Indigenous Rights Litigation, Legal History, and the Role of Experts

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Litigation involving the rights of Indigenous peoples in Canada usually involves historical facts and events from a long time ago, sometimes as far back as 400 years.¹ This reality presents significant challenges for proof of the facts upon which these rights are based. In addition to historical documents, the parties have to rely on testimony by Indigenous witnesses who are able to present the oral histories and traditions of their people, as well as on the opinion evidence of experts such as archaeologists, anthropologists, linguists, historians, ethnohistorians, and legal historians. In this paper, I examine the role of legal historians in Indigenous rights cases, using the example of one academic in particular as an illustration. But first it is necessary to distinguish between law and history because, as a general rule, expert witnesses cannot testify and offer opinions on applicable domestic law. In the common law system, domestic law is within the purview of judges and not a matter of evidence.² So where is the line

¹ See e.g. R v Adams, [1996] 3 SCR 101, 138 DLR (4th) 657 where the accused had to prove that fishing for food in Lake St Francis in what is now Quebec had been a practice, custom, or tradition integral to the Mohawks’ distinctive culture at the time of contact with the French in 1603.

² Domestic law is the law of the jurisdiction where the case is being tried (see Ron Delisle, Don Stuart & David Tanovich, Evidence: Principles and Problems, 9th ed (Toronto: Carswell, 2010) at 387-89; David M Paciocco & Lee Stuesser, The Law of Evidence, 6th ed (Toronto: Irwin Law, 2011) at 186). Foreign law and local custom (including the laws and customs of Indigenous peoples) are not part of the domestic law that a judge is assumed to know and so they generally do have to be proven by expert testimony (see Adrian Keane, James Griffiths & Paul McKeown, The Modern Law of Evidence, 8th ed (Oxford: Oxford University Press, 2010) at 33,
between law and history to be drawn in the context of legal proceedings involving Indigenous rights?

In attempting to answer this question, one needs to take account of a debate, originating mainly in New Zealand and Australia, over the place and appropriate use of history in Indigenous claims, especially, but not limited to, claims involving lands and resources. Although this debate has not yet had the same impact in Canada, an attempt

526-27). I am grateful to my colleague, Benjamin Berger, for helping me understand the role of expert witnesses and the distinction between current domestic law and law that belongs to the legal history of a particular jurisdiction.

In Australia, this debate arose mainly out of Mabo v Queensland (No 2), [1992] HCA 23, (1992) 175 CLR 1 [Mabo], in which the High Court decided that the denial of non-statutory Indigenous land rights by Australian governments and courts for 200 years was legally wrong and no longer acceptable.


to give it more traction here is being made by Dr. Paul McHugh (a prominent academic from New Zealand who teaches at Cambridge University) in his published work and, more significantly, as an expert witness for the Crown as a legal historian in Indigenous rights cases in Canada. Because I am concerned about the way in which McHugh is attempting to influence the development of Canadian law in relation to Indigenous rights, I have structured this paper around an analysis and critique of his views on the use of history in this context. In doing so, I hope to shed light on the distinction between history and law and the proper role of legal historians in Indigenous rights cases.

I. THE DISTINCTION BETWEEN HISTORY AND LAW
It is trite to observe that historians and lawyers approach and use history in different ways. Historians are generally interested in history for its own sake; they study and try to understand and illuminate the past. McHugh describes this as the “scientific” or “disinterested” approach to history. Legal historians likewise seek to shed light on the past, specifically by revealing the place of the law and the role of legal practitioners in given social and political contexts. McHugh describes the legal historian’s task as involving “the disinterested retrieval and recounting of a past that is specifically or, rather, primarily legal in character. Basically, it is an enquiry into how law has operated in the past.” Of course one can dispute how disinterested historians in general and legal historians in particular really are, given that no one, in my opinion, can be entirely disengaged from political perspective, cultural worldview, and personal bias.

7 My criticisms of Paul McHugh’s views are intellectual and academic. I have known him since 1980 when we were both at the University of Saskatchewan, and respect him as a person and a scholar while disagreeing with him fundamentally on some issues.


9 McHugh, Aboriginal Title, ibid at 274. See also Frederick Bernays Wiener, “Uses and Abuses of Legal History: A Practitioner’s View” (Selden Society Lecture, delivered at the Old Hall, Lincoln’s Inn, 29 March 1962), (London: Bernard Quaritch, 1962): “legal history itself is essentially a record of changing rules and doctrines” (ibid at 16).

10 Witness the “history wars” that have raged during the past twenty years over the proper interpretation of Australia’s past, in particular with regard to the treatment of the Indigenous peoples. In addition to works cited in supra note 5, see e.g. Bain Attwood, Telling the Truth About Aboriginal History (Crows Nest, NSW: Allen & Unwin, 2005); Lorenzo Veracini, “A Prehistory of Australia’s History Wars: The Evolution of Aboriginal History during the 1970s and 1980s” (2006) 52:3 Australian Journal of Politics and History 439; Bain Attwood & Tom Griffiths, eds,
theory, however, the role of the historian is to shine an objective light on the past.\textsuperscript{11}

Lawyers, on the other hand, take a more instrumental approach: they are interested in using history to help resolve present-day disputes. To do this, they tend to search the past selectively for facts and precedents that can be used and applied to the legal problems they are trying to solve. McHugh refers to this practical use of the past as “presentism,” which he defines as “use of the past for present purposes”:\textsuperscript{12}

The common lawyer’s use of the past is, therefore, seen through the lens of the present, which renders the questions and issues for the resolution of which the past is the primary resource. The report of that past is marshalled around the demands presently being made of the law.\textsuperscript{13}

I agree with McHugh that lawyers make practical use of the past by “seeing [it] in terms of the requirements of the present.”\textsuperscript{14} However, I think he fails to adequately distinguish between the use lawyers make of history and the use they make of law. These are entirely different inquiries. As stated by F.W. Maitland, in a passage McHugh quotes, one has to be very careful not “to mix up two different logics, the logic of authority, and the logic of evidence.”\textsuperscript{15} Maitland was distinguishing here between the logic employed by lawyers who look to the past for precedents to resolve contemporary legal disputes and the logic used by legal historians who are interested in evidence of how the law was understood and applied in the past. Immediately after quoting this statement, McHugh observes that Maitland (along with A.V. Dicey)\textsuperscript{16} was “sure that the historian required evidence and was concerned with questions of origin and what ‘was,’ matters that

\textit{Frontier, Race, and Nation: Henry Reynolds and Australian History} (Melbourne: Australian Scholarly, 2009).

\textsuperscript{11} See Attwood, “History, Law and Narrative,” \textit{supra} note 5 at 20: “With works of history, the author undertakes to represent the past as truthfully to that time as he or she can.” On the attainability of this goal, see William Twining, \textit{Rethinking Evidence: Explanatory Essays} (Oxford: Basil Blackwell, 1990), ch 4 at 103-112. For detailed discussion of the distinction between history and law in the context of Indigenous peoples’ rights, see Promislow, \textit{supra} note 6.

\textsuperscript{12} McHugh, \textit{Aboriginal Title}, \textit{supra} note 8 at 275.

\textsuperscript{13} \textit{Ibid.}

\textsuperscript{14} \textit{Ibid.} at 276. See also Allan C Hutchinson, \textit{Evolution and the Common Law} (Cambridge: Cambridge University Press, 2005) at 6.

\textsuperscript{15} “Why the History of English Law is not Written” in HAL Fisher, ed, \textit{The Collected Papers of Frederic William Maitland} (Cambridge: Cambridge University Press, 1911) vol 1, 480 at 491, quoted in McHugh, \textit{Aboriginal Title}, \textit{supra} note 8 at 274.

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...did not strictly concern the lawyer." Now if McHugh means by this that lawyers (unlike legal historians) are generally not concerned with how law operated in the past, but only with how it applies in the present, I think he is right. But regarding the facts of history, as opposed to "legal" history, lawyers are just as concerned as historians with what "was," as every case must have a factual basis that depends on what actually happened in the past.

In a courtroom, history is a matter of fact, part of Maitland's "logic of evidence," that has to be either proven by testimony and documentary sources or accepted through judicial notice. Lawyers will, of course, search the past for historical evidence that supports their client's case; this is part of their professional obligation. But they can also expect their opponent to do the same. Neither side intends to present an entirely disinterested historical account to the court. Instead, both are advocates trying to convince the court that history (i.e. the facts) favours their client's case. Judges, however, are in a different position. They are supposed to be disinterested and impartial, and (in the absence of a jury) make findings of historical fact to the best of their ability based on the evidence presented by both sides.

McHugh contends that, given their goal of seeking certain solutions for current legal problems, lawyers tend to decontextualize and oversimplify history. He also accuses them of failing to distinguish adequately between legal argument supporting Aboriginal title today and the historical foundations for that title. In a particularly sarcastic passage, he writes:

Those unable to apprehend the distinction between the legal and historical foundation of aboriginal title have

17 McHugh, Aboriginal Title, supra note 8 at 274.
18 Paraphrasing Maitland in the sentence immediately before the one quoted at supra note 14, McHugh writes that "Maitland saw the common lawyer's interest in the past as no more than a trawling for the authority of precedent" (Aboriginal Title, ibid). But it seems to me that this trawling exercise relates to the "logic of authority," not to the "logic of evidence" that relates to relevant historical facts that are of equal interest to lawyers.
21 See R v Marshall, [1999] 3 SCR 456 at para 37, 177 DLR (4th) 513, Binnie J.
22 "Lawyers seek to allay anxiety about the contingency of the present, and the future, and do so by removing it from their account of the past" (McHugh, Aboriginal Title, supra note 8 at 284).
tended to be lawyers, wedded (blinker, more like) to the declaratory theory’s belief that contemporary doctrine articulates eternal verities as available to past (though, of course, less clever) actors as themselves—re-educating the dead, as Bartleson [sic] put it.23

But I think McHugh himself fails to take sufficient account of the distinction between law and historical fact. In formulating a common law doctrine of Aboriginal title, lawyers have sought legal precedents from the past that would support Indigenous land claims today. These precedents are part of the historical development of the common law itself; they are not “eternal verities” that lawyers discover in the present and inappropriately apply to the past.

To better understand the nature of my disagreement with McHugh, we need to examine the declaratory theory more carefully. Simplistically stated, the theory is that common law judges do not make law, they just “discover” and declare it.24 In Parker v. British Airways Board,25 Lord Donaldson put it this way: “As a matter of legal theory, the common law has a ready-made solution for every problem and it is only for the judges, as legal technicians, to find it.”26 But, as he went on to observe,

[the reality is somewhat different. Take the present case. The conflicting rights of finder and occupier have indeed been considered by various courts in the past. But under the rules of English jurisprudence, none of their decisions binds this court. We therefore have both the right and the duty to extend and adapt the common law in the light of established principles and the current needs of the community. This is not to say that we start with a clean sheet. In doing so, we should draw from the experience of the past as revealed by the previous decisions of the courts.27

So while the view that the declaratory theory is “fiction” is not entirely incorrect,28 the theory does not depend on, as McHugh put it, a “belief

23 Ibid at 283. The reference is to Jens Bartelson, A Genealogy of Sovereignty (Cambridge: Cambridge University Press, 1995) at 57.
25 [1982] 1 All ER 834 at 836, [1982] 2 WLR 503 (CA) [Parker].
26 Ibid. The Parker case involved a dispute over entitlement to a gold bracelet between the finder of it (Parker) and the occupier of the premises where it had been found (British Airways).
27 Ibid.
28 However, classifying the theory as fiction does not mean it has no legitimate place in the common law. Fictions are very much a part, in some instances a necessary
that contemporary doctrine articulates eternal verities." Common law methodology is much more nuanced than that. In deciding cases where the law is still uncertain (which is usually the situation in appeal courts), judges do, as Lord Donaldson stated, properly consider "previous decisions," "established principles," and "the current needs of the community." The common law is neither divorced from, nor rigidly tied to the past. These observations apply as much to the doctrine of Aboriginal title as to the rest of the common law.

And yet McHugh seems to think that the articulation in the 1990s of the common law doctrine of Aboriginal title by the highest courts in Australia and Canada in particular was "presentist" and ahistorical in the sense that the judges constructed new law and then applied it backwards to a time when Indigenous peoples had no legal rights to their traditional lands. He states:


See also *Harrison v Carswell*, [1976] 2 SCR 200 at 218, 62 DLR (3d) 68 [Harrison], per Dickson J: "The duty of the Court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts."


A judge, in laying down a rule to meet these situations [where there is no precedent to guide the decision of the court], is certainly making a new contribution to our law, but only within limits, usually well defined. If he has to decide upon the authority of natural justice, or simply "the common sense of the thing" [(Pearce v Gardner, [1897] 1 QB 688 (CA) at 690 (Lord Esher MR))], he employs that kind of natural justice or common sense which he has absorbed from the study of law and which he believes to be consistent with the general principles of English jurisprudence.

tribes’ land was vested in the Crown as sovereign and that any aboriginal interest was protected by and through the Crown. This was an expression of the feudal doctrine of tenures according to which all enforceable legal title to land derived from a Crown grant...The reasoning ran that since tribal occupation did not rest upon a Crown-derived basis and remained un-granted land, the tribe had no land rights of which a common law court might take cognizance.32

While this feudal basis for denying Indigenous land rights in the Crown’s settled colonies did indeed have resonance in Australia prior to the High Court’s 1992 decision in Mabo33 and was relied upon by Justice Blackburn of the Northern Territory Supreme Court in 1971 in Milirrpum v. Nabalco Pty. Ltd.,34 the legal status of Indigenous land rights in Canada remained an open question35 until all doubt was removed in 1973 by the Supreme Court’s acknowledgement of the legality of these rights in Calder v. British Columbia (Attorney-General).36

But beyond pointing out that the law in relation to Indigenous land rights in the nineteenth and most of the twentieth centuries was not as settled as McHugh seems to think,37 the argument I want to

32 McHugh, Aboriginal Title, supra note 8 at 111. In reality, however, even in England it was recognized early on that the doctrine of tenures does not have a factual basis. The fiction of Crown grants was a “supposition in law” invented to explain and support the feudal doctrine of tenures. See Charles Yorke, Considerations on the Law of Forfeitures, for High Treason, 4th ed (London: J Williams, 1775) at 64-65. See also William Blackstone, Commentaries on the Laws of England (Oxford: Clarendon Press, 1765-69) vol 2 at 51; Joseph Chitty, A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject (London: Joseph Butterworth & Son, 1820) at 211.
33 Supra note 3.
34 (1971) 17 FLR 141, [1972-73] ALR 65. For an argument based on English precedent and legal principle predating British colonization (see works cited in supra note 28), that the Australian courts prior to Mabo, ibid, misunderstood the fictional nature and colonial relevance of the doctrine of tenures, see Kent McNeil, “A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?” (1990) 16:1 Monash UL Rev 91 [McNeil, “Question of Title”].
35 See e.g. the differences in opinion and the inconclusive pronouncements on Aboriginal title expressed by the judges of the Supreme Court of Canada and Privy Council in St Catharines Milling and Lumber Co v The Queen (1887), 13 SCR 577 and St Catherine’s [sic] Milling and Lumber Co v The Queen, [1888] UKPC 70, 14 App Cas 46 [St Catherine’s Milling].
36 [1973] SCR 313, 34 DLR (3d) 145 [Calder]. Importantly, the majority of the Supreme Court in Calder decided that, although Aboriginal title entailed legal rights, it was not justiciable because the plaintiffs had not obtained permission from the Crown to bring legal action against it.
make is broader, going to the very nature of judicial decision-making
and the vital distinction between fact and law. If I understand him
correctly, McHugh is suggesting that, in the context of Indigenous
land rights, common law doctrine did not exist until the latter part
of the twentieth century when it was created by judges who ignored
the historical context and applied the doctrine retroactively to an
earlier time. In my opinion, this is not the way the common law
works. Rather, when cases involving unresolved legal questions
come before the courts, judges are obliged to say what the law is, but
as Lord Donaldson explained in the Parker decision they are not
working in a legal vacuum.38 Just because a legal issue has not yet
been resolved by a court does not mean there is no law in relation
thereto.39 On the contrary, the matter may not have gone to court
because legal practitioners were in no doubt about the relevant law.
Or, as where Indigenous land rights are concerned, the people who
might have asserted the rights in court were unable to do so because
they did not understand the legal system,40 did not have the financial
resources to hire lawyers, or were legally prevented from litigating,
either by Crown immunity from suit41 or by discriminatory laws such

38 McHugh acknowledges that the late twentieth-century Indigenous land rights
decisions were not made “in a legal vacuum,” but nonetheless maintains that
“they represented a paradigm shift and the assertion by the courts of a new role
in what until then had been the mostly non-justiciable” (McHugh, Aboriginal
Title, supra note 8 at 31).

39 See Baker, Law’s Two Bodies, supra note 28 at 59-90.

40 See Manitoba Métis Federation Inc v Canada (Attorney General), 2013 SCC 14 at paras
note 8 at 190: “By the mid nineteenth century, tribes were becoming better versed
in the ways of Anglo-settler polity and had they been able to enforce a common
law aboriginal title against the Crown, then surely that would have happened.”

41 In the common law, the Crown could not be sued in its own courts without its
consent, which is why the Nisga’a Nation’s claim to Aboriginal title in Calder,
supra note 36, was dismissed by the majority of the Supreme Court of Canada (see
Foster, “Not O’Meara’s Children,” supra note 37 at 70-79). This Crown immunity
has been removed by statute in the United Kingdom and Canada (see the Crown
Proceedings Act, 1947, (UK), 10 & 11 Geo VI, c 44; Petition of Right Amendment Act,
SC 1951, c 33; Crown Proceedings Act, SBC 1974, c 24; Walter Clode, The Law and
Practice of Petition of Right under the Petitions of Right Act, 1860 (London: William
Clowes and Sons, 1887); H Street, Governmental Liability: A Comparative Study
(Cambridge: Cambridge University Press, 1953) at 1-7; Peter W Hogg, Patrick J
as the section of the Canadian Indian Act enacted in 192742 that made it an offence, absent written permission from the Superintendent General of Indian Affairs, for anyone to solicit or receive funds from Indians to pursue any of their claims.43 Or, as in the case of the Milirrpum decision in Australia, a trial judge may have misapplied the common law,44 though this did not become apparent until the High Court overruled that decision in Mabo.

This brings me back to the distinction between fact and law. In a common law court, history is a matter of fact. In cases involving Indigenous rights, lawyers and judges treat it as such. In Aboriginal title and treaty claims in Canada, for example, lawyers often spend huge amounts of time presenting historical evidence to the court through witnesses, and trial judges devote large portions of their judgments outlining their factual findings.45 The lawyers and judges are also completely aware that legal argument about the applicable law is distinct from factual evidence about history. They understand that the relevant domestic law is not a matter of history that has to be proven by evidence, but depends instead on Maitland’s “logic of authority.” This is not to say that the common law has a ready-made solution to every novel issue that arises in the context of Indigenous claims. But the common law, along with equity, does contain principles and precedents honed over centuries of development that are relevant to Indigenous claims. For example, in applying to Aboriginal title claims the common law rule that a person in occupation of land has a title derived from the occupation, the Supreme Court in Delgamuukw v. British Columbia46 simply acknowledged the relevance to these claims of a long-standing common law rule that predated

42 An Act to Amend the Indian Act, SC 1926-27, c 32.
43 Ibid, s 6, continued in the Indian Act, RSC 1927, c 98, s 141, repealed by the Indian Act, SC 1951, c 29, s 123(2). If the Crown’s legal advisers in early twentieth-century Canada were so sure that Indigenous peoples had no legal rights to their traditional lands, why did the Parliament of Canada bother to enact this provision? Professor Paul Tennant, in his book Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989 (Vancouver: UBC Press, 1990) at 112, provides this answer, referring to the sponsors of the amendment after detailing the history leading up to it: “[T]heir intent was to prevent all land claims activity and, above all, to block the British Columbia claim from getting to the Judicial Committee of the Privy Council.” The timing of the amendment was significant: the Privy Council, in Amuda Tijani v Secretary, Southern Nigeria, [1921] 2 AC 399, 90 LJPC 236, had decided that the land rights of the Africans in the British colony of Southern Nigeria continued after Crown acquisition of sovereignty, and the Allied Tribes in British Columbia planned to rely on this decision in legal action (see Foster, “Not O’Meara’s Children,” supra note 37 at 79-84).
44 See McNeil, “Question of Title,” supra note 34.
45 See e.g. Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700, [2008] 1 CNL R 112; Keewatin v Ontario (Minister of Natural Resources), 2011 ONSC 4804, [2012] 1 CNL R 13, both currently on appeal to the Supreme Court of Canada.
46 [1997] 3 SCR 1010 at paras 114, 149, 153 DLR (4th) 193, Lamer CJC [Delgamuukw].
European colonization of North America.\textsuperscript{47} Similarly, when the Supreme Court in \textit{Guerin v. The Queen}\textsuperscript{48} decided that the Crown owes fiduciary duties to First Nations in relation to reserve lands held by the Crown for their benefit, the judges were adapting and applying principles of equity that for centuries had governed the dealings of trustees with land held in trust for beneficiaries.\textsuperscript{49} In these cases the Supreme Court was doing exactly what Lord Donaldson in \textit{Parker} said judges have both the right and duty to do, namely “to extend and adapt the common law [or equity as in \textit{Guerin},] in the light of established principles and the current needs of the community.”\textsuperscript{50} In the context of Indigenous rights, “current needs” identified by the Supreme Court include the present-day need to reconcile the prior presence of Indigenous peoples in North America with the assertion of sovereignty by the Crown.\textsuperscript{51} The Court has also taken account of the need to adapt existing law to the unique circumstances of Indigenous peoples. In \textit{Guerin}, Justice Dickson (as he then was) held that the Crown’s obligation to First Nations is trust-like, but the relationship is not a true trust. This permitted him to apply fiduciary principles from trust law to the Crown-First Nation relationship, while at the same time acknowledging that “the fiduciary obligation which is owed to the Indians by the Crown is \textit{sui generis},” given “the unique character both of the Indians’ interest in land and of their historical relationship with the Crown.”\textsuperscript{52}

I think McHugh would contend that \textit{Guerin}, for example, changed the law by replacing the discretionary, non-justiciable authority that government officials in the past had exercised over First Nation lands with legally enforceable obligations because, in his view, the dealings of representatives of the Crown with Indigenous peoples prior to what he calls “the breakthrough cases” of the 1970s through the 1990s were political rather than legal.\textsuperscript{53} In reality, however, the case is an illustration of one reason why the Crown had not been held legally accountable for wrongful dealings with First Nation lands in the past. In the 1950s, officials of the Department of Indian Affairs negotiated a long-term lease of Musqueam reserve

\textsuperscript{47} On the common law origins of this rule, see Kent McNeil, \textit{Common Law Aboriginal Title} (Oxford: Clarendon Press, 1989), 6-78.
\textsuperscript{48} [1984] 2 SCR 335, 13 DLR (4th) 321 \textit{[Guerin]}.
\textsuperscript{49} In my view, Dickson J (as he then was), delivering the principal judgment in \textit{Guerin, ibid}, consistently followed the description of the adjudicative function that he had provided in \textit{Harrison, supra note 30}.
\textsuperscript{50} \textit{Supra} note 25 at 836.
\textsuperscript{52} \textit{Guerin, supra note 48} at 387.
\textsuperscript{53} McHugh, \textit{Aboriginal Title, supra note 8} at 20-24, 27-31, 107, and quotation accompanying \textit{infra} note 71.
lands to a golf club. The Musqueam were induced to surrender the lands to the Crown for this purpose, but were misled by those government officials over the terms of the lease and were unable to obtain a copy of it from Indian Affairs until 1970, after which they commenced their legal action against the Crown. The Supreme Court decided that the Crown owes fiduciary obligations to First Nations in the context of surrenders of reserve lands, and that the Indian Affairs officials had breached these obligations almost thirty years earlier by not providing the Musqueam with accurate information and by proceeding with a lease that was not in their best interests.

In the Guerin decision, the Supreme Court did not purport to create “new law” in 1984 and apply it retroactively to actions of the Crown in the 1950s. Instead, the Court ruled that the relevant fiduciary principles already existed in the 1950s and then applied them to surrenders of reserve lands. So it was not an absence of law that prevented the Musqueam from suing the Crown earlier, but rather lack of access to justice caused in large part by the wrongful actions of government officials acting on behalf of the Crown, which actions also led the Court to hold that the legal proceedings were not barred by limitation periods. Moreover, the fact that the government officials seem to have thought they had discretion that was unfettered by law (the Crown argued this in Guerin) was irrelevant, as it must be in a constitutional monarchy governed by the rule of law where it is up to the courts, not the executive branch of government, to determine what the law is.

II. LEGAL HISTORIANS AS EXPERT WITNESSES
As mentioned above, McHugh has not limited his expression of opinion on the absence of earlier law in relation to Aboriginal title and on Crown discretion to his academic publications. He has been saying the same thing even more forcefully as an expert witness for the Crown in Canadian cases. The tenor of his testimony in Chippewas of Sarnia Band v. Canada (Attorney General), for example, was summarized by the Ontario Court of Appeal:

One Crown expert, Dr. Paul Gerald McHugh, posits that the government of the day did not regard the Royal

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54 For an illuminating account of the history leading up to the legal proceedings and detailed analysis of the judgments, see James Reynolds, A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples (Saskatoon: Purich, 2005) at 25-125.
55 Guerin, supra note 48 at 384.
56 See Estick v Carrington (1765), 19 St Tr 1029, 95 ER 807 (CP); Roncarelli v Duplessis, [1959] SCR 121, 16 DLR (2d) 689. The classic work on the rule of law is Dicey, supra note 16, first published in 1885 during the period when McHugh contends that there was no “law” governing Crown-Indigenous relations in North America.
57 [1999] 40 RPR (3d) 49, 88 ACWS (3d) 278 (Ont Sup Ct J).
Proclamation [of 1763] as being operative even before the passage of the Quebec Act [1774]. According to his evidence, it would appear that instructions as to the treatment of Indians, including the formalities for the surrender of Indian lands, were treated as an ongoing exercise of the royal prerogative. He further asserted that while the spirit of the Royal Proclamation was respected in that all surrender procedures were to be of a public nature, the specific procedure in each case was a matter to be determined on a case-by-case basis by the Governor in Council.5

In that case, the Court of Appeal declined to express an opinion on the legal status of the Royal Proclamation,59 while observing that “[t]here can be little doubt that from the aboriginal perspective, the Royal Proclamation was perceived as an authoritative and enduring statement of the principles governing their relationship with the Crown.”60

More recently, McHugh was an expert witness in Ross River Dena Council v. Canada (Attorney General),61 decided by the Yukon Supreme Court in 2012 but overturned by the Yukon Court of Appeal in May of the following year.62 The case involves the legal status and

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58 195 DLR (4th) 135 at para 200, [2001] 1 CNLR 56 [Chippewas of Sarnia], leave to appeal to SCC refused, [2001] 3 SCR vi. See also McHugh, “Politics of Historiography,” supra note 8, commenting on this case. Compare Brian Slattery, The Land Rights of Indigenous Canadian Peoples (Saskatoon: University of Saskatchewan Native Law Centre, 1979); Walters, supra note 29 at 826, 831.

59 The Court nonetheless held, on the authority of its own decision in Ontario (Attorney-General) v Bear Island Foundation, 58 DLR (4th) 117, [1989] 2 CNLR 73, aff’d on other grounds [1991] 2 SCR 570, 83 DLR (4th) 381, that “the surrender provisions of the Royal Proclamation were revoked by the Quebec Act, 1774, RSC 1985, App. II, No. 2” (Chippewas of Sarnia, ibid at paras 19, 206-219). With all due respect, this is doubtful (see Kent McNeil, “The High Cost of Accepting Benefits from the Crown: A Comment on the Temagami Indian Land Case”, Case Comment (1992) 1 CNLR 40, reprinted in Emerging Justice? Essays on Indigenous Rights in Canada and Australia (Saskatoon: University of Saskatchewan, Native Law Centre, 2001) 25 at 42-44 [McNeil, Emerging Justice?!).

60 Chippewas of Sarnia, ibid at para 201. See also Alain Beaulieu, “‘An Equitable Right to Be Compensated’: The Dispossession of the Aboriginal Peoples of Quebec and the Emergence of a New Legal Rationale (1760-1860)” (2013) 94:1 The Canadian Historical Review 1.

61 2012 YKSC 4, [2012] 2 CNLR 276 [Ross River YSC].

62 2013 YKCA 6, [2013] 4 CNLR 355 [Ross River YCA]. The Court of Appeal decided that the trial judge should not have severed the issue of the justiciability of Canada’s undertakings in the context of the Rupert’s Land and North-Western Territory Order, 23 June 1870, in RSC 1985, App II, No 9 [Rupert’s Land Order], from the other issues in the case, and so sent the matter back to be tried as a whole. The case has been set down for trial in September, 2014.
application of the following undertaking by the Parliament of Canada in relation to the transfer of Rupert's Land and the North-Western Territory to Canada in 1870:

And furthermore, that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.63

This undertaking (hereinafter the “equitable principles undertaking”) was one of the terms and conditions under which the Queen transferred these territories to the newly-created Dominion of Canada by the *Rupert's Land and North-Western Territory Order*, 1870, which due to s. 146 of the *Constitution Act*, 1867,64 has the force and effect of an Imperial statute and forms part of the Constitution of Canada.65 Justice Gower stated the following threshold question to be addressed in this context: “Were the terms and conditions referred to in the *Rupert's Land and North-western Territory Order* of June 23, 1870 concerning ‘the claims of the Indian tribes to compensation for lands required for purposes of settlement’ intended to have legal force and effect and give rise to obligations capable of being enforced by this Court?”66 It was in regard to this question, and in particular on the legislative intention and executive understanding at the time regarding the legal enforceability of this undertaking, that McHugh acted as an expert witness.67

During cross-examination, McHugh was asked whether he agreed with the Ontario Court of Appeal in *Chippewas of Sarnia* that the Royal Proclamation of 1763 “has been consistently cited in the case

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63 Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada, 16 and 17 December 1867, Schedule A to the *Rupert's Land Order*, *ibid* at 8.
64 (UK), 30 & 31 Vict, c 3, reprinted in *RSC 1985, App II*, No 5.
65 See Schedule to the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, listing the documents acknowledged by s 52(2)(b) to be part of the Constitution of Canada.
66 *Ross River YSC*, *supra* note 61 at paras 2, 6.
67 Dr. McHugh was asked by Canada to provide an expert opinion on the historical context of the *1870 Order* to assist this Court in determining the intention of Parliament in including terms about Aboriginal peoples. He was also asked to address the legal understanding of the Crown's role at the time of the *1870 Order* and to provide an account of how the *Order* would have been understood as a legal instrument at that time.

*ibid* at para 81.
law from the earliest times as the defining source of the principles governing the Crown in its dealing with the Aboriginal people of Canada.”

He responded:

“The word is principles...Principles are not rules. Principles—you see, we’re getting into an argument here about—I’m resisting the suggestion that you’re making it historically. There was a perception that they were externally enforceable standards that could be brought to bear against the Crown for the conduct of its relations with First Nations. That is a suggestion you are making, it seems to me, and that I’m resisting, in the period that we’re looking at, because historically there was no perception that there were externally enforceable standards that could be brought to bear against the Crown.”

In his judgment at trial, Justice Gower observed that “the evidence of Dr. McHugh on this point, which I discuss below and find to be credible, casts doubt on the current justiciability of the Royal Proclamation, notwithstanding its inclusion in the Constitution of Canada, at s. 25.”

In his Expert Report, McHugh addressed the issue of the justiciability of Aboriginal title claims generally prior to the decisions of the Supreme Court of Canada in the late-twentieth century:

In the late-nineteenth century (and for most of the twentieth), the Crown’s relations with tribes in respect of their land “rights” were conceived as a matter of non-justiciable executive grace in the sense that the “trust” and “guardianship” duties avowed by the Crown, including the practice of obtaining formal cessions of their land, were regarded as having a high moral character not enforceable directly through court process... It was not until the courts developed the common law doctrine of Aboriginal title from the 1970s onwards that those collective land rights

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68 Ibid at para 44, quoting Chippewas of Sarnia, supra note 58 at para 201.
69 Ibid at para 45 [emphasis added].
70 Ibid at para 47 (the reference is to s 25 of the Constitution Act, 1982. Compare R v Marshall; R v Bernard, 2005 SCC 43 at para 86, [2005] 2 SCR 220 (not cited in Ross River YSC, supra note 61), where McLachlin CJC stated that “the Royal Proclamation must be interpreted in light of its status as the ‘Magna Carta’ of Indian rights in North America and Indian ‘Bill of Rights’: R. v. Secretary of State for Foreign and Commonwealth Affairs, [1982] 1 Q.B. 892 (C.A.), at 912.” How, one might ask, can the Royal Proclamation be the Magna Carta of Indian “rights” if its provisions are not legal? See also Campbell v Hall (1774), 98 ER 1045, Lofft 655 (KB) [Campbell], on the constitutional impact of other provisions in the Proclamation.
and associated Crown obligations became justiciable.

The Crown recognized the land rights of tribes and negotiated for their cession but these practices were undertaken as a matter of executive grace rather than from any legal imperative compelling this treaty-making. These relations engaged Crown beneficence and guardianship but they were never regarded as justiciable or enforceable by legal process—a possibility that the state of legal art could not admit (until the late-twentieth century).\(^7\)

McHugh apparently thinks that, because (in his view) Crown officials from the time of the Royal Proclamation of 1763 to long after the issuance of the *Rupert’s Land Order* did not regard Aboriginal title claims as justiciable,\(^7\) the Parliament of Canada, in formulating its

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\(^7\) *Ross River YSC*, *supra* note 61 at paras 84-85 (Evidence, Paul McHugh’s Expert Report at paras 9-10 [McHugh’s Report]). See also para 20 of McHugh’s Report. *Compare Connolly v Woolrich* (1867), 17 RJRQ 75, 11 LCJ 197 (Qc SC), aff’d *Johnstone v Connolly* (1869), 17 RJRQ 266, 1 CNLC 151 (Qc CA) [Connolly], where Monk J stated that, after French and British assertions of sovereignty in the interior of North America, “the Indian political and territorial right, laws, and usages remained in full force” (*ibid* at 87 [emphasis added]). See discussion in Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993) at 5-8. See also a speech given by the Earl of Dufferin, Governor General of Canada, at Government House, Victoria, British Columbia, 20 September 1876:

> [T]here has been an initial error ever since Sir James Douglass [sic] quitted office [in 1864], in the Government of British Columbia neglecting to recognize what is known as the Indian title. In Canada this has always been done: no Government, whether provincial or central, has failed to acknowledge that the original title to the land existed in the Indian tribes and communities that hunted or wandered over them. Before we touch an acre we make a treaty with the chiefs representing the bands we are dealing with, and having agreed upon and paid the stipulated price, oftentimes arrived at after a great deal of haggling and difficulty, we enter into possession, but not until then do we consider that we are entitled to deal with a single acre.


Contrast Earl of Dufferin’s Speech, *ibid* at 210: “I consider that our Indian fellow-subjects are entitled to exactly the same civil rights under the law as are possessed by the white population, and that if an Indian can prove a prescriptive right of way to a fishing station, or a right of any other kind, that right should no more be ignored than if it were the case of a white man.” McHugh might contend that this statement applies only to the private rights of *individual* Indians, not to *communal* Indian land rights (see McHugh, *Aboriginal Societies*, *supra* note 29 at 155, where this kind of distinction is made), but in fact, the context makes clear that the Governor General had the communal rights of the Indigenous peoples of British Columbia in mind (see passage in *supra* note 71).
Address in 1867 and the Queen in approving the terms and conditions contained therein in 1870, cannot have intended the equitable principles undertaking to have legal force.73

One can dispute McHugh's opinion on the views of Crown officials at the time on this issue of the legal status of Indigenous land rights and the equitable principles undertaking.74 But even if one agrees

73 At one level, McHugh is right when he asserts that Crown undertakings in the Royal Proclamation and the Rupert's Land Order were not justiciable in the sense that they were not enforceable in the Crown's courts. This is because, prior to the enactment of Crown liability statutes in the United Kingdom and Canada from the middle of the twentieth century, no one's rights were enforceable in court against the Crown without the Crown's consent (see supra note 41). However, from his academic writing and expert testimony McHugh's position seems to be that Aboriginal land rights and Crown promises in regard thereto were non-justiciable, not just because there were jurisdictional barriers preventing their enforcement in court, but because they were not legal (I think this is apparent from his reliance on the royal prerogative and his use of terms such as "executive grace" (see supra notes 58 and 71). I am grateful to Professor Hamar Foster for reminding me of the important point that rights can be legal without being justiciable. For example, some statutes of limitation bar an owner of personal property from going to court to recover for wrongful taking (e.g. conversion) after the limitation period has passed, but do not extinguish the owner's legal title (see Miller v Dell, [1891] 1 QB 468, 60 LJQB 404 (CA); Barberree v Bilo (1991), 126 AR 121, 84 Alta LR (2d) 216 (QB); Eileen E Gilles, Property Law: Cases, Text and Materials, 2d ed (Toronto: Emond Montgomery, 1990) at 3:38-3:39). See generally Lorne M Sossin, Boundaries of Judicial Review: The Law of Justiciability in Canada, 2d ed (Toronto: Carswell, 2012).

74 See e.g. Frank J Tough, "Aboriginal Rights Versus the Deed of Surrender: The Legal Rights of Native Peoples and Canada's Acquisition of the Hudson’s Bay Company Territory" (1992) 17:2 Prairie Forum 225. See also Report of the Minister and Deputy Minister of Justice for Canada to the Governor General (19 January 1875) in which the authors expressed their "duty to assert such a legal or equitable claim as may be found to exist on the part of the Indians" (ibid [emphasis omitted]) in British Columbia where, apart from the Vancouver Island treaties entered into in the 1850s, land cessions had not been obtained. On their recommendation, Canada disallowed a provincial statute, An Act to Amend and Consolidate the Laws Affecting Crown Lands in British Columbia, 1875, 38 Vict, c 65 because it did not respect Indian rights (Ross River YSC, supra note 61 at paras 53-58 quoting Report, ibid). In cross-examination on this report, McHugh is recorded in the judgment as opining that, "notwithstanding the language used by the two law officers, there was no pattern of matters of Aboriginal title being enforced in courts at that time and that this particular Report was 'not indicative of a general understanding' in that regard" (ibid at para 57). But how could a "pattern of matters of Aboriginal title being enforced in courts" emerge when Indigenous peoples had no knowledge of such a possibility and no capacity to commence legal action? Even in the first important case involving Aboriginal title in Canada, St Catherine's Milling, (supra note 35) in the 1880s, there were no Indigenous parties or witnesses. Nonetheless, despite McHugh's opinion to the contrary (see Ross River YSC, supra note 61 at paras 120-26), the St Catherine's Milling case confirms the legal uncertainty over Indian land rights expressed by the law officers of the Crown in their 1875 Report. In that case, Canada argued that, "inasmuch as the proclamation [of 1763] recites that the territories thereby reserved for Indians had never 'been ceded to or
with him on this issue (which I do not), the question remains: why are the views of Crown officials even relevant to this issue of legal status? To answer this, we have to know whose opinions are being considered. While this is not clear from the extensive references to McHugh’s testimony by Justice Gower in his judgment in the Ross River case, McHugh’s Report reveals that he relies largely on a dispatch in relation to the Rupert’s Land transfer dated 10 April 1869, from the Colonial Secretary, Earl Granville, to Sir John Young, the Governor General of Canada, in which Granville referred to the “uncertain rights” of the Indian tribes and the “obligations” of Canada to protect them in face of “the advance of civilized man.” Beyond this “evidence” of the perception of Crown officials in his Report, in McHugh’s oral testimony as explicitly relied upon by Justice Gower one finds only vague statements, such as “historically there was no perception that there were externally enforceable standards that could be brought to bear against the Crown” and “the Crown’s relations with tribes in respect of their land ‘rights’ were conceived as a matter of non-justiciable executive grace.”

These statements raise the questions of whose “perception” is being referred to and who (besides Earl Granville, as questionably purchased by’ the Crown, the entire property of the land remained with them” (St Catherine’s Milling, ibid at 54). Although the Privy Council rejected that argument while declining to express an opinion on exact nature of Indian title, the fact Canada would make such an argument reveals that there was sufficient doubt in the 1880s over the legal nature of Aboriginal land rights for Crown counsel to think the argument was worth making and might be accepted. Indeed, Lord Watson observed that “[t]here was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right” (ibid at 55), confirming that the Indians did have a right to the land but revealing disagreement over the nature thereof.


Compare my perspective on this dispatch in McNeil, “Fiduciary Obligations”, supra note 75 at 329-30: “Earl Granville thus foresaw the dangers to the Indian tribes inherent in the transfer of the two territories to Canada, and impressed on the Governor General that Canada would have an obligation to protect them against these dangers.” I then present reasons why this obligation is not just legal, it is constitutional. See also McNeil, Canada’s Constitutional Obligations, supra note 75.

Ross River YSC, supra note 61 at paras 45, 85. See text accompanying supra notes 69, 71, for quotations containing these phrases. In his Report, McHugh does provide a couple of specific examples of opinions expressed by executive officers in the 1830s that relations with the Indian tribes in British North America were a matter of royal prerogative (supra note 71 at paras 37, 51).
McHugh evidently does not have Indigenous people in mind, despite the fact that they seem to have generally regarded promises made to them by the Crown as binding. Nor does he seem to have judges in mind, as he points out that the issue of the justiciability of Indigenous land rights was not judicially determined in Canada until the latter part of the twentieth century, in decisions that reveal that the perception upon which he relies was legally erroneous. Nor does McHugh point to legislation as the source of this perception, as he apparently uses the alleged perception to determine the intention of the Imperial and Canadian Parliaments in 1867-70, rather than the other way around. In other words, he concludes that it cannot have been the intention of these Parliaments for the equitable principles undertaking to be legally enforceable because the perception at the time was that the land rights of the Indigenous peoples were “a matter of non-justiciable executive grace.” So the perception McHugh alleges to be present in the historical record is the perception, not of the judicial or legislative branches of the Imperial and Canadian


80 See McHugh's Report supra note 71. See also Ross River YSC, supra note 61 at para 57, quoted in supra note 74. In McHugh's Report, ibid at paras 48-49, he gives one example of a decision by Robinson CJ of the Upper Canada Queen's Bench in Doe d Sheldon v Ramsey (1852), 9 UCQB 105, 3 NBR 259, holding that the Haldimand Grant to the Six Nations in 1784 did not create a legal right to the granted land, but that decision involved the court's assessment of Governor Haldimand's authority and intention in making the grant, not a judicial determination of Aboriginal rights (see Walters, supra note 29 at 831, n40). Surprisingly, in his Report McHugh does not mention Connolly, supra note 71, a well-known and directly relevant case decided just five months before the Parliament of Canada included the equitable principles undertaking in its Address to the Queen, where Monk J expressed the view that the “territorial right” of the Indian tribes in Rupert's Land remained in full force after Crown assertion of sovereignty. Monk J also held that Indigenous laws, including laws relating to marriage, remained in full force in Rupert's Land in 1803 (133 years after the Hudson's Bay Company Charter) and were a source of rights enforceable in Canadian courts.

81 See Calder, supra note 36; Guerin, supra note 48; Delgamuukw, supra note 46. McHugh's Report, supra note 71 at paras 9-10, as quoted in Ross River YSC, supra note 61 at paras 85. See text accompanying supra note 71.
governments, but mainly of Earl Granville and other members of the executive branch, as clairvoyantly revealed by McHugh.83

This takes us back to the rule of law: from the constitutional crisis in England in the seventeenth century, Parliament and the common law courts emerged supreme over the executive. As Chief Justice Coke had decided in the Proclamations Case,84 the Crown, acting executively (i.e. without the authorization of Parliament), does not have the constitutional authority to change or make law.85 Consequently, the rights of British subjects, including their land rights, are protected by the common law against executive action, or, to put it another way, against the prerogative of the Crown.86 Yet McHugh seems to think that Crown dealing with the communally-

83 Even if McHugh is right (which is highly questionable, see supra notes 72-75) that there was a consensus among Crown officials in the nineteenth century that Indigenous peoples in Canada had no legal land rights, one needs to keep in mind the cautionary words of Justice Hall (dissenting on other grounds) in Calder, supra note 36 at 346:

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species.

In other words, to the extent that past perceptions of Indigenous peoples’ rights were based on erroneous factual assumptions, they can have no validity. For a stark example, consider Chancellor Boyd’s trial decision in the St Catharines case, where he described Indigenous people not living on reserves variously as “wild,” “primitive,” “untaught,” “uncivilized,” “rude,” and “degraded,” apparently without evidence being presented in court to substantiate this assessment (R v The St Catharines Milling and Lumber Co (1885), 10 OR 196 at 211, 227-28). After admitting that “little is known of the people in this remote region” (the area of Treaty 3, entered into in 1873), he nonetheless concluded that most of them were “a more than usually degraded Indian type” (ibid at 227). For discussion connecting his judgment with discredited nineteenth-century theories of the evolution of human societies from “barbarism to civilization” (ibid at 228), see Kent McNeil, “Social Darwinism and Judicial Conceptions of Indian Title in Canada in the 1880s” (1999) 38:1 Journal of the West 68.

84 (1610), 12 Co Rep 74, 77 ER 1352 (KB).


86 See Field v Boethsby (1657), 2 Sid 137 at 140, 82 ER 1298 (KB): “The prerogative of the King will not destroy or prejudice the property of the subject.” See also Nichols v Nichols (1576), 2 Pi Com 477 at 487, 75 ER 711 (CP); Attorney-General v De Keyser’s Royal Hotel, Ltd, [1920] All ER Rep 80 at 106-107, [1920] AC 508 HL (Eng); Eshugbayi Eleko v Office Administering the Government of Nigeria, [1931] All ER Rep 44 at 49, [1931] AC 662 (PC).
held lands of the Indigenous peoples was a matter of royal prerogative, not governed by law. He bases this conclusion, not on a denial that Indigenous people were British subjects and therefore not protected by the common law at the relevant time, but rather on the perception that they had no legal rights to these lands. This, on McHugh's own admission, was not the result of judicial determination or legislative enactment. Rather, he opines that it was the view of the executive, whose officers did not conceive that the Indians could have legal rights. But since does the perception of the executive in relation to legal rights determine the law? While this may have been the attitude of the seventeenth-century Stuart kings of England, it was also a major reason why one was beheaded in 1649 and another deposed in 1688; their views of kingship and prerogative power were out of touch with the constitutional monarchy that England had become.

So whatever the views of executive officers of the Crown on the land rights of Indigenous peoples in British North America, those views, to the extent they can be ascertained from the historical record, are matters of fact, not law. However, McHugh did extrapolate from those views and arrive at legal conclusions in relation to two issues in particular. First, as we have seen, he testified that there was no intention at the time of the Rupert's Land transfer that the equitable

87 Ross River YSC, supra note 61 at paras 57, 150; McHugh, “Politics of Historiography,” supra note 8 at 189-95.
88 McHugh, “Politics of Historiography,” ibid at 189, 193. For confirmation that Indigenous people living within the Dominions of the Crown were regarded as British subjects at the time, see Earl of Dufferin's Speech, supra note 71 at 210, quoted in supra note 72.
89 See also McHugh, Aboriginal Societies, supra note 29 at 155-56.
90 See McHugh, “Politics of Historiography,” supra note 8.
91 See Theodore T Plucknett, Taswell-Langmead's English Constitutional History: From the Tectonic Conquest to the Present Time, 11th ed (Boston: Houghton Mifflin, 1960) at 328-460. As discussed in Dicey, supra note 16, parliamentary sovereignty and the rule of law prevailed over prerogative power. See also Blackstone, supra note 32, vol 1 at 136-37, 226-32; Chitty, supra note 32 at 7-9. Compare McHugh's Report, supra note 71 at para 54, stating that, at the time of the Rupert's Land transfer in 1870, "the idea of a constitution as a substantive normative constraint upon governmental authority had not taken hold." Nor can it be argued that the constitutional protections of the rights of British subjects did not apply in the colonies, for in settled colonies, and conquered and ceded colonies where the common law had been introduced or a legislative assembly had been promised or created (see Campbell, supra note 70), the royal prerogative was subject to the same constitutional constraints as in England. See Chitty, ibid at 25-39, stating at 32-33 that, if the charter granted to the subjects of a colony "be silent on the subject it cannot be doubted, but that the King's prerogatives in the colony are precisely those prerogatives which he may exercise in the mother country...Where the colonial charters afford no criterion...the common law of England, with respect to the royal prerogative, is the common law of the plantations".
principles undertaking would be legally enforceable. Justice Gower accepted this opinion, stating that on “the intention of the Canadian Parliament when the 1867 Address was drafted and the intention of the Imperial Parliament when the 1870 Order was enacted,” he “generally accepted Dr. McHugh’s expert opinion evidence that the relevant provision [the equitable principles undertaking] was not intended to have justiciable legal force and effect.” Secondly, McHugh stated repeatedly that there was no law in relation to Indigenous land rights in what is now Canada during the period under consideration. On both these issues, one needs to ask whether his testimony went beyond the permissible scope of expert testimony, as legislative intention and the existence of domestic law are legal, not factual, matters. If McHugh’s testimony as a legal historian related only to a matter of domestic law as it existed in the past, arguably it would come within Maitland’s “logic of evidence” as historical “fact.” However, if the law in the past is the law that the court is being asked to apply in the present to the case before it, then testimony on that law could cross over into Maitland’s “logic of authority,” taking it outside the scope of expert testimony. If, for example, the question before the court involves the interpretation of legislation that is still in force and that relates to the matter before the court, the legislative intent is a matter of domestic law that is up to the judge to determine, regardless of when the statute was enacted.

92 See Ross River YSC, supra note 61 at paras 94-106.
93 Ibid at para 136. Note, however, that the Rupert’s Land Order was issued by the Queen, not enacted by Parliament, though the Order had effect as if it “had been enacted by the Parliament of the United Kingdom” (Constitution Act, 1867, supra note 64, s 146).
94 Ross River YSC, supra note 61 at para 139.
95 Ibid at paras 45, 57, 84-86, 107, 129, 132-33. See also McHugh’s Report, supra note 71 at para 55.
97 In Willick v Willick, [1994] 3 SCR 670 at 699, 119 DLR (4th) 405, L’Heureux-Dubé J, in relation to interpretation of provisions of the Divorce Act, RSC 1985, c 3 (2nd Supp), stated: “The task of statutory interpretation requires that courts discover the intention of Parliament”; see also ibid, Sopinka J at 679-680. Legislative intent is ascertained from the context, purpose, and text of a statute (including the grammatical and ordinary sense of the language used), and from the application of rules of statutory interpretation, not from trying to determine the factual, subjective intent of the members of the legislature (see Randal N Graham, Statutory Interpretation: Theory and Practice (Toronto: Emond Montgomery Publications, 2001) at 18-20; Ruth Sullivan, Statutory Interpretation, 2d ed (Toronto: Irwin Law, 2007) at 32-33, 37-42; Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27, 134
III. THE COMMON LAW TRADITION

Of course McHugh is entitled to express an opinion as an academic, though probably not as an expert witness, on the existence of Canadian law in relation to Indigenous land rights. As we have seen, he has done this in his published work, denying that there was any such law prior to what he calls “the breakthrough cases” in the last 40 years or so. From his opinion that there was no law follows his conclusion that there were no legal rights. But how do we know there was no law? McHugh says this was the perception of the Crown’s executive officers, but as we have seen they do not have the constitutional authority to determine whether law and rights exist; they can only express opinions on the matter. Since McHugh must be aware of this fundamental limitation on executive authority arising from the constitutional separation of powers, I think his conclusion that there was no law on the matter until recently necessarily rests on his cursory dismissal of the declaratory theory of law, as he seems to think there was no law in relation to Indigenous land rights until a court decision or competent legislature acknowledged those rights and gave them legal force. He regards those who hold a contrary view as “wedded (blinkered, more like) to the declaratory theory” of law. As discussed above, one does not have to adhere to a Platonic conception of the declaratory theory to realize that non-statutory law can exist before judges articulate it in particular cases. Nor does one need to resort to natural law theories or Dworkinian conceptions of fundamental rights, though these are relevant and can influence

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98 See McHugh, Aboriginal Title, supra note 8 at 29-31 and quotation accompanying supra note 32. Note that this denial applies to the law of the Canadian state; McHugh is not denying that Indigenous peoples have land rights under their own laws.

99 See McHugh, “Politics of Historiography,” supra note 8 at 173.

100 McHugh, Aboriginal Title, supra note 8 at 283, quoted supra note 23. See also ibid at 282, 310; McHugh, Aboriginal Societies, supra note 29, where he says that this “notion of immanence according to which all law is already and previously made” stems from “whiggish or presentist technique” (ibid at 18).

101 One can also point to local custom that must have been in existence long before declared by judges to be legally enforceable, presumably from the time Richard I became king in 1189. See Allen, supra note 31 at 129-46, especially at 130: “if a custom is proved in an English court by satisfactory evidence to exist and to be observed, the function of the court is merely to declare the custom operative law”.

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judicial decision-making. The common law itself is a rich body of principles and precedents that can be and are adapted and applied in new contexts virtually every time an appeal court makes a decision. Moreover, as the influential English legal historian Brian Simpson has pointed out, it is often impossible to identify the case in which a particular principle or rule was first articulated. Rather, like the English language, the common law developed out of custom and usage, with authority to formulate the law on an ongoing basis assigned to the judiciary:

Formulations of the common law are to be conceived of as similar to grammarians' rules, which both describe linguistic practices and attempt to systematize and order them; such rules serve as guides to proper practice since the proper practice is in part the normal practice; such formulations are inherently corrigible, for it is always possible that they may be improved upon, or require modification as what they describe changes.

Though McHugh might deny it, I think his argument that Indigenous land claims were not legal before the latter part of the twentieth century is an extreme positivist position that is contrary to the common law tradition. For him, it seems that law does not exist until made by a legislature or court (i.e. by command of the legislative or judicial arm of the sovereign state). Jeremy Bentham, whose forceful positivism has influenced generations of legal theorists


105 See McHugh, *Aboriginal Societies*, supra note 29 at 18-20, where he links whiggish thinking, the declaratory theory, and positivism, apparently disapproving of each of them.

106 On the rejection of the declaratory theory by positivists, see Wesley-Smith, supra note 24 at 74-75.
in England from John Austin\textsuperscript{107} to H.L.A. Hart\textsuperscript{108} and beyond, was of like mind, leading him to question the very existence of the common law “as a system of general rules,” since for him there could be no law in relation to a particular matter until created by a judge or legislature.\textsuperscript{109} This led Bentham to conclude that the exercise of judicial power in England is arbitrary.\textsuperscript{110} After asserting that judges “make the common law,” he used an extreme analogy to describe the judicial process: “Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me.”\textsuperscript{111} While Bentham’s scepticism about the common law may seem excessive, he does have a point; if no law exists before a judge decides a case on a particular matter, the judge’s decision is necessarily retroactive to the facts of the case that transpired previously,\textsuperscript{112} and in that sense the decision is arbitrary. One can view the declaratory theory of law as an answer to Bentham, though of course the theory pre-dates the writings of the famous positivist.\textsuperscript{113} But if one discards the theory entirely, one does have to confront the problem of the retrospective nature of judicial law-making,\textsuperscript{114} which Bentham did by proposing the codification of English law, as happened with French private law during his lifetime when the Napoleonic Civil Code was created, largely out of Roman law.

Short of replacing the common law with an English equivalent of the Civil Code, jurisdictions that adhere to the common law tradition are obliged to accept the reality that judicial decisions can have retroactive effect for the litigants in the case before the court.\textsuperscript{115} This does not mean that judges, even in cases where they overrule previous

\textsuperscript{107} See \textit{Lectures on Jurisprudence} (1861) (New York: Burt Franklin, 1970), vol 2 at 216: “there can be no law without a legislative act” (“legislative act” taken here to include judicial decision (see Simpson, supra note 104 at 84)), though Austin describes “judicial law” as “improper legislation” (Austin, \textit{ibid} at 321-22).


\textsuperscript{111} \textit{Ibid}, vol 5 at 235.


\textsuperscript{113} See Hale, supra note 103 at 68-70: Blackstone, \textit{supra} note 32, vol 1 at 68-71.


\textsuperscript{115} See discussion of \textit{Donoghue v Stevenson}, (1932) All ER Rep 1, (1932) AC 562 HL (Eng) in Cross & Harris, \textit{ibid} at 31-33.
decisions, are making new law out of whole cloth.116 As Brian Simpson suggests, it is not a matter of choosing between the two extremes posed by John Austin, “either agreeing that the common law was laid down by the judges, or believing in the childish fiction (as [Austin] called it) that the common law was ‘a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges.’”117 Judges have to make decisions based on law, and when the law in relation to the matter before them is in dispute (as it often is), they “must of course choose between incompatible views, selecting one or other as the law, and the fiction that the common law provides a unique solution is only a way of expressing this necessity.”118

In a recent article, “The Declaratory Theory of Law,” Professor Allan Beever argues convincingly that the scorn heaped upon the theory by some critics stems from a misunderstanding, not only of the theory itself, but of the conception of law that prevailed in England before the advent of positivism and that is of continuing relevance today.119 As an example of that earlier understanding, he refers to Lord Coke’s judgment in Calvin’s Case,120 where the Chief Justice, in answer to the defendant’s objection that a judgment for the plaintiff would be a dangerous innovation in the law, stated:

[...]

Beever contends that earlier judges and jurists (e.g. Coke, Hale, and Blackstone) distinguished positive laws, consisting of rules laid down by statute or stemming from particular cases, from the reason of the law and fundamental principles, sometimes stated as legal maxims: the former are subject to change whereas the latter generally are not.

116 See text accompanying supra note 27 for quotation from Parker, supra note 25.
117 Simpson, supra note 104 at 84, quoting John Austin, Lectures on Jurisprudence, or the Philosophy of Positive Law, 4th ed by R Campbell (London: John Murray, 1879), vol 2 at 655 [emphasis in original].
118 Simpson, ibid at 97.
120 Calvin’s Case (1608), 7 Co R 1, 77 ER 377.
121 Ibid at 27a. See also JH Baker, An Introduction to English Legal History, 4th ed (Oxford: Oxford University Press, 2002) at 195: “Common lawyers before the nineteenth century liked to think of their law as an unchanging body of common sense and reasoning which was part of the heritage of the English people.”
Another way of stating this is that the letter of the law can change, whereas the spirit of the law, based as it is on reason and underlying values, is much more enduring.\textsuperscript{122} Moreover, Beever argues that the modern common law adheres more closely to the pre-positivist conception of the declaratory theory than most commentators, and even some judges, are willing to admit.\textsuperscript{123} To avoid accusations that judges violate the separation of powers and improperly legislate retroactively,\textsuperscript{124} one needs to distinguish between judicial development of the positive law in conformity with underlying principles and legislative alteration of it through the political process.\textsuperscript{125} "In reality," Beever asserts, "change in the positive law is perfectly consistent with the declaratory theory as long as that change can be seen to accord with more abstract legal principles."\textsuperscript{126} He concludes that these principles, forming as they do the basis of the common law, are as much a part of it—indeed, are more fundamental to it—than the evolving rules of positive law.\textsuperscript{127} I think Beever would agree, if the

\textsuperscript{122} This is not to say that the underlying values of a society do not change, as we have seen in the past fifty years in Canada, during which equality, especially gender and racial equality, have become fundamental values of Canadian society and law.\textsuperscript{123} Beever, “Declaratory Theory,” supra note 119, analyzing Lord Reid, “The Judge as Lawmaker” (1972-73) 12:2 Journal of the Society of Public Teachers of Law 22, and Lord Goff’s judgment in Kleinwort Benson Ltd v Lincoln City Council, [1998] 4 All ER 513, [1998] 3 WLR 1095 HL (Eng). For another perspective on the Kleinwort decision, see MacCormick, supra note 112 at 262-66.\textsuperscript{124} For an American perspective, see Fred V Cahill, Jr, Judicial Legislation: A Study in American Legal History (New York: Ronald Press Company, 1952).\textsuperscript{125} See Allen, supra note 31 at 307-10, distinguishing the law-making authority of judges from that of legislatures. Allen utilizes this analogy: A man who chops a tree into logs has in a sense ‘made’ the logs.... Mankind, with all its resource and inventiveness, is limited in its creative power by the physical material vouchsafed to it. Similarly, the creative power of courts is limited by existing legal material at their command. They find the material and shape it. The legislature may manufacture entirely new material. \textit{Ibid} at 309-10. \textsuperscript{126} See also Geldart, supra note 102 at 23-27; Dennis Lloyd, \textit{The Idea of Law} (Harmondsworth: Penguin Books, 1964) at 256-73. Likewise, John Finnis, “The Fairy Tale’s Moral” (1999) 115 Law Q Rev 170, republished as “Adjudication and Legal Change” in John Finnis, \textit{Philosophy of Law: Collected Essays} (Oxford: Oxford University Press, 2011) vol 4, 397 [Finnis, “Adjudication”], points out that the declaratory theory is “a way of stating an important element in judicial duty,” namely, “the duty of judges to differentiate their authority and responsibility, and thus their practical reasoning, from that of legislatures” \textit{(ibid} at 400).\textsuperscript{127} Beever, “Declaratory Theory,” supra note 119 at 440.\textsuperscript{128} See also Allan Beever, “Formalism in Music and Law” (2011) 61:2 UTLJ 213 at 228-29. Beever’s point can be supported by many concrete examples: To take just one, a murderer cannot inherit from the victim by will or intestacy, nor benefit as survivor from a joint tenancy held with the victim. In these instances, the positive law rules of inheritance and survivorship are overridden by legal principle, expressed in the maxim, \textit{nullus commodum capere potest de injuria sua propria} (no
word “permanent” were deleted or qualified, with Sir Carleton Kemp Allen’s observation that “underneath the whole elaborate structure of precedents in our courts lies a permanent foundation of fundamental legal doctrine.”

Beever’s deeper understanding of the intimate connection between the declaratory theory and common law methodology can be contrasted with McHugh’s dismissive attitude towards “the declaratory theory’s belief that contemporary doctrine articulates eternal verities” and his apparent conviction that legal principles are not law. Like Austin, McHugh seems to regard all law as positive law that has no existence until brought into being by a court decision or legislative enactment. This positivist viewpoint stems from a legal theory that not only has its critics (especially in its extreme Austinian form), but, as Simpson and others have pointed out, is at odds with the common law tradition. Yet as an expert witness, McHugh implicitly relies on this controversial legal theory and purports to present as “evidence” questionable opinions on the (non)existence of law—opinions that to some extent seem to involve the content of domestic law, which is beyond the permissible scope of expert testimony.

As mentioned earlier, it is important to distinguish between a legal academic’s role as a scholar and the role he or she may choose to play as an expert witness in litigation. The limitations on what is permissible in a courtroom do not apply in the academic realm. Indeed, a major aspect of a law professor’s job is to describe, analyze, and critique the law. However, in doing so one still has to keep in mind Maitland’s caution against mixing the “logic of evidence” and the “logic of authority.” In effect, McHugh tends to treat the existence of law rights to obtain an advantage by his own wrong) (see Lundy v Lundy (1895), 24 SCR 650; Nordstrom v Baumann, [1962] SCR 147, 31 DLR (2d) 255; Schobelt v Barber, [1967] 1 OR 349 (HC); Singh Estate v Bajrangie-Singh (1991), 29 ETR (2d) 302, 89 ACWS (3d) 1219 (Ont SCJ)).

128 See Beever, “Declaratory Theory,” supra note 119 at 441, where he states that he “would not wish to defend precisely” the version of the theory that “these principles are unalterable.”

129 Allen, supra note 31 at 293. With the same deletion, I would also agree with Allen.

130 McHugh, Aboriginal Title, supra note 8 at 283, quoted more fully at supra note 23.

131 See quotation from his testimony from Ross River YSC, supra note 61 at para 45, supra note 69.


133 See also Geldart, supra note 102 at 23-27; Allen, supra note 31 at 1-8.
of law in the past as a matter of historical fact that fits into the logic of evidence. However, while a legal historian can probe and seek to illuminate the existence and content of law in the past, in doing so the logic of evidence necessarily mingles with the logic of authority. As John Finnis has pointed out,

[Law has a double life. It is in force as a matter of fact; historians and contemporary observers can describe—and make predictions about—its content and effect by attending to the opinions and practices prevalent among certain persons and groups, especially courts and their officers. But it has its force by directing the practical reasoning of those persons and groups.]

Judges have to make decisions based on the force of law as a normative system of principles and rules, not on law as an evidential matter of historical fact. In so doing, they are not “falsifying history,” but instead are determining the legal norms that apply to the historical facts that have been ascertained by evidence. When a case before a court presents novel legal issues, as is often the situation in appeals, the judges still have to say what the law is; they cannot throw up their hands and exclaim that the case can’t be decided because there is no applicable law. This is as much the situation in cases involving Indigenous rights as in other cases. The main difference is that the historical facts giving rise to Indigenous cases are usually much further back in the past, often decades or centuries, for a variety of reasons, including Indigenous people’s lack of knowledge of the common law system and lack of access to the courts to have their claims adjudicated. But this difference does not change the role of the judges or the nature of adjudication, nor does it cause history to be rewritten. As in all cases, judges rely on the historical record presented in court as evidence, and have to determine and apply the law as they understand it.

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134 Finnis, “Adjudication,” supra note 125 at 397 [emphasis added].
135 See ibid at 401-402.
137 See Wiener, supra note 9 at 26: “The truth of historical assertions depends on facts and facts alone,” as established by evidence.
IV. CONCLUSION
This paper challenges Paul McHugh's position, expressed in his published work and on the witness stand, that there was no law in relation to Indigenous land rights in Canada prior to decisions of the Supreme Court in cases such as *Calder*,139 *Guerin*,140 and *Delgamuukw*.141 In my opinion, the Crown was bound by the common law and constitutional documents, in particular the Royal Proclamation of 1763 and the *Rupert's Land Order* of 1870, to acknowledge the land rights of the Indigenous peoples and to settle them through established practices in accordance with legal principles. In other words, the Crown's dealings with Indigenous peoples were not a matter of royal prerogative and executive grace, but rather were governed by law. The reason why Indigenous peoples did not go to court to assert their land rights prior to the latter half of the twentieth century was not because they had no legal rights, but rather because they were denied access to justice by a variety of factors, including lack of knowledge of Canadian law, inability to hire lawyers, and Crown immunity from suit.

However, my intention in this paper is not just to challenge McHugh's opinion on the historical existence of Indigenous land rights. Beyond that, I hope to clarify the distinction between law and history, and the role of legal historians in this context. History is a matter of fact, provable in court through the testimony of witnesses who have first-hand experience with the relevant events and qualified experts who have studied the past and can provide opinions in relation thereto. Every case that goes to court involves history, in the sense that the events forming the basis for the claim necessarily happened in the past. Most cases, however, involve fairly recent events that are within the living memory of the participants and observers. Indigenous claims, however, often involve events that happened decades or centuries before. As witnesses with direct experience of the events are no longer available, courts have to rely on the testimony of experts, including Indigenous elders who are authorities on the oral histories of their people, and trained historians who have studied and written about the people and period in question.

In the common law system, the opinions of experts are admissible insofar as they relate to factual matters. Experts cannot offer opinions on the domestic law to be applied in deciding a case as judges are expected to know that law and should not accept expert testimony on it, as that would permit experts to impinge on the judicial role and

139 *Supra* note 36.
140 *Supra* note 48.
141 *Supra* note 46.
This distinction between questions of fact that are provable through witnesses and questions of law that are within the purview of judges is fundamental. It is as applicable in Indigenous rights cases as in other cases, with the above-mentioned difference that in cases involving Indigenous rights opinions of experts on the historical facts are often needed because the events usually took place before living memory.

I do not think there is any controversy over this distinction between historical fact and applicable domestic law, and the proper role of historians as such in the courtroom. However, the distinction becomes murky when the expert is a legal historian because legal history obviously involves both history and law. So where is the line between these to be drawn when a legal historian testifies as an expert? Clearly, a legal historian cannot testify and offer opinions on the domestic law that the judge will have to apply in deciding the case. However, there would not seem to be any problem with a legal historian offering an opinion on what the law was at some time in the past, as long as that is not the law that the judge will have to apply, because the existence of law in the past can be viewed as historical fact. But if the law in the past is the law that the judge will have to apply, it is a different matter: in that situation, it seems to me that the existence and content of that law is for the judge to determine, and the opinion of a legal historian on those issues is both irrelevant and inadmissible.

142 On the judicial duty to determine the applicable law, see supra note 27 for the quotation from Lord Donaldson’s judgment in *Parker*. However, the domestic law judges are expected to know does not include local custom (in England, at least) or Indigenous law (in Canada), which can be proven by expert testimony (supra note 2).

143 See Keane, Griffiths & McKeown, supra note 2 at 524-32; Delisle, Stuart & Tanovich, supra note 2 at 858-929.

144 See supra note 134 for the quotation from Finnis.