Aboriginal Title and Treaty Rights Research

A COMPARATIVE LOOK AT AUSTRALIA, CANADA, NEW ZEALAND AND THE UNITED STATES*

ABORIGINAL AND TREATY RIGHTS have been the subjects of litigation since the nineteenth century in Australia, Canada, New Zealand and the United States. Yet, ethnographic and historical evidence concerning colonized indigenous people did not play a significant role in judicial and quasi-judicial rights proceedings until the second half of the twentieth century. Prior to that time, claims disputes mostly focused on interpretations of imperial and settler society law. Although claims-oriented research has been underway for over 50 years in the United States and for shorter, but substantial, periods in Australia, Canada and New Zealand, it has not been the subject of comparative scholarly analysis. The existing literature mostly addresses the issue of objectivity that arises when scholars take part in adversarial proceedings. Few of the authors who have addressed this topic have looked beyond their own countries. Also, to date, little attention has been given to the creative aspect of this interactive process, which draws together discourses from indigenous, scholarly and legal communities. Presently, I am in the early stages of a long-term project that focuses on this dimension of the history claims-oriented research. I am approaching the topic from a comparative perspective. Here I will offer some preliminary observations about the ways the process has influenced the historiography of indigenous people in North America, Australia and New Zealand.

The United States led the way in introducing ethnographic and historical evidence in claims proceedings beginning in 1946, when congress created the Indian Claims Commission (ICC) to address the outstanding grievances Indian tribes held against the federal government. Congress acted in the belief that these claims could be settled quickly (in five years), if the tribes could air them outside of the adversarial environment of the courtroom. However, this was not to be. Almost immediately, the commission became a quasi-judicial three-man tribunal, whose hearings provided venues for Indian and United States' government lawyers and their hosts of supporting expert witnesses to battle over evidence and interpretations of Indian history pertaining to claims.[1] Instead of addressing the full range of issues troubling Indians, the commission quickly narrowed its focus to a particular category of land claims — those involving alienations that had taken place neither by conquest nor by equitable treaties. The antagonists addressed claims issues in reference to the legal precedents regarding Indian title that already had been established by the United States Supreme Court,[2] the Court of Claims,[3] and according to the terms of reference of the Indian Claims Commission Act. These various parameters led the commission to the viewpoint that claimant groups had to establish that their ancestors had held

communal title to definable territories by virtue of their possession of it to the exclusion of other groups.

The highly adversarial nature of the ICC hearings had two important consequences. First, it precluded the commission from proceeding expeditiously. The result was that the ICC existed until 1978 and, after 32 years of operation, many claims remained outstanding and had to be taken up in the courts. Second, the Indians as plaintiffs and the federal government as defendant had to undertake massive research efforts to support their positions before the commission. As a result, the ICC became a driving force for historical research in Indian history. Most of the leading experts in American anthropology took part.[4] Historians played minor roles.[5]

Claims-oriented research posed new methodological and theoretical challenges for American anthropologists. Before the 1930s, their discipline had an historical particularistic orientation that reflected the seminal influence of Franz Boas at the beginning of the twentieth century. Researchers undertook archaeological and ethnographic surveys during this formative period that emphasized salvaging cultural elements they thought were relics of pre-contact Indian life. Anthropologists devoted particular attention to collecting data about kinship systems, religious beliefs, mythologies and features of material cultures.[6] They eschewed making sweeping theoretical statements about cultural development and emphasized regional diversity and culture areas. By the 1930s and 1940s, American anthropologists had begun to direct more of their attention to culture-environment relationships, under the rubric of ecological anthropology, or cultural ecology. They also became increasingly interested in studying post-contact culture change from an acculturation perspective.

Alfred L. Kroeber, one of the doyens of mid twentieth-century American anthropology, stated in 1955 that research for ICC claims posed new challenges for anthropologists. Previously they had paid little attention to Indian socio-political and economic life or land tenure systems. He noted that ICC hearings had redirected attention to these topics because: 'the suits are brought in the names of tribes, bands, or identifiable groups able to substantiate a claim to ownership or use and occupancy of specifiable territories. Group ownership or control is by definition political, and use and occupancy of land are in their nature primarily economic.'[7] Kroeber observed that the terms most commonly applied to Indians (including by historians, lawyers and law-makers) were 'tribe', 'band', and 'village', all of which imply political autonomy and ownership of territory. He noted that 'all three terms, and especially tribe, are vague and shifting in definition, and carry quite variable connotations in different contexts'.[8] In the area of methodology, Kroeber and other anthropological experts noted that claims research also required the use of new lines of evidence, particularly documentary records, in conjunction with more traditional ethnographic sources.[9] In North America, this new multi-source and interdisciplinary approach to Indian history came to be known as ethnohistory and led to the founding of the journal of *Ethnohistory* in 1954.

Kroeber, who was the father of the so-called 'Berkeley school of anthropology', served as the lead witness for the plaintiffs in the California claims. Before he assumed this role, however, he considered working for the federal defendant.

This resulted in an exchange of letters with the United States Justice Department in the summer of 1952. This correspondence clearly laid out the parameters of the claims disputes in California, where most land alienations had taken place neither by treaty nor by conquest. Most of the issues identified would arise elsewhere in the United States, Canada, Australia and New Zealand when Aboriginal and treaty rights were raised. In the preamble of his contract offer to Kroeber, the acting attorney general told him that the plaintiffs had claimed that they 'owned and had immemorial possession of and were entitled to the sole use, occupation and possession, in the accustomed Indian manner' of all of the land of California that had not been taken away by Spanish or Mexican grants prior to the Treaty of Guadalupe Hidalgo of 1848.[10] The acting attorney general added: 'From our study — gained largely from your published writings[11] on the situation as it existed in California — we understand that each tribe, or band or group of Indians living in California claimed the right to use and occupy a definite area of land to the exclusion of all other groups. What we are interested in determining is what land each of the tribes, bands or specific groups *actually used and occupied* as distinguished from the area each claimed. It is in connection with this study that we would like to engage your services.'

Significantly, the Justice Department did not intend to advance a *terra nullius* legal argument, which would have involved asserting that California had been effectively unoccupied when the United States gained sovereignty over the territory from Mexico. Instead, department lawyers planned to question the amount of land each tribe had actually used and occupied. This modified *terra nullius* perspective echoed the philosophical underpinning of settler societies as formulated by such philosophers as John Locke and Emeric de Vattel, who theorized that land-use intensity, or labour input, determined ownership.[12]

In reply to the acting attorney general, Kroeber detailed the problems that the government's position would pose for anthropological experts who supported it. He cautioned that the idea of: 'Land "actually used and occupied" is going to be **hard** [bold indicates an insertion in the draft] to define because it slides off in a gradient. A **settled** site with houses is certainly both occupied and used. But the watershed ridge that bounds the valley **of** this group might **never even** [be] visited-**except** in pursuit of a wounded deer, or **perhaps chiefly** at a gap through which a trail ran to the next valley harboring a distinct but friendly group. In between **these extremes were all** transitions of utilization: frequent; limited but seasonally regular; occasional; rare; practically none.'[13] Kroeber then cited some examples to explain why there had been such varied intensities of land-use in the traditions of California Indians,[14] and he noted the implications this had for presenting the ethnohistorical geography of the California Indians to the commission. Kroeber said it would take an army of research assistants and cartographers to tell the story and it would be 'contestable at point after point as to non use'.

Having laid out the research problem, Kroeber proposed a solution that would support the government's objective of 'pulling claims down from billions to millions'.[15]

> Isn't there some way of generalizing the evidence? Say to try to establish the average proportion of a valley land given (1) over to permanent residence, (2) to frequent but

occasional use, (3) to seasonally **brief** but significant use on account of food products, (4) to local or sedentary use, (5) to negligible use: and there aim at the same category percentages for (6) hill and brush land; and again for mountains, bare plains, and deserts. That **would be** something I could make a stab at **estimating** and **at** substantiating with examples mostly already described or mapped. It would make **a whole lot more** sense to me; and perhaps to you also, but how about the court?[16]

For a variety of reasons, Kroeber decided to work for the Indians instead.[17] This meant that his task became one of trying to maximize the Indians' claim area rather than minimize it. This contrary objective led him to challenge vigorously the utilitarian approach to defining land tenure, arguing that it was inappropriate because it failed to take into account the Indians' non-material attachments to the land, particularly their aesthetic and spiritual ties.

The government's team of experts, most of whom were Kroeber's former students, adopted an approach that was nearly identical to the one he had initially proposed to the Justice Department. Theoretical stirrings in the area of cultural ecology provided them with rudimentary models that were compatible with the defendant's utilitarian perspective. For instance, in 1936 Ralph Linton published *The Study of Man,* which was an introductory anthropology textbook, in which he proposed that 'primitive' hunters' territories ought to be conceptualized as having been comprised of two zones: (1) a 'zone of exploitation', the area a hunter could traverse in one day and return at night, and (2) a peripheral area that reached beyond it to the limit of a hunter's territory.[18] The inner zone was the area of primary exploitation; the outer region was of secondary economic importance. Already the government had used a modified version of the Linton model in the Coeur d'Alene case, which it argued before the commission in January 1952.[20]

The theoretical work of Julian Steward, who was a member of the government's team, also was a useful guide. Steward had begun publishing his ideas on cultural ecology in the same year as Linton. He made his most important theoretical advance between 1952 and 1955, when he was a government expert in the Great Basin Shoshone (Utah and Nevada) and California claims. Recent research has indicated that Steward's involvement as a government expert in the Great Basin cases strongly influenced his cultural ecological theories.[20] Of particular relevance, Steward linked cultural ecology to his hypotheses about multi-linear cultural evolution. The 'culture core' was a key ingredient in his approach. This was the constellation of cultural traits and practices that were associated with a people's exploitation of their specific environment.[21] Steward surmised that concepts of ownership and land tenure systems were tied to stages of cultural evolution. His thesis was that 'primitive societies', such as the Great Basin Shoshone of the United States, lacked notions of ownership and, therefore, they did not have land tenure systems.[22]

The government's team of experts used their ecological approach to classify the extremely diverse California Indian cultures (there were over 500 land-using groups) into six different categories in terms of their fundamental cultural-ecological adaptations, that is, in terms of the characteristics of their culture cores. For each eco-type, they estimated the portion of the total territory claimed that was needed for primary subsistence. They termed this the 'primary economic zone' or 'home range'. In essence, it was the spatial expression of the culture

core, using the same measure Linton proposed — the area hunters, fishers or gatherers could traverse in a day and return home. For most ecological types, the home range comprised a very small percentage of the total land area (often less than 20%) claimed. The Justice Department argued that the core areas were the only territories that California Indian groups had effectively used and occupied before 1848.

The government experts put forward two additional lines of argument to backstop their primary position (a common strategy in litigation). First, they declared that the California Indians had suffered catastrophic population losses between the time of initial contact with Europeans and 1848, when the United States asserted sovereignty over the territory. Supposedly, this depopulation had caused Indians to lose effective control over large areas of the state. Second, the defendant's experts asserted that the northern California salmon fishing region was an exceptional place where 'private ownership' was a key feature of native cultures. They made this argument because the ICC Act specified that communal title was the only type that was eligible for compensation.

In rebuttal testimony, Kroeber assailed all of these arguments. He agreed that the ecological approach the government's experts used had merits as a new way of looking at the ecological dimension of California Indian history, but he reasserted his objection to using the methodology to deny tribal occupancy rights. He noted that there was no scholarly consensus about the scope of the depopulation that had taken place in the state before 1848. Indeed, historical demographic research concerning North American Native people was in its infancy. In any event, he argued that the depopulation issue was irrelevant because population losses did not necessarily lead groups to abandon portions of their traditional territories. Regarding the evidence for private ownership, he contended that it was subsumed under communal title.[23] In the end, the ICC found Kroeber and his experts to be persuasive and the commissioners rejected the ecological theory put forward by the government's experts. Nonetheless, scholars subsequently used the defendant's methodology to portray the cultural geography of California Indians in a way that was a substantial departure from the culture area approach Kroeber had applied in 1925.[24]

Here it should be noted that the California claims were atypical for ICC claims in the sense that this state encompassed one of the few regions in the United States that had not been encompassed by historic treaties or conquered by force. Nonetheless, even in the areas where Indians had surrendered their land through treaties, 'use and occupancy' issues arose in claims disputes. This was because it served the government's interest to demonstrate that some areas had never been effectively used and occupied exclusively by any single group. In the American mid-west, for example, which had been blanketed by treaties in the nineteenth century, researchers debated whether tribal groups had ever lived in well-defined territories that they defended. Government witnesses also argued that often territories overlapped and that there were no-man's lands between some tribes where no group had effective control. Also, the mid-west and great plains regions were areas where substantial population migration had taken place on the eve of treaties. This historical fact raised other questions about land tenure. Most important, it raised the possibility that some of the groups

who signed treaties had not occupied lands long enough to have established ownership rights. Whereas the California claims drew very heavily on the extant cultural element survey database that had been created (mostly by Kroeber's students) before the 1950s, the mid-western claims' issues stimulated massive documentary research projects.[25]

Just as the ICC process was coming to an end, ethnohistorical data began to play an important role in Canadian claims litigation. This development was the consequence of the Canadian Supreme Court's 1973 ruling regarding the Aboriginal title suit of the Nisga'a of British Columbia. These people, like the majority of First Nations in the province, had not surrendered their lands through treaties. The court's divided judgment in this case, known as *Calder v. Regina,* made it clear that historical evidence could be highly relevant to the determination of outstanding title issues. However, litigants and their supporting researchers faced problems in the immediate aftermath of *Calder*. It was unclear what measures the courts would apply to ethnohistorical evidence. In 1980, an Aboriginal rights case went to trial in the Northwest Territories known as *Baker Lake v. Minister of Indian Affairs and Northern Development*. The trial judge ruled that Aboriginal plaintiffs making a title claim had to establish the crucial fact that their ancestors had been members of an organized society whose members had occupied a specific tract of territory to the exclusion of others. The trial judge stipulated further that the claimants' ancestors' occupation had to have been an established fact at the time England asserted its sovereignty. Significantly, the so-called 'Baker Lake test' was very similar to the one the ICC had applied. It remained an uncertain guideline in Canada during the 1980s, however, because *Baker Lake* was never appealed to higher courts.[26]

In the 1980s, the Gitxsan and Wet'suet'en of British Columbia launched a landmark title suit against the federal and provincial governments. When they did so another legal theory weighed heavily on claims litigation in Canada. This was the idea that any Aboriginal cultural practices that had been substantially modified, or created, as a consequence of interactions with Euro-Canadians were not eligible for legal protection. This belief, known as the 'frozen rights', or 'pizza Indian'[27] doctrine, held sway in Canada until 1990, when the Supreme Court rejected it in its *Regina v. Sparrow* judgment regarding the fishing rights of a British Columbia First Nation.[28] In *Sparrow*, the court decided that modern forms of traditional practices were entitled to legal protection. By this time, however, the massive *Delgamuukw* trial was in its final phase and most of the ethnohistorical evidence had been presented and examined.

A key problem with the Mahoney test, especially during the 'frozen rights' era, was that it was uncertain when effective British sovereignty had been established in many parts of the country. During the *Delgamuukw* trial, the assumption was that this event had taken place in British Columbia sometime between the arrival of Captain James Cook in 1778, and the creation of the colony of British Columbia in 1858 (or possibly later in more remote areas). This ambiguity precluded ethnohistorical experts from targeting their research to a specific date, which they were able to do in the California claims.[29] The result was that the Gitxzan and Wet'suet'en thought it was necessary to demonstrate that the land tenure system described by their hereditary elders and early nineteenth-century

Hudson's Bay Company traders was a pre-contact institution that had remained essentially unchanged until the late nineteenth century.

The ethnohistorical data that the Gitxsan and Wet'suet'en elders and expert witnesses collected and presented at trial supported this theory. Oral and documentary evidence showed that the ancestral Gitxsan and Wet'suet'en were members of houses of extended kinship groups (clans or clan segments). Hereditary chiefs led these residential-social units. These chiefs managed their respective house territories, each of which was clearly defined and defended against trespassers. The whole system was underpinned by a feasting (potlatch) system and customary laws — the *Adaawk* of the Gitxzan and the *Kungax* of the Wet'suet'en. The line of argument that the Gitxsan and Wet'suet'en elders and their experts advanced in support of their title claim was similar to the one Kroeber had used in the California Indian Claims, albeit they were not aware of this fact.[30]

In rebuttal, the Crown and its experts advanced an ecological theory of Gitxsan and Wet'suet'en cultural history that paralleled the one the United States Justice Department had used in various ICC cases. The Crown's primary ethnohistorical expert asserted that there was 'no conclusive evidence that suggests that, prior to the advent of European influence in the claim area, the Gitxsan and Wet'suet'en lineages and families identified ownership rights to large and precisely defined tracts of hunting territories'.[31] This expert conjectured that, before the arrival of the European, fur trade native territorial holdings 'were in all likelihood more limited in size, to include mainly the area surrounding villages'.[32] This was a more extreme, yet less sophisticated, cultural ecology theory than the one the defendant's experts put forward in ICC hearings. It was also a theory that was in harmony with the Aboriginal title perspectives of successive colonial and provincial British Columbia governments. It is noteworthy that the government's key ethnohistorical expert relied heavily upon the acculturation and cultural ecology theories of the pre-1980s ethnographic literature, particularly the work of Julian Steward and those who elaborated upon his ideas.[33] In contrast, the Gitxsan and Wet'suet'en commissioned massive oral and documentary research projects that brought to light a great deal of new information about their history.

In *Delgamuukw,* the crown also advanced another line of argument that had strong *terra nullius* overtones. Primarily through the cross-examination of the plaintiffs' experts, Crown attorneys dwelled on instances of inter-house and inter-village conflicts (mostly from the late nineteenth century) to suggest that hereditary chiefs had no real authority. The Crown's thesis was that the Gitxzan and Wet'suet'en lived in a Hobbesian world of chaos until British Columbia and Canada brought civilization and established order in the region.[34]

After presiding over 318 days of trial and having received over 50,000 pages of exhibits, British Columbia Supreme Court Justice Alan McEachern ruled that the Aboriginal interests, which the Gitxzan and Wet'suet'en held when the British asserted sovereignty (he chose 1846 as the date), 'were rights to live in their villages and to occupy adjacent lands for the purpose of gathering the products of the lands and waters for subsistence and ceremonial purposes. These aboriginal interests did not include ownership or jurisdiction over the territory.'[35] In other words, McEachern accepted the very narrow utilitarian perspective of

land use and title offered by the Crown's legal team and experts. The primary rationale he offered for doing so was that the Gitxzan and Wet'suet'en had always been a salmon-fishing people who located their villages near their fisheries. McEachern acknowledged that they did some hunting and trapping also, but he thought that 'there was no reason for them to travel far from their villages or rivers for this purpose, or to take more animals than were needed for their aboriginal subsistence'.[36] In 1997, the Supreme Court of Canada overturned McEachern's ruling and ordered a new trial, because the court ruled he had not given proper weight to the oral testimony of the elders.[37] In its landmark judgment, the Supreme Court also defined the parameters of Aboriginal title for the first time in Canada.[38]

In Australia, claims-oriented research began in a very different historical, anthropological and legal context. Here the settler society had overtly used the myth of *terra nullius* to dispossess the indigenous people. In fact, the concept had been enshrined as a fundamental legal doctrine until the High Court overturned it in *Mabo* 2 in 1992. When Aboriginal people took their first steps to challenge this regime in the 1960s, they turned to anthropologists for help. Although the developmental stage of Australian anthropology paralleled that of North America (and elsewhere) in that it had a salvage and cultural evolutionary orientation, its subsequent elaboration was substantially different. This was because of the dominant influence of British trained anthropologist, A.R. Radcliffe-Brown. Like Boas, Radcliffe-Brown rejected speculative evolutionary theories. However, whereas Boas advocated alternative approaches to culture history, most notably diffusion and migration studies, Radcliffe-Brown eschewed historical studies altogether believing they would, of necessity, always be highly conjectural.[39] Instead, he thought ethnologists should focus their attention on the surviving structural features of non-European societies.

From 1910 to 1952, Radcliffe-Brown played the leading role in establishing an ahistorical structural-functional focus for Australian anthropology. Although he was unwilling to make temporal speculations, he did not hesitate to make sweeping generalizations about the fundamental nature of Aboriginal societies based on very limited field data.[40] Of particular relevance to the later land claims struggles, from the early 1930s to the early 1950s, Radcliffe-Brown developed his classic anthropological model of Aboriginal societies. It had two key elements: (1) the exogamous local patrilineal totemic group, and (2) the 'horde', which he defined as the local residential land-using group that included unmarried female members and the wives of clansmen.[41] Each horde had a bounded estate.[42]

Beginning in the 1950s, and especially in the early 1960s, anthropologists began to question Radcliffe-Brown's characterization of the 'horde' and the universality of his model.[43] Nonetheless, anthropological experts presented it to the Supreme Court of the Northern Territory in 1971 in support of the Yolngu's landmark title suit (the Gove Land Rights case).[44] The problem was that the testimony of the ten Yolngu witnesses contradicted the experts' evidence. In the end, the trial judge dismissed the claim partly because of this conflict. Even more important, he believed that the Yolngu had failed to meet two crucial western legal proofs of proprietorship. They had not demonstrated that they held

exclusive rights to use and occupy their land and they could not alienate it. As the Australian anthropologist L.R. Hiatt observed afterward, the fundamental problem was that the Aboriginal ethic of generosity, and their spiritual bonds to the land, precluded their meeting the exclusivity standard of the court.[45] In other words, the court deemed Aboriginal land use practices to be incompatible with common law notions of proprietorship.

When the Australian Labor party decided to pass beneficial legislation to grant land rights to Aborigines for unalienated Crown lands in the Northern Territory, they appointed Mr Justice Woodward to hold an inquiry to determine the best way to proceed. He had been legal counsel for the Yolngu. The findings of the Woodward Commission guided the subsequent drafting of the Aboriginal Land Rights (Northern Territory) Act of 1976. This Act was loosely patterned after Radcliffe-Brown's model. Its key provisions allowed 'local descent groups' having common spiritual affiliations to a site, or complex of sites, and responsibility for them, to claim their extant reserves and the portions of their former estates that were included in unalienated Crown lands. The Act established a Land Commissioner to hear the claims and make recommendations to the government. Significantly, the nature of the Act meant that historical research did not form a significant component in the Northern Territory claims process. This was because the primary objective of claims proceedings was to determine if the surviving tenure systems of the claimant groups met the terms of the Act. The Act also required the commissioner to determine if the claimants retained significant attachments to their traditional lands. Thus, there were no extended discussions about the impact that contact had on local Aboriginal societies, even though historical information was gathered and the reports of the commissioners include thumbnail sketches of the post-contact histories of the various claim areas. In this way, the early claims process in Australia differed substantially from that of the United States and Canada, where it promoted ethnohistorical research that examined post-contact cultural change.

What the Northern Territory claims research did establish, however, was the fact that the Radcliffe-Brownian model was problematic. Hiatt expressed the view that none of the claims research undertaken in the Northern Territory after 1976 upheld the concept of the patrilineal horde. On the contrary, he thought this work 'even raised doubts as to whether patrilineality was always the pre-eminent qualification for ownership'.[46] Although Hiatt's views are rather extreme, research did show that the traditional model had largely ignored the rights of women and the reciprocal obligations that moieties had toward one another with regard to the protection of sacred sites and the performance of the crucial ceremonies that were associated with them. In other words, the land tenure system proved to be considerably more complex than Radcliffe-Brown and his predecessors had imagined. The first land commissioner, Justice John Toohey, came to understand this reality as he heard evidence in successive hearings. This led him to develop a more inclusive interpretation of the Act than had been anticipated, one which accommodated rights based on maternal affiliations.[47]

In the early 1980s, the scope of claims research began to reach beyond the Northern Territory when, in 1982, Eddie Mabo and others brought a suit against

the state of Queensland for Aboriginal title. This action ultimately resulted in the *Mabo* 2 decision by the High Court ten years later. By this time, the country's understanding of its colonial past was changing rapidly partly because of the political activism of Aboriginal people and the publication of revisionist histories, particularly the work of Henry Reynolds. In 1972, Reynolds published the first of a series of books that focused on the Aboriginal dimension of Australia's frontier history. He recounted colonial injustices to Aboriginal people and attacked the *terra nullius* legal doctrine.[48] For the ongoing claims struggle, his most important work was *The Law of the Land,* which first appeared in 1987. The High Court cited it extensively in *Mabo* 2.[49] So, in this instance, revisionist history within the academy helped pave the way for advances in Aboriginal rights litigation.

Hiatt and fellow anthropologist Bruce Rigsby have noted that the ever-widening reach of claims-oriented research in Australia has led to new understandings of Aboriginal land use and tenure systems.[50] The work has helped to demonstrate that there is far greater spatial diversity in Aboriginal social organization and tenure systems than Radcliffe-Brown imagined, or could be codified in a single law, such as was attempted in 1976. Claims work is also beginning to influence the methodologies of Australian anthropologists in ways that are similar to the impact that ICC-oriented research had on the history of American Indians. For instance, anthropologist Julie Finlayson notes that documentary evidence is playing an increasingly important role in native title cases in Australia.[51] This trend accelerated with the passage of the Native Title Act in 1993 and the amendment to this Act in 1998. This legislation calls for increased documentation from claimants about the basis and nature of their claims. The amended legislation required the Federal Court to adhere to the normal rules of evidence. It allows the court to take into account the cultural and customary concerns of Aboriginal peoples, but not to the undue prejudice of other parties to the litigation.[52] In other words, consideration has to be given to the rights of non-Aboriginal people. This calls for research into the local land-use histories of this group. Finlayson worries that the weighting of the oral evidence obtained from Aboriginal people will be diminished by these developments. She expressed the hope that the Supreme Court of Canada's *Delgamuukw* decision will lead the Australian courts to mitigate this threat. Perhaps it will. It should be noted, however, that the relative weight to be assigned to documentary and oral evidence remains a contentious issue in Canada in spite of *Delgamuukw.* It is being hotly contested in the massive *Victor Buffalo et al. v. Regina* treaty rights (Treaty 6) case that presently is at trial in Calgary. In this and other Canadian cases, the Crown is vigorously challenging the veracity of First Nations' oral histories when they conflict with the documentary histories of treaties, especially the accounts written by government officials.

In New Zealand, claims-oriented research began later than in Australia and North America. Although the Treaty of Waitangi Act of 1975 created the Waitangi Tribunal as an inquisitorial body to address Maori grievances against the state, the tribunal was not authorized to investigate historic claims (those originating before 1975) until parliament amended the Act in 1985. Of the four countries under review, New Zealand was the only one where the proprietary rights of the indigenous people had been recognized and theoretically protected in a single

pact that has English and Maori variants.[53] Most Maori claims arise from their belief that successive colonial and New Zealand governments failed to protect their proprietary interests in accordance with the spirit and terms of the Treaty of Waitangi. Given these circumstances, a major component of claims-oriented research has been concerned with interpreting the content and meaning of the 1840 accord. This focus has meant that historians have played a more central role in claims research in New Zealand than they have in Australia and North America, where social scientists, especially anthropologists, have remained the key players until very recently.[54]

Questions about how best to interpret the Treaty of Waitangi have raised fundamental philosophical and methodological issues for New Zealand historians. A central problem concerns the nature of the 1840 agreement. Was the treaty intended to be merely a hopeful expression about the potentialities of Pakeha-Maori relations in the new colony, or was it supposed to be a binding contract for all time? Another basic issue concerns the scope of treaty construction. Should the Treaty of Waitangi be narrowly or broadly construed? Those who opt for the former approach charge that the tribunal has adopted a 'common law' or 'juridical' outlook that seeks to deduce timeless principles from the treaty in order to use them to re-evaluate the country's colonial history and maximize the liability of the state. These critics argue that this approach leads the tribunal into the trap of engaging in 'counter-factual' history on the underlying presumption that government officials should have, and could have, been more effective in protecting Maori culture and their land base.[55] Liberal constructionists, on the other hand, emphasize that the treaty was a bi-cultural agreement. For them, this means that Maori understandings, as recorded in their oral and written histories, have to be taken into account.[56]

Treaty claims in Canada and the United States have raised the same fundamental issues, albeit in North America the search for resolutions is more complicated because the treaty-making process evolved over several centuries; it generated thousands of agreements; it unfolded under many different political jurisdictions; and it involved indigenous people who were (and are) much more culturally diverse than Maori. In Canada, the Supreme Court has ruled that treaties 'should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories'.[57] This represented a substantial departure from earlier practices of the courts, which involved approaching historic treaties as thought they were mostly 'plain on their face'. In other words, they had been narrowly construed. The primary result of the Supreme Court's dictum has been that claimants and defendants now commission research to place disputed treaties in their historical context. Since *Delgamuukw*, this entails considering oral as well as written records. As is the case with claims research in New Zealand, researchers often present sharply different interpretations about what treaty partners sought to obtain and what they thought they had achieved.

In New Zealand, historians have noted that one impact of claims research has been the reinvigoration of the study of racial and intercultural relations, particularly as they relate to land alienation and colonial settlement.[58] This work has emphasized the New Zealand Wars (1860–1872), the confiscatory New Zealand Settlement Act (1863), and the Native Land Court.[59] Of necessity, the interrelated topics of Maori economic life and land tenure systems before and

after contact have also received a lot of attention. When claims work began in the late 1980s, the state of anthropological knowledge on these issues was limited in many of the same ways (and for the same reasons) that it had been in Australia and North America when claims-oriented research commenced. Anne Salmond noted, for example, that before 1930, anthropologists were 'obsessed' with reconstructing traditional (pre-contact) Maori life and they were not interested in the dynamic aspects of Maori culture.[60] This was also the case with native studies in North America before the advent of the ICC and the subsequent rise of ethnohistory. Traditional (pre-claims) anthropological studies of Maori differed from those of the indigenous people of North America in one important respect, however. Maori economic life had received a great deal of attention because of the seminal influence of Raymond Firth. His 1929 work, *Primitive Economics of the New Zealand Maori,* is one of the great classics of economic anthropology.[61] The problem with Firth's work from the perspective of the Maori rights struggle is that, reflecting the time it appeared, it was cast in an evolutionary mold.[62]

Salmond noted that another problem with the early anthropological tradition in New Zealand was that it sought to create a general model of Maori culture.[63] In this respect it was more similar to the Radcliffe-Brownian tradition of Australia than the historical particularistic outlook that characterized early North American anthropology. Significantly, tribunal claims research shifted the focus of historians and anthropologists to individual tribes. This work also encouraged historians to become involved with Maori cultural history, a subject that previously had been mostly the domain of anthropologists.[64] To date, the results of this research are contained mostly in published and unpublished tribunal reports. The next task will be to synthesize it in a general ethnohistorical study.[65]

The introduction of ethnohistorical evidence into judicial and quasi-judicial proceedings has raised a host of issues. American anthropologist Julian Steward, who appeared as a government expert in several ICC cases, pointed out starkly in 1955, that this type of evidence has a high degree of plasticity because competing and evolving theoretical perspectives shape it.[66] Alan Ward has made a similar observation more recently. He noted that the increased emphasis on cognitive relativism in culture studies and history since the 1960s has compounded the problem of identifying, weighing and interpreting historical evidence.[67] Claims research, when undertaken and presented under adversarial circumstances, accentuates these difficulties by pushing scholars to the polarities of their academic discourses. This has meant that it is often not possible to reach the kinds of scholarly consensuses about the histories of indigenous peoples that tribunals and adjudicators desire and need. The problem is that the claims process has a destabilizing impact, at least in the short term, because it challenges many historical perspectives of indigenous people that are legacies of the colonial era. It does so primarily for two reasons. First, it has been a major catalyst for new research since the mid-twentieth century. One of the most fruitful and contentious areas of work has involved undertaking oral history research in indigenous communities. This evidence often poses major ethical and methodological issues for researchers, the courts and tribunals. Also, the need to give weight to this

evidence means that the academic and legal communities have been forced to listen to native voices. As Ward and others have noted, these voices often tell stories that challenge the conventional histories of settler societies.[68] Second, claims research has addressed, and continues to address, previously neglected topics, most notably, the economic histories of indigenous communities. For these reasons, I regard the claims litigation and resolution process as a creative force that has not only yielded positive benefits for indigenous people, but it has also enriched the study of their pasts.

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NOTES

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1 The legislation empowered the ICC to undertake its own research, but the commissioners did not do so. The plaintiffs and the defendant could appeal ICC rulings to the Unites States Court of Claims.

2 The most important cases decided by the United States Supreme Court were *Fletcher v. Peck,* 10 US 87 (1810), *Johnson v. McIntosh,* (1823), and *United States v. Santa Fe Pacific Railroad Co*., 314 US 339 (1941). With the exception of *Johnson v. McIntosh*, these decisions can be viewed at http://www.usscplus.com/online/case/hcase.asp?mpage=search. For *Johnson v. McIntosh* see, Henry Wheaton, *Wheaton's International Law 7th* edition, (London 1946), 543. The first two decisions held that Indian possession, prior to White settlement was not at issue. Although the United States held radical title within its jurisdiction, aboriginal title, which was collectively rather than individually held, had to be respected. It could only be alienated to the state by purchase or conquest. Until this had been done, land could not be legally granted to individuals.

3 Prior to the establishment of the ICC, this court handled legal disputes between Indians and the federal government. One of its most important decisions regarding historic treaties concerned the suit of the Choctaw Indians. This case was appealed to the United States Supreme court in *Choctaw Nation v. United States,* 119 US 1. The judgment can be viewed at http://www.usscplus.com/online/case/hcase.asp?mpage=search.

4 Alfred L. Kroeber, Nancy O. Lurie, Robert Manners, Verne Ray, Julian Steward and Ommer C. Stewart were among the leading experts whose work influenced the subsequent development of interdisciplinary approaches to Indian history.

5 ICC hearings involved two stages. In the first phase, the plaintiffs attempted to establish their claim. In the second phase, experts sought to place a market value on the lands in dispute at the time they had been alienated. Historians mostly took part at this stage.

6 One of the classic works of this period was Alfred L. Kroeber, *Cultural and Natural Areas of Native North America,* Berkeley, 1939.

7 Kroeber Papers, Series 4, Bancroft Library, University of California-Berkeley, BANC Film 2049 (hereafter Kroeber Papers) Reel 152, Folder 28, 1955, 'The land-holding group', 1.

8 ibid.

9 A.L. Kroeber, 'The Nature of the Land-holding Group', *Ethnohistory,* 2, 4 (1955), pp.303–14.

10 The United States gained sovereignty over the territory through this treaty. Ralph Luttrell to Alfred L. Kroeber, 6 August 1952, Kroeber Papers, Reel 150, Folder 7.

11 Kroeber's *Handbook of California Indians,* which was published in 1925 by the Smithsonian Institution Bureau of American Ethnology, was the definitive work on California Indians.

12 Locke developed the labour theory of property. See Barbara Arneil, *John Locke and America: The Defence of English Colonialism*, Oxford, 1996. Arneil notes that Sir William Blackstone was heavily influenced by Locke when he wrote his landmark work, *Commentaries on the Laws of England,* London, 1844.

13 Kroeber to Luttrell, 28 August 1952, Kroeber Papers, Reel 150, Folder 7.

14 He noted: 'In October ~~acorn~~ [strike-out in original] oak tracts ~~might be used~~ were likely to be camped in for **acorn gathering for** [bold indicates inserts in original] a month, but perhaps not visited the next year except by stray [unreadable strike out of two words] hunters. **A good** tar weed ~~patch~~ meadow ~~would~~ might be visited for seed gathering only for a **few** days ~~or two~~ [after he inserted 'few'] actually, ~~but that regularly. More deer~~ hunting would naturally be done within a mile or so of the river or stream on which the village stood, than several miles **off** [off replaced an unreadable one-word strikeout] in the bush; but the ~~latter~~ back tracts would also be used in spots which experience showed ~~were~~ favorable, or [an unreadable three-word insert]. Some groups lived in the home village [he inserted and struck out 'by a stream'] practically continuously; others lived there perhaps only the 4 wettest months ~~of the year~~ camping over the hills at any spring, the rest of the year following the seasons of the various wild crops and game.' ibid.

15 Luttrell had indicated that this was the Justice Department's goal. ibid.

16 ibid.

17 Arthur J. Ray, 'Kroeber and the California Indian Claims: Myth and Reality', unpublished paper presented to Anthropology/History Colloquium, University of Illinois-Urbana, October, 2001.

18 Ralph Linton, *The Study of Man: An Introduction,* New York, 1936, pp.209–11.

19 Their expert divided tribal territories into three zones: nuclear areas (settlement sites), intermediate areas (adjacent to settlements and continually used for subsistence), and outlying areas (used only occasionally). Stuart A. Chalfant, 'Ethnological Field Investigation and Analysis of Historical Material Relevant to Coeur d'Alene Indian Aboriginal Distribution: A Report', Defendant's Exhibit 13, Claim 81: 153. Research for this report began in the summer of 1952. 'Briefs and exhibit digests before the Indian Claims Commission' (microform), New York, 1976.

20 Sheree Ronaasen, Richard O. Clemmer, and Mary Elizabeth Rudden, 'Rethinking Cultural Ecology, Multilinear Evolution, and Expert Witnesses: Julian Steward and the Indian Claims Commission Proceedings', in Richard Clemmer, Daniel Meyers and Mary Elizabeth Rudden, eds, *Julian Steward and the Great Basin: The Making of an Anthropologist,* Salt Lake City, 1999, pp.171–2.

21 This concept was articulated in Julian Steward, 'The Concept and Method of Cultural Ecology', in *Theory of Culture Change: The Methodology of Multilinear Evolution,* Urbana, 1955, pp.30–42.

22 He advanced this line of argument on behalf of the Justice Department and against the Shoshone before the Indian Claims Commission. In this case, he argued that the claimants' ancestors had not developed a sufficiently complex society to facilitate the development of notions of land ownership. Also, the resources that the Northern Shoshone relied upon were too meagre. See Ronaasen, pp.176–8.

23 Ray, 2001.

24 Subsequently, Ralph Beals and Joseph Hester published the government's expert report. See Ralph Beals and Joseph Hester, *Indian Land-use and Occupancy in California,* 3 vols, New York, 1974. Robert Heizer, who was a co-witness with Kroeber for the Indians, subsequently adopted the approach. See ch.3: 'Ecological Types of California Indian Cultures' in Robert Heizer and Albert B. Elsasser, *The Natural World of the California Indians,* Berkeley, 1980.

25 For this purpose, the United States Justice Department funded the Great Lakes and Ohio Valley Ethnohistorical Survey project at Indiana University. The first three editors of the journal *Ethnohistory* were associated with this project.

26 According to Stuart Rush, chief counsel for the Gitxsan and Wet'suet'en, there was almost a complete lack of judicial guidance on the tests to prove title in Canada until the SCC issued its appeal judgment in *Delgamuukw* in 1997. Personal communication, September 2001.

27 It came to be known more popularly as the 'pizza Indian' doctrine on the assumption that Indians who ate this very popular food were acculturated and had ceased to be aboriginal.

28 The court acknowledged that traditional rights could exist in modern forms.

29 In his trial judgment, Chief Justice of the Supreme Court of British Columbia, Allan McEachern held that it took place between 1803 and 1858. *Delgamuukw v. Regina: Reasons for Judgment,* Supreme Court of British Columbia, Smithers Registry 0843, 8 March 1991, viii.

30 The documentary evidence was presented by Robert Galois, 'The History of the Upper Skeena Region, 1850–1927', unpublished report, February 1989 and Arthur J. Ray, 'Fur Trade History of Gitxzan and Wet'suet'en Territory', Proceedings At Trial, Supreme Court of British Columbia, Smithers Registry No. 0843, 20 March 1989, Exhibit Number 963.

31 Sheila Robinson, 'Protohistoric Developments in Gitksan and Wet'suet'en Territories', unpublished report, 12 May 1987, p.5.

32 ibid., p.6.

33 The following works were most central to the Crown's case: Vernon Kobrinsky, 'The Tsimshianization of the Carrier Indians', in *Problems in the Prehistory of the North American Subarctic: The Athabaskan Question,* Calgary, 1977, pp.201–10; Charles A. Bishop, 'Limiting Access to Limited Goods: The Origin of Stratification in Interior British Columbia', in *The Development of Political Organization in Native North America*, Proceedings of the American Ethnological Society, New York, 1979, pp.148–61; Julian Steward, 'Recording Culture Changes among the Carrier Indians of British Columbia', *Explorations and Field Work of the Smithsonian Institution in 1940*, Washington, 1941 and Julian Steward, 'Carrier Acculturation: The Direct Historical Approach', in Jane C. Steward and Robert F. Murphy, eds, *Evolution and Ecology: Essays on Social Transformation*

by Julian Steward, Urbana, 1977, pp.188–201. This essay originally appeared in Stanley Diamond, ed., *Culture in History: Essays in Honor of Paul Radin*, New York, 1961, pp.732–44.

34 A.J. Ray, 'Creating the Image of the Savage in Defense of the Crown: The Ethnohistorian in Court', Special Issue, *Native Studies Review*, 6, 2 (1993), pp.13–28.

35 *Delgamuukw v. Regina: Reasons for Judgment*, ix.

36 ibid., viii.

37 In 1996, in *R. v. Van der Peet,* the Supreme Court of Canada established the principle that courts must give due consideration to this line of evidence in aboriginal rights' cases.

38 *Delgamuukw v. British Columbia,* 1997. The court held: 'Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures'.

39 A.R. Radcliffe-Brown, 'Review: The Diffusion of Culture in Australia', *Oceania, 1* (1930), pp.366–70.

40 Adam Kuper, *The Invention of Primitive Society: Transformations of an Illusion*, London, 1988, p.174. According to Kuper, like Maine and Bronislaw Malinowski before him, Radcliffe-Brown was attracted to the study of the indigenous people of Australia in the belief they had 'primitive societies'.

41 L.R. Hiatt, *Arguments About Aborigines: Australia and the Evolution of Social Anthropology,* Cambridge, 1996, p.22. Hiatt provides an excellent history of the use of term horde, pp.20–26. The term was first used by the evolutionary anthropologists L. Fision and A. Howitt, who had strong ties with American anthropologist Lewis Henry Morgan.

42 Another excellent synopsis of the history of this concept is available in John Reeves, QC, *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, 2nd ed., Canberra, 1998, 'Chapter 7: Traditional Aboriginal Owners and Anthropology'.

43 Hiatt, pp.20–26. As early as the 1930s, anthropologist Olive Pink raised questions about the universality of Radcliffe-Brown's model by pointing out that men played obligatory roles in the ceremonial affairs of their mothers' territories. Reeves, pp.133–4.

44 Hiatt, p.28.

45 ibid., p.29. Anthropologist Nancy Willams has written an excellent account of the trial and its significance for Aboriginal people. See Nancy Willams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition*, Canberra, 1986.

46 Hiatt, p.31.

47 Mr Justice Toohey discusses the evolution of his thinking in the early claims cases in *Report by The Aboriginal Land Commissioner for the Year Ended 30 June 1981*, Canberra, 1982, pp.3–4.

48 His first book was a collection of early observers' and writers' accounts of Aborigine-newcomer relations and documents pertaining to government policies. Henry Reynolds, *Aborigines and Settlers: The Australian Experience, 1788–1939*, Melbourne, 1972.

49 Henry Reynolds, *The Law of the Land*, Ringwood, 1987 (reprinted 1992).

50 Bruce Rigsby, Department of Anthropology and Sociology, University of Queensland, personal communication, September 2001.

51 Julie Finlayson, 'Sustaining Memories: The Status of Oral and Written Evidence in Native Title Claims', in J. Finlayson, B. Rigsby and H.J. Bek, *Connections in Native Title: Genealogies, Kinship and Groups,* Centre for Aboriginal Economic Policy Research the Australian National University, Research Monograph No. 13, Canberra, 1999, pp.89–90.

52 *Native Title Amendment Act 1998*, No.97, 1998. Section 82 states '(1) The Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders. . . . (2) In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings.'

53 Issues regarding effective use and occupancy arose nonetheless. In the Ngai Tahu claim, for instance, they arose regarding Maori and Pakeha understanding of the term mahinga kai. These were tracts that were supposed to be reserved for the Maori. Colonial officials defined them as plantations or cultivated lands, a definition that the Ngai Tahu claimants regarded as being too narrow. The claimants considered that mahinga kai included all food gathering/producing areas. Waitangi Tribunal, *The Ngai Tahu Report*, Wellington, 1991, I, pp.66–7.

54 In North America, in recent years, claims-oriented research has ceased to be the almost

exclusive domain of anthropologists. In *Delgamuukw* the trial judge stated that anthropological experts were not needed. In fact, he questioned their reliability in terms of their basic methodological approach of participant observation. This was a shocking statement to anthropologists who immediately expressed their outrage.

55 W.H. Oliver, 'The Future Behind Us: The Waitangi Tribunal's Retrospective Utopia', in A. Sharp and P. McHugh, eds, *Histories, Power and Loss: Uses of the Past — A New Zealand Commentary*, Wellington, 2001, p.11.

56 See, for example, Ann Parsonson, 'The Fate of Maori Land Rights in Early Colonial New Zealand: The Limits of the Treaty of Waitangi and the Doctrine of Aboriginal Title', in Diane Kirkby and Catherine Coleborne, eds, *Law, History, Colonialism: The Reach of Empire*, Manchester, 2001, pp.173–89 and M.P.K. Sorrenson, 'Giving Better Effect to the Treaty: Some thoughts for 1990', *New Zealand Journal of History* (NZJH), 24, 2 (1990), pp.135–49. Michael Belgrave has noted that academic history programmes mostly have not provided historians with the language skills and training in oral history research that they need to undertake tribunal research. Michael Belgrave, 'Something Borrowed, Something New: History and the Waitangi Tribunal', in Bronwyn Dalley and Jock Phillips, eds, *Going Public: The Changing Face of New Zealand History*, Auckland, 2001, p.97.

57 Relevant treaty cases are: *Simon v. R.*, 1985, *R. v. Sioui,* 1990, *R. v. Badger, 1996* and *R. v. Marshall,* 1999.

58 Constance Backhouse, Ann Curthoys, Ian Duncanson and Ann Parsonson, '"Race", Gender and Nation in History and Law', in Kirkby and Coleborne, pp.283–4.

59 An example is David V. Williams, *'Te Kooti tango whenua': the Native Land Court 1864–1909*, Wellington, 1999, pp.7–29.

60 Anne Salmond, 'The Study of Traditional Maori Society: The State of the Art', *Journal of the Polynesian Society,* 92, 3 (1983), p.316.

61 Raymond Firth, *Primitive Economics of the New Zealand Maori*, 2nd edn, Wellington, 1959 (1929).

62 This practice is still commonplace in economic history and economic anthropology, especially by those scholars who have a neo-Marxian perspective.

63 Salmond, p.316.

64 Erik Olssen, 'Where to From Here?: Reflections on the Twentieth-Century Historiography of Nineteenth-Century New Zealand', NZJH, 26, 1 (1992), p.64. Olssen notes that a very few historians had begun this work in the 1970s, most notably Ann Parsonson and Judith Binney.

65 Alan Ward, *An Unsettled History: Treaty Claims in New Zealand Today*, Wellington, 1999, p.171. Ward notes that the tribunal has produced 30 major reports since 1985 and that there are an additional 29 unpublished reports. Michael Belgrave also notes that little of the tribunal evidence has found its way into the academic literature. Belgrave, 'Something Borrowed, Something New', p.102.

66 Julian Steward, 'Theory and Application in a Social Science', *Ethnohistory* 4 (1955), p.300.

67 Alan Ward, 'History and Historians before the Waitangi Tribunal: Some Reflections on the Ngai Tahu Claim', NZJH, 24, 2 (1990), pp.157–8.

68 ibid., p.163.