginal or native title. Rather, the issue in the case was whether the Maori Land Court had jurisdiction to investigate areas below the high water mark. It required a determination as to whether, as a matter of law, Maori customary title could exist with respect to the foreshore and seabed.

9.56 As the matter before the Court was a narrow jurisdictional point, the decision gave little guidance as the nature of aboriginal title, or how it was to be established. The Court of Appeal confirmed that the Crown is not the source of aboriginal title. According to Elias CJ, '[t]he Crown has no property interest in customary land and is not the source of title to it'.⁷⁷ The Crown did not acquire full and absolute dominion at the point of sovereignty, but rather radical title. In particular, the Crown did not acquire ownership of the foreshore by prerogative, as that rule was displaced by local circumstance.⁷⁸ Radical title was further extended to include the seabed.⁷⁹

9.57 The existence and content of customary property is determined as a matter of the custom and usage of the particular community. These are questions of fact,⁸⁰ which may be referred for determination to the Maori Appellate Court.⁸¹ Beyond this, the

72 McHugh, above n 1, 27; Richard Boast, 'Treaty Rights or Aboriginal Rights?' [1990] NZLJ 32; PG McHugh, 'Aboriginal Title in the New Zealand Courts' (1984) 2 *University of Canterbury Law Review* 235.

73 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

74 *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641; *Te Runanganui o te Ika Whenua v Attorney General 2* [1994] 2 NZLR 20.

75 *Te Runanganui o te Ika Whenua v Attorney General 2* [1994] 2 NZLR 20 5–6.

76 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643.

77 *Ibid* [47].

78 *Ibid* [49].

79 *Ibid*; Dorsett, above n 70.

80 *Paki v Attorney-General* [2014] NZSC 118 [16].

81 *Te Ture Whenua Maori Act 1993* (NZ) s 61.

Court gave little further direction as to the nature and content of aboriginal title, although the Court unanimously noted that native property continues until lawfully extinguished, and that the onus of proof of extinguishment lay on the Crown.⁸²

Statutory responses

9.58 As in Australia following the *Mabo [No 2]* decision, the decision in *Ngati Apa* prompted a legislative response: the *Foreshore and Seabed Act 2004* (NZ) ('*Foreshore and Seabed Act*').

9.59 In the context of this Inquiry—which recommends reform to the test for establishing native title under the *Native Title Act*—the history of legislation relating to customary rights is instructive. The *Foreshore and Seabed Act* was repealed and replaced in 2011 by the *Marine and Coastal Areas (Takutai Moana) Act 2011* (NZ) ('*Takutai Moana Act*'). A central reason for this reform was concern about the restrictive thresholds for recognition of customary rights.

The Foreshore and Seabed Act 2004 (NZ)

9.60 The *Foreshore and Seabed Act* was considered to have codified the common law, and to have been guided by overseas jurisprudence as to the tests for customary rights.⁸³ The Act went considerably beyond the brief descriptions of aboriginal title in *Ngati Apa*, introducing two types of claims:

- non-exclusive customary rights orders (non-exclusive rights);⁸⁴ and
- territorial customary rights (exclusive rights).⁸⁵

9.61 The *Foreshore and Seabed Act* legislatively extinguished all aboriginal title, and replaced the inherent jurisdiction of the High Court with a statutory jurisdiction based on the provisions of the Act.⁸⁶

9.62 The requirements to establish both kinds of claims reflected an amalgam of Canadian and Australian law relating to Indigenous rights and interests in land and waters. The two types of claims may be considered analogous to the Canadian distinction between aboriginal rights and title.

9.63 A territorial rights claim required relevantly, that the claimants show exclusive use and occupation of a particular area, and that the use and occupation be 'substantially uninterrupted' since 1840.⁸⁷ The Act expressly limited the evidence of exclusive use and occupation to physical activities and uses.⁸⁸

82 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 [34] (Elias CJ), [99] (Gault P), [147]–[148] (Keith and Anderson JJ), [184] (Tipping J).

83 (16 November 2004) 621 NZPD.

84 *Foreshore and Seabed Act 2004* (NZ) ss 50–51.

85 *Ibid* s 32.

86 *Ibid* ss 10, 50.

87 *Ibid* s 32(2).

88 *Ibid* s 32(3).

9.64 A determination of territorial customary rights did not provide a legally enforceable right, but entitled the applicants to an order referring the matter to the Attorney-General and the Minister for Maori Affairs. This essentially gave a right to negotiate an agreement for some form of redress in recognition of the finding of the Court.⁸⁹

9.65 A customary rights order required the claimants to show a use, activity or practice, integral to 'tikanga Maori' (Maori customary values and practices), which had been carried on in a 'substantially uninterrupted manner' since 1840.⁹⁰ Section 51(1) further stated that 'an activity, use, or practice has not been carried on, exercised, or followed in a substantially uninterrupted manner if it has been or is prevented from being carried on, exercised, or followed by another activity authorised by or under an enactment or rule of law'.

9.66 The Act also recognised that the activities, uses or practices might include a commercial component.⁹¹ The effect of a customary rights order was to allow the activity, use or practice to be undertaken, and to be protected in accordance with the provisions of the *Resource Management Act 1991* (NZ).

9.67 The *Foreshore and Seabed Act* was a significant source of controversy and concern for Maori.⁹² By 2009, no claims had been brought under the Act, and in that year, a Ministerial Review Panel recommended its repeal. The panel determined that the Act was discriminatory because it removed the ability of Maori to have their claims adjudicated by the common law. Rather they were required to have their claims judged against the definitions in the statutory provisions which 'imposed extremely restrictive thresholds for the recognition of customary rights'.⁹³ The Panel considered that the Act discriminated on the grounds of race and contravened the *Bill of Rights Act 1990* (NZ).⁹⁴

The Marine and Coastal Areas (Takutai Moana) Act 2011 (NZ)

9.68 The *Takutai Moana Act* replaced the *Foreshore and Seabed Act*. The later Act seeks to balance the rights of Maori and non-Maori in the foreshore and seabed. Section 6 specifically 'restores and gives legal expression to those rights extinguished by the *Foreshore and Seabed Act*.' However, the Act excludes the jurisdiction of the Court to hear and determine any aboriginal rights claim and replaces it with the statutory jurisdiction given under the Act.⁹⁵

89 Ibid ss 36–37.

90 Ibid s 50(1)(b)(ii).

91 Ibid 52(2), (3).

92 Dorsett, above n 70, 74–75.

93 Ministerial Review Panel, *Pākia Ki Uta Pākia Ki Tai: Report of the Ministerial Review Panel - Ministerial Review of the Foreshore and Seabed Act 2004 - Vol 1* (30 June 2009) 12; see also *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ) preamble.

94 Ministerial Review Panel, *Pākia Ki Uta Pākia Ki Tai: Report of the Ministerial Review Panel - Ministerial Review of the Foreshore and Seabed Act 2004 - Vol 1* (30 June 2009) 139.

95 *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ) s 98(4).

9.69 The *Takutai Moana Act* provides for two claims:

- protected customary rights (non-exclusive rights); and
- customary marine title (exclusive rights).

9.70 These essentially mirror those available under the previous *Foreshore and Seabed Act*. However, the tests have been simplified.

9.71 Claims are filed with the High Court. Alternatively, customary marine title and protected customary rights may be recognised by an agreement made with the Crown.⁹⁶ In addition, the Act recognises a ‘universal award’ of ‘mana tuku iho’. This is the relationship ‘iwi’ (peoples or nations) have with the foreshore and seabed in their ‘rohe’ (territory) and applies without the need for a claim of any other kind.⁹⁷ It entitles Maori to participate in conservation processes under the Act. While it is difficult to make comparisons, ‘mana tuku iho’ could be likened to the right that Aboriginal and Torres Strait Islander peoples have to speak for country.⁹⁸

9.72 A protected customary right is a right that has been exercised since 1840 and continues to be exercised in accordance with tikanga,⁹⁹ regardless of whether it continues to be exercised in exactly the same manner, or a similar way, or evolves over time.¹⁰⁰ Iwi or ‘hapu’ (clans or descent groups) may derive commercial benefit from exercising protected customary rights.¹⁰¹

9.73 There are three significant changes from the earlier *Foreshore and Seabed Act*. First, the Act no longer equates such a right with a ‘use, activity or practice’—rather, simply using the term ‘right’.¹⁰² Secondly, the requirement for the right to have been exercised in a ‘substantially uninterrupted manner’ has been removed.¹⁰³ Thirdly, the provision specifically allows for evolution or adaptation over time.¹⁰⁴

9.74 The exclusive rights provisions under the *Takutai Moana Act* require that a particular part of the marine and coastal area be held in accordance with tikanga and that the claimant group has exclusively used and occupied it from 1840 to the present day without substantial interruption.¹⁰⁵ Unlike the previous *Foreshore and Seabed Act*, the outcome of this claim is a recognition of customary marine title, rather than a right

96 Ibid ss 94–95.

97 Ibid s 4.

98 *Western Australia v Ward* (2002) 213 CLR 1, [93].

99 The High Court may refer questions of tikanga to the Maori Appellate Court, or appoint a ‘pukenga’ (court expert) with knowledge of tikanga: *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ) s 99.

100 Ibid s 51.

101 Ibid s 52(4)(b).

102 See Ch 8 for a discussion of the relationship between rights, uses and activities.

103 See Ch 5 for consideration of the requirement for ‘substantially uninterrupted’ continuity in proof of native title in Australia.

104 See Ch 5 and Ch 8 for a consideration of the relevance of evolution and adaptation in Australian native title law.

105 *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ) s 58(1).

to negotiate an agreement for redress. The new Act also specifically allows for customary transfer of rights between iwi or hapu.¹⁰⁶

9.75 Certain rights are conferred by, and may be exercised under, a customary marine title order. These include:

- a right to permit or not permit applications for new resource consents, with limited exceptions;
- a right to give or withhold permission for conservation activities;
- a right to the protection of wahi tapu;
- the ownership of minerals other than petroleum, uranium, silver, and gold;
- the right to create a planning document; and
- the prima facie ownership of taonga tuturu (Maori cultural or historical objects).¹⁰⁷

9.76 The first claims under the *Takutai Moana Act* are due to be heard by the High Court in 2015. A number of applications for customary marine title and protected customary rights through recognition agreements with the Crown have also been lodged.¹⁰⁸

Crown obligations

9.77 In both New Zealand and Canada it has been recognised that the Crown may owe obligations to Indigenous peoples with respect to dealing with their land. Those obligations are variously described as fiduciary in character, obligations of good faith, or obligations which flow from the honour of the Crown. Although they take different legal forms, the various formulations recognise and emphasise the particular nature of the relationship of the Crown with its Indigenous population and the need to balance the rights of the title holders with wider public interests.

The duty to consult in Canada

9.78 The duty to consult, and where appropriate, accommodate First Nations peoples, arises when the Crown has knowledge, real or constructive, of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect it.¹⁰⁹ The duty to consult and accommodate, and some aspects of the fiduciary duty, are

106 Ibid ss 58(1)(b)(ii), 58(3). See Ch 5 for a discussion of customary transfer in the Australian context.

107 Ibid s 62.

108 A full list can be found at Ministry of Justice, *Marine and Coastal Area Act Applications* <<http://www.justice.govt.nz/treaty-Settlements/office-of-Treaty-Settlements/marine-and-Coastal-Area-Takutai-Moana/current-Marine-and-Coastal-Applications#notified>>.

109 *Haida Nation v British Columbia (Minister of Forests)* (2004) 3 SCR 511; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* (2005) 3 SCR 388; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* (2004) 2 SCR 550; *Beckman v Little Salmon/Carmacks First Nation* 3 SCR 103; McHugh, above n 1; Gordon Christie, 'Developing Case Law: The Future of Consultation and Accommodation' (2006) 39 139.

functionally similar to the protections offered by the future acts regime under the *Native Title Act*.¹¹⁰

9.79 The duty has a foundation in the principle of the ‘honour of the Crown’ and the Crown’s unique relationship with Aboriginal peoples. It is necessary that the Crown act with honour in order to achieve the reconciliation of the pre-existence of aboriginal societies with the assertion of sovereignty of the Crown and its control over land and resources that were formerly in the control of that people.¹¹¹ The duty to consult and accommodate supports the honour of the Crown, and is part of the process of reconciling the pre-existence of aboriginal societies with the sovereignty of the Crown.¹¹²

9.80 To further this process of reconciliation, it is necessary for the Crown to recognise and respect indigenous rights. The reality that this may take many years means that the Crown cannot ignore, or fail to treaty fairly, aboriginal rights that are awaiting determination. It must respect potential, but unproved, rights and interests. Once proved, these rights and interests will be protected and affirmed by s 35(1) *Constitution Act, 1982*.¹¹³

9.81 The content of the duty to consult and accommodate varies with the circumstances. Generally, the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and the seriousness of the potentially adverse effect on the right or title claimed.¹¹⁴ The duty to consult and accommodate is part of the process of reconciliation which begins with the assertion of sovereignty by the Crown, and thus any efforts to consult and accommodate should be consistent with the objective of reconciliation.¹¹⁵

9.82 The duty to consult and accommodate was clarified in the recent decision of the Supreme Court of Canada in *Tsilhqot’in Nation*.¹¹⁶ The duty owed by the Crown varies depending on whether the rights or title have been established.

9.83 At the claims stage, prior to establishment of title, the Crown is required to consult in good faith with any Aboriginal groups asserting those rights or title about proposed uses of the land and, if appropriate, to accommodate the interests of such claimant groups. If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out.¹¹⁷

110 *Native Title Act 1993* (Cth) pt 2 div 3.

111 *Haida Nation v British Columbia (Minister of Forests)* (2004) 3 SCR 511, [32] (McLachlin CJ).

112 *Beckman v Little Salmon/Carmacks First Nation* 3 SCR 103, [12], [38] (Binnie J).

113 *Haida Nation v British Columbia (Minister of Forests)* (2004) 3 SCR 511, [32] (McLachlin CJ).

114 *Ibid* [39] (McLachlin CJ); *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* (2004) 2 SCR 550, [24] (McLachlin CJ).

115 *Haida Nation v British Columbia (Minister of Forests)* (2004) 3 SCR 511, [32] (McLachlin CJ).

116 *Tsilhqot’in Nation v British Columbia* 2014 SCC 44.

117 *Ibid* [89] (McLachlin CJ); *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* (2010) 2 SCR 650, [37] (McLachlin CJ); see, eg, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* (2005) 3 SCR 388.

9.84 After aboriginal title to land has been established, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land.¹¹⁸

9.85 If aboriginal title holders do not consent to a government taking action on their lands, it may still be possible if the Crown demonstrates that:

- it has discharged its procedural duty to consult and accommodate;
- its actions are in pursuit of a compelling and substantial objective; and
- the action is consistent with the Crown's fiduciary duty.¹¹⁹

9.86 To be consistent with the Crown's fiduciary duty, the government must 'act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations'.¹²⁰ Its actions must also be proportional. That is:

- they must be necessary to achieve the government's goal;
- they must go no further than necessary to achieve that goal; and
- the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the aboriginal interest.¹²¹

9.87 If the duty is breached, 'the usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title'.¹²²

9.88 The overview of the law relating to aboriginal rights and title in Canada and customary rights and claims to the seabed and foreshore in New Zealand reveals that the common law and judicial interpretation of statute has applied quite similar tests to recognise and determine Indigenous Peoples' rights to traditional land and waters to the laws and customs model that have been adopted in Australia. However, there has been a more direct focus on the 'rights' claimed than in establishing the laws and customs under which such rights are possessed.

9.89 In Canada, the occupancy foundation for aboriginal title still requires 'continuity', but it need not be an unbroken chain. There is a stronger reliance upon present occupancy of land and waters by First Nations peoples, as going toward proof of continuity. There is also a clear acknowledgement that aboriginal rights should not be 'frozen'.

9.90 In New Zealand there is a similar trajectory to Australia in the interplay between common law and statute. With respect to claims to the seabed and offshore in New Zealand, judicial recognition of aboriginal territorial title (Maori customary title) was followed by a statutory response. The legislative history of the provisions dealing with

118 *Tsilhqot' in Nation v British Columbia* 2014 SCC 44, [90] (McLachlin CJ).

119 *Ibid* [80]–[84].

120 *Ibid* [86] (McLachlin CJ).

121 *Ibid* [87] (McLachlin CJ).

122 *Ibid* [90] (McLachlin CJ).

rights to be exercised in a ‘substantially uninterrupted manner’ is of particular relevance for the *Native Title Act*. The statutory confirmation that rights may evolve or adapt over time also has relevance for ALRC recommendations in Chapter 5.

9.91 The ALRC notes the view of Kirby J in *Western Australia v Ward* that care must be exercised in the use of authorities from other former colonies and territories.¹²³ Nevertheless, comparative jurisprudence demonstrates many similar issues in former British colonies, with respect to the accommodation of, and proof of, indigenous rights to land and waters at common law. The ALRC, therefore, considers that there is merit in understanding the parallel development of law between these jurisdictions that can be fostered by a comparative law reform process.

123 *Western Australia v Ward* (2002) 213 CLR 1, 148–9.

