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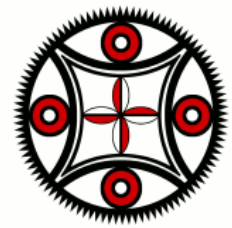

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BEING/NOTHING: NATIVE TITLE AND FANTASY FULFILLMENT
By Katherine Biber

This paper proceeds from the idea that the nation is a fantasy, an imaginary zone through which identity, belonging and control are mediated. I explore the consequences of imagining the nation in this way by reading the formative Australian cases through which Native title jurisprudence developed in this country. Those cases—Mabo, Wik and Yorta Yorta—and the public discourses surrounding them reveal the competing national fantasies at stake in disputes over property, recognition and co-existence.

Using the theoretical writing of psychoanalytic scholars Slavoj Žižek and Julia Kristeva, and the critique of nationalist practices from the work of Benedict Anderson and Ghassan Hage, I interrogate what it means to possess the nation.

CLAIMING THE PAST: HISTORICAL UNDERSTANDING IN AUSTRALIAN NATIVE TITLE JURISPRUDENCE
By Alex Reilly and Ann Genovese

In this paper, we consider the use of history in Indigenous land rights claims in Australia through a critique of the High Court's construction of Native title rights in Yorta Yorta Aboriginal Community v. Victoria. The leading joint judgment of Gleeson C.J., Gummow and Hayne JJ. (with whom McHugh and Callinan JJ. agreed on the result) posited the time of the assertion of sovereignty as the key moment in the history of Indigenous and non-Indigenous legal relations, and the test for the proof of Native title focuses on this moment. This paper is intended to be interdisciplinary in perspective and uses analysis from both legal and historical theory. We aim to demonstrate how the courts have adopted a particular understanding of what history is and how it may be used in the resolution of claims. The courts assume that law and history have a shared understanding of the past. Secure in this assumption, the only issues of concern to courts relating to historical evidence are practical issues of the form and presentation of expert reports and testimony, and legal issues of their relevance and reliability. We question the ability of history and law to speak to each other about the past, free from difficult questions of theory and method. We advocate for an alternative role for historians in the claims process as theoretical experts on the nature of the past and its interpretation.

TREATIES VS. TERRA NULLIUS: "RECONCILIATION," TREATY-MAKING AND INDIGENOUS SOVEREIGNTY IN AUSTRALIA AND CANADA

By Angela Pratt

In Australia, Canadian government approaches to dealing with Indigenous peoples' demands for recognition and justice are often lauded as being more progressive than those of their Australian counterparts. Drawing on aspects of the treaty-making process currently underway in British Columbia and the policies of "reconciliation" and Native title in Australia as examples, this paper compares Australian and Canadian approaches to their relationships with Indigenous peoples in terms of how each state handles demands for the recognition of Indigenous sovereignty and nationhood. This analysis shows that there are as many similarities as there are differences between Indigenous-state relations in Canada and Australia, and that in both cases there is need for a more genuinely inclusive approach to negotiations and debates over Indigenous peoples' rights.

"SALMON FOR PEANUT BUTTER": EQUALITY, RECONCILIATION AND THE REJECTION OF COMMERCIAL ABORIGINAL RIGHTS

By André Goldenberg

The recent case of R. v. Kapp marks a downward turning point in Aboriginal rights law in Canada. At issue was a federal ameliorative program that established an exclusive Native commercial fishery and whether such a program violated non-Native fishers' guarantee of equality under s. 15(1) of the Charter. Judge Kitchen of the British Columbia Provincial Court found that the Native fishery was not a valid ameliorative program under s. 15(2) of the Charter and was "analogous to racial discrimination." While the decision can be easily criticized on the grounds that the wrong s. 15(1) and s. 15(2) legal tests were applied (or that the correct tests were incorrectly applied), it is Kapp's deafening silence on Aboriginal rights and ss. 25 and 35(1) of the Constitution that requires greater attention and creates alarm. A critical analysis of the legal and political context of the Kapp judgment, and of its unspoken assumptions about the nature of Aboriginal rights and struggles for justice, reveals two key issues that could have helped Judge Kitchen reach a more just resolution—recognition of these issues will also help appellate courts deal with the facts of the case in a more satisfactory way. By addressing (1) the possible modes of interaction between Charter equality rights and Aboriginal rights under the Constitution, and (2) the reluctance of courts and Canadians in general to recognize commercially-based Aboriginal rights, this paper offers an alternative lens through which the dispute in Kapp may be examined and resolved. In so doing, it also attempts to shed light on future problems and challenges in Canadian Aboriginal rights litigation more generally.

INDIGENOUS PEOPLES' OWNERSHIP AND MANAGEMENT OF MOUNTAINS: THE AOTEAROA/NEW ZEALAND EXPERIENCE

By Jacinta Ruru

In 1840, the British Crown guaranteed to Māori, the Indigenous people of Aotearoa/New Zealand, the continued right to exercise tino rangatiratanga (selfdetermination) over their own taonga (treasures). This article assesses the historic and current legislative reality for giving

effect to this guarantee in the context of the treasured landscapes of mountains. Throughout the world, mountain ownership and management has become an integral part of many Indigenous peoples' struggles for self-determination. While this article has a narrow domestic focus, the struggle here told, which is illuminated through legislative examination, will be of comparative interest to many jurisdictions.

AUSTRALIAN ICONS: AUTHENTICITY MARKS AND IDENTITY POLITICS
By Matthew Rimmer

This article evaluates the adoption and implementation of an Indigenous certification trademark system in Australia. Section II considers the use of copyright law, moral rights provisions and consumer protection laws to protect Indigenous cultural property in Australia. It suggests that there needs to be additional protection under trademark law—especially to deal with problems concerning communal ownership, material form and duration of protection. Section III evaluates the efficacy of the scheme for marks of authenticity established by the National Indigenous Arts Advocacy Association in November 1999. It contends that there were practical problems with the implementation of the scheme and symbolic concerns about the definition of "authenticity" applied under the regime. Section IV engages in a comparative analysis of other jurisdictions—such as New Zealand, Canada and the United States. It demonstrates that an Indigenous certification mark can be successful, given sufficient support and assistance. The article concludes that there needs to be a sui generis system to protect traditional knowledge at an international level.

BOOK REVIEW

MAMISKOTAMAW: "ORAL HISTORY," "INDIGENOUS METHOD" AND CANADIAN LAW IN THREE BOOKS
Review by Signa Daum Shanks