BOOK REVIEW

Paul G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford: Oxford University Press, 2005): ix; 661 pp.

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Aboriginal Societies and the Common Law[1] makes an important contribution to scholarship on the history of Aboriginal peoples and the common law legal system. Indeed, this weighty tome verges on the magisterial in its comprehensiveness and depth of analysis. Paul McHugh meticulously traces the encounter between the common law and the Aboriginal peoples of North America and Australasia (Australia and New Zealand), beginning from the early settlement of the New World to the close of the 20th century. Because of their "strong historical correspondence," McHugh favoured a comparative approach that looked at these jurisdictions together.[2] *Aboriginal Societies and the Common Law* is significant because of the way McHugh carefully illuminates that complex history across several jurisdictions through the lens of the core themes of sovereignty, status and self-determination. The book is a culmination of many years of assiduous scholarship and teaching by McHugh on Aboriginal law.[3] Presently, he is a Senior Lecturer at the University of Cambridge and holds a Visiting Professorship at Victoria University of Wellington in New Zealand.

Aboriginal Societies and the Common Law is structured in three parts around the headings of "Sovereignty," "Intermezzo" and "Self-determination." In the first part, McHugh concentrates on the theme of sovereignty in British imperialism and the position of non-Christian peoples

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1. Paul G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford: Oxford University Press, 2005) [*Aboriginal Societies and the Common Law*].
2. *Ibid.* at 2.
3. Among his earlier work, see *e.g.* P.G. McHugh, *Māori Land Laws of New Zealand: Two Essays* (Saskatoon: University of Saskatchewan Native Law Centre, 1983); P.G. McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991) [*Māori Magna Carta*].

at large in the 17th and 18th centuries. He then focuses on notions of sovereignty and Aboriginal status in North America and Australasia during the 19th century, when assimilation policies emerged in their most devastating form. In the second part, "Intermezzo," McHugh considers Aboriginal peoples' status in international law in the "interval" period between the late 19th century and recent decades. It was a period that helped lay the conditions for some of the more recent domestic legal changes for Aboriginal peoples. The theme of self-determination occupies the final part of the book where McHugh analyzes the movement towards greater recognition and integration of Aboriginal rights since the 1970s.

To McHugh, the historical basis of Aboriginal peoples' relations with the common law system is best understood through the enduring themes of sovereignty, status and, more recently, self-determination. He suggests, "as the tribal societies variously engaged with and, eventually, were overwhelmed by the colonialist policy, the common law legal system provided the sole means through which the tribes' political integrity and other aspects of their tribal culture … might be peacefully vindicated."[4] McHugh sees these themes as best able to illuminate the various ways the common law legal system responded to the resistance and continuation of Aboriginal society and political organization. On sovereignty, he is interested in how the Anglophone constitutional order accommodated the Aboriginal peoples. How were the pre-existing systems of tribal governance to be subordinated to, or reconciled with, the sovereignty of the imperial Crown? On status, McHugh enquires as to the extent the common law systems recognized the Aboriginal polity and its members. And, on self-determination, he explores whether and how those legal systems abandoned the assimilation policies to recognize and facilitate the cultural, economic and political integrity of Aboriginal nations.

McHugh begins in his Introduction by outlining a preferred research method that emphasizes the distinct roles of the lawyer and historian.[5] To McHugh, while they use the same subject matter, "the lawyer seeks to resolve contemporary problems whereas the historian seeks to explain bygone contingency."[6] McHugh is critical of the tendency of some contemporary judges and scholars to conflate these two roles. Thus, in relation to recent Aboriginal land title claims considered by Commonwealth courts, McHugh observes that, "the concern of [A]boriginal title litigation was not with accurate historical depiction but with marshalling certain facts from the past as to sanction a contemporary state of affairs."[7] McHugh is concerned that this late 20th century doctrine of Aboriginal title is being

4. *Aboriginal Societies and the Common Law*, *supra* note 1 at 1.
5. *Ibid.* at 1-61.
6. *Ibid.* at 20.
7. *Ibid.* at 21.

"applied retrospectively as though it described historical truth."[8] Historic cases such as the *Mohegan* dispute heard by the Privy Council,[9] argues McHugh, are "legal moments [that have] become over-parted, imbued with significance well beyond their actual importance in their own time."[10] The result is that "the legal history is baked largely, if not entirely, in a late twentieth century oven."[11]

McHugh argues that common law Aboriginal title principles were not in fact "consciously present" in the "minds of historical actors," especially the colonial officials.[12] To suggest otherwise, warns McHugh, amounts to a "practical use of the past," and "it is not history properly understood."[13] *Aboriginal Societies and the Common Law* thus aims to properly illuminate that history. McHugh portrays how the common law legal systems, in their pre-positivist form before the late 19th century, conceived of Aboriginal peoples in relation to the settler societies. In its pre-modern, pre-positivist form, McHugh argues that the common law was not an externally imposed set of Austinian rules and commands, but "was woven into a general worldview that saw law, with religion, as the reflection of an integrated normative order immanent in the community itself."[14] In the formative early years of British imperial rule and subjugation of Aboriginal peoples, courts and legal rules played a different and less prominent role in colonial legal affairs, which tended to be built around a "fluid combination of imperial practice expressed formally through royal instrumentation" and the discretionary authority of the governors and other colonial functionaries.[15]

Having laid out his research method, McHugh then examines the nature of British imperialism and the impact of its shifting notions of sovereignty on Aboriginal and other non-Western peoples in the 17th and 18th centuries. McHugh argues that in this formative era, "the notion of sovereignty … remained a substantially feudal one, conceiving Crown *imperium* (right of governance) in [a] jurisdictional rather than [in a] absolutist and territorial sense …."[16] The latter concepts, McHugh shows, did not fully emerge in British legal thought and practice until the 19th century as the settler-states in

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8. *Ibid.*
9. Some commentators argue that the Privy Council, in the long-running case of *Mohegan Indians, by their Guardians v. The Governor and Company of Connecticut* (1705-1773) [unreported], determined that Native nations residing on reserved lands within North American colonies enjoyed rights of sovereignty: see M.D. Walters, *"Mohegan Indians v. Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33:4 Osgoode Hall L.J. 785.
10. *Aboriginal Societies and the Common Law*, *supra* note 1 at 26.
11. *Ibid.* at 25.
12. *Ibid.* at 21.
13. *Ibid.*
14. *Ibid.* at 29.
15. *Ibid.* at 32-34, 43.
16. *Ibid.* at 61.

North America and Australasia asserted ever-greater control over Aboriginal peoples within their ostensible jurisdiction.

From the late 19th century, as law took on the characteristics of its contemporary positivist form, McHugh shows how, at first, an "overwhelming legalism smother[ed]" Aboriginal peoples, which "designated and pronounced their destiny to assimilate into versions of the industrious society."[17] In this era, which he describes as the "Empires of Uniformity," law served to dissolve collective landholdings and tribal structures, and replace them with an "overweening state paternalism."[18] McHugh steers away from simplistic accounts of legal policy towards Aboriginal peoples, though some of his analyses may be controversial for some readers. For example, while the era of assimilation policies is appropriately condemned, McHugh suggests it "was not as all-bad as is tended to be depicted."[19] For example, "some of its tenets, such as equal citizenship rights (including social welfare and protection from racial discrimination), equality in standards of living, and equal pay for equal work involved important rights for [A]boriginal peoples."[20] Many Aboriginal peoples today, and then, may not share such a sanguine view. For example, in Canada, the exercise of these "rights" meant enfranchisement in mainstream society, but the concomitant loss of Indian status. In Australia, Aboriginal peoples did not generally have the right to vote in parliamentary elections until the 1960s.

In the second part of his book, "Intermezzo," McHugh introduces the role of international law as an increasingly influential lever for positive change for Aboriginal peoples. McHugh concedes that, during the second half of the 20th century, "the international backdrop became an increasingly influential factor in shaping law," particularly in demanding greater "settler-state accountability for its management of [A]boriginal affairs."[21] The growing recognition of Aboriginal peoples as a subject of international law, and concomitant acknowledgment of their land, environmental and cultural rights, helped to attenuate the traditional absolutist notions of state sovereignty inimical to a resuscitation of the Aboriginal polity. The first international treaty to squarely address the plight of Aboriginal peoples was the *ILO Convention 107*[22] of 1957, which McHugh concludes "gave [I]ndigenous peoples a foothold in the international system through the

17. *Ibid.* at 50.
18. *Ibid.* at 49.
19. *Ibid.* at 318.
20. *Ibid.*
21. *Ibid.* at 289.
22. International Labour Organisation, *Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, 328 U.N.T.S. 247 (entered into force on 2 June 1959) [*ILO Convention 107*].

conceptual and institutional medium of human rights."[23] Surprisingly, McHugh does not say much about its successor, the *ILO Convention 169*[24] of 1989—a treaty that has most strongly enshrined the self-determination principles that McHugh concentrates on in the next section of his book. This treaty has come into effect with over 17 ratifications to date, and contains some of the most progressive provisions for Aboriginal rights, although Australia, Canada, New Zealand and the United States are not parties to it.[25] Since the late 1980s, observes McHugh, Aboriginal peoples began to participate in international law-making processes, notably in the preparation of the *United Nations Draft Declaration of the Rights of Indigenous Peoples*[26] of 1993, and the creation of the *United Nations Permanent Forum on Indigenous Issues* in 2002.[27] One aspect of the international framework for Aboriginal rights overlooked by McHugh is the various initiatives of Aboriginal peoples themselves. International norms on Aboriginal rights are increasingly emanating directly from non-state, Aboriginal groups, such as the Inuit Circumpolar Conferences.[28]

From the early 1970s, McHugh traces another seismic shift in the legal systems of North America and Australasia: in response to wider political and cultural changes, law came to help articulate and channel the principles of self-determination being increasingly expressed by Aboriginal peoples. Thus, in the final part of *Aboriginal Societies and the Common Law*, McHugh analyzes the emergence in each jurisdiction of a vigorous movement for Aboriginal self-determination whereby Indigenous peoples have sought legal and political acknowledgment of their rights to retain their cultural identity. This initially posed an enormous challenge to the Anglophone regimes, explains McHugh, which regarded "the special legal position of [A]boriginal peoples as contrary to the liberal democratic principle that required equal treatment of a culturally undifferentiated citizenry."[29] But the break from assimilation philosophies came quickly in

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23. *Aboriginal Societies and the Common Law*, *supra* note 1 at 298.
24. International Labour Organisation, *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 I.L.M. 1382 (entered into force 5 September 1991) [*ILO Convention 169*).
25. For example, Article 7(1), *ibid.*, provides:

> The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

26. UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).
27. *Aboriginal Societies and the Common Law*, *supra* note 1 at 300-301.
28. Inuit Circumpolar Conference, online: <http://www.inuitcircumpolar.com>.
29. *Aboriginal Societies and the Common Law*, *supra* note 1 at 317.

some cases, explains McHugh. For example, the Canadian government's 1969 White Paper advocated the complete structural integration of Indians into Canadian society, through measures including the repeal of the *Indian Act* and dismantling of the Department of Indian Affairs.[30] However, by early 1971 the White Paper was "consigned to historical notoriety"[31] following widespread protest from Aboriginal peoples. And, by 1973, a new course was being charted following the historic decision of the Supreme Court of Canada in the *Calder* case.[32]

McHugh argues that the ensuing legal changes—such as affirmation of Native title, land claims settlements and some self-government agreements—promoted substantial change, and that "by the late 1980s most jurisdictions had experienced a fundamental paradigm shift."[33] This is a view, however, some commentators and Aboriginal peoples would not agree with, as the situation in New Zealand (discussed below) illustrates. During the 1990s, "the focus had moved from the *recognition* of [A]boriginal rights … to the *recognition* and *management* of those rights inside the legal system."[34] This required, explains McHugh, a "deeper, more sophisticated legalism."[35] In this most recent period, "reconciliation" has become the motif of Aboriginal-Crown relations. More cooperative relations emerged, modulated through new and revitalized claims-making and resolution mechanisms.

Depending on the means by which Aboriginal self-determination was articulated, it would have profound consequences for questions of sovereignty and status. Thus, observes McHugh, "Aboriginal claims … generated a growing sense of constitutional displacement by raising direct questions about the location and nature of sovereignty within the national legal systems."[36]

Some of the most far-reaching legal changes occurred in New Zealand, suggests McHugh. Through the revitalization of the Waitangi Tribunal, by extending its jurisdiction to historical claims, and some groundbreaking

30. *Ibid.* at 332.
31. *Ibid.* at 333.
32. *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [*Calder*]. In *Calder*, the Supreme Court of Canada recognized for the first time that the occupation of traditional lands by an Aboriginal society gave rise to a unique form of title in land that arose independent of a treaty, legislation or executive order.
33. *Aboriginal Societies and the Common Law*, *supra* note 1 at 315.
34. *Ibid.* at 321.
35. *Ibid.* at 429.
36. *Ibid.* at 319.

Court of Appeal judgments in the 1980s,[37] McHugh explains that "the reverberations of the recharged engagement between *kawanatanga* (the Crown's legal sovereignty) and *rangatiratanga* (Māori political sovereignty) gave [A]boriginal affairs a sustained political profile and influence on national life that … the other jurisdictions could not match."[38] McHugh identifies the Māori opposition to the 1967 legislative reforms that aimed to remove statutory protections of Māori land as a crucial beginning for pan-Māori protest that challenged the paternalism of the Anglo-settler state.[39] By the mid-1970s, argues McHugh, the New Zealand constitution came to be increasingly viewed in a new light, and a Lockean contractarian theme emerged whereby Māori and Pakeha New Zealand society would be partners "who should engage in active dialogue with one another."[40] Under this contractarian model, the *Treaty of Waitangi* (or at least its "principles") became the foundation of the state, believes McHugh.[41]

Other lawyer commentators, however, have been less enthusiastic about the impact of these legal changes in New Zealand. Professor Jane Kelsey of the University of Auckland's Faculty of Law does not see a paradigm shift or any obvious partnership between the Crown and Māori based on the *Treaty*. Instead, she believes that there has been a "subtle cultural repositioning" to defuse the nationalist threat posed by Māori firebrand activism in the 1970s.[42] Kelsey argues that the tide towards the courts accepting a special constitutional status for the *Treaty* faded from the early 1990s.[43]

McHugh does, however, concede that there were some setbacks for Aboriginal peoples in all jurisdictions in recent years, as courts became less receptive to, or ambivalent about, some Aboriginal claims. In the United States, "with Chief Justice Rehnquist at the reins, the Supreme Court was backtracking on Indian sovereignty"[44] as evident in cases such as *Nevada v.*

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37. See *e.g. New Zealand Māori Council v. A.G.*, [1987] 1 N.Z.L.R. 641 (C.A.). In this case brought by the New Zealand Māori Council, it was successfully argued that the Crown was not able to transfer to state enterprises lands that were subject to claims made to the Waitangi Tribunal lodged after 18 December 1986 without first taking into account the principles of the *Treaty of Waitangi* according to section 9 of the *State-owned Enterprises Act 1986* (N.Z.). The duty fell upon the Court to determine the principles of the *Treaty* with which the Crown's proposed actions had been inconsistent.
38. *Aboriginal Societies and the Common Law*, *supra* note 1 at 419.
39. *Ibid.* at 348.
40. *Ibid.* at 415-16.
41. These themes were advanced earlier, in his book *Māori Magna Carta, supra* note 3.
42. J. Kelsey, *Rolling Back the State* (Wellington: Bridget Williams Books, 1993) at 279-85. See also J. Kelsey, "Māori, Te Tiriti, and Globalisation: The Invisible Hand of the Colonial State" in M. Belgrave, M. Kawharu & D. Williams, eds., *Waitangi Revisited: Perspectives on the* Treaty of Waitangi (Melbourne: Oxford University Press, 2004) 81.
43. *Ibid.*
44. *Ibid.* at 330. Though there were exceptions to this trend, notably *California v. Cabazon Band*, 480 U.S. 202 (1987) (concerning the rights of Indian tribes to operate gaming facilities on Indian reservations).

Hicks[45] and *Rice v. Cayetano*.[46] In Canada, McHugh observes a judiciary also less receptive to Aboriginal claims. After the groundbreaking *Sparrow* decision,[47] the Supreme Court retreated somewhat in its judgments in *Van der Peet*[48] and *Pamajewon*.[49] In the former, the Court introduced a controversial test for the existence of an Aboriginal right, which was required to have been "integral to the distinct culture" of the claimant group since contact with Europeans. In the latter, the Court rejected an argument that the Aboriginal claimants' asserted rights to self-government encompassed the right to regulate on-reserve gambling. In Australia, too, the prospects of a sympathetic judiciary after *Mabo*[50] somewhat evaporated, as evident by the majority ruling of the High Court in *Yorta Yorta*[51] that Native title required that the claimants prove continuous acknowledgment and observance of traditional laws and customs in relation to land.

Even when courts have supported Aboriginal claims, such as the crucial decision of the New Zealand Court of Appeal on Māori rights to the foreshore and seabed,[52] the government has intervened to extinguish Aboriginal rights given sufficient economic and political stakes. Unfortunately, McHugh's book was published before he had the opportunity to fully consider the New Zealand government's controversial response in the form of the *Foreshore and Seabed Act 2004*.[53] That legislation gave ownership of these areas to the state, while allowing Māori to apply for "guardianship" of certain areas. Ironically, despite McHugh's assertions about the constitutional-like status of the *Treaty of Waitangi* principles, McHugh himself appeared as the Crown's expert witness (though as an independent expert, according to him) in the Waitangi Tribunal's foreshore

45. 533 U.S. 353 (2001). In this case, the Supreme Court held that state officers could enter an Indian reservation uninvited to investigate or prosecute an off-reservation violation of state law. It further held that tribal courts are not empowered to hear civil rights cases under federal law because they are not courts of general jurisdiction.

46. 528 U.S. 495 (2000). Here the Supreme Court struck down the state's Hawaiian-only restriction for voting in elections for a state agency that administered millions of dollars earmarked exclusively for Indigenous Hawaiians. The Court ruled that the racial restriction violated the Fifteenth Amendment.

47. *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Aboriginal Societies and the Common Law*, *supra* note 1, at 471 [*Sparrow*]. The *Sparrow* case, involving customary rights to fish, was the first in which the Supreme Court of Canada dealt with section 35 of the *Constitution Act, 198*2, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, which recognizes and affirms "the existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada."

48. *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

49. *R. v. Pamajewon*, [1996] 2 S.C.R. 821.

50. *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1. In this case, the High of Court of Australia upheld the Native title land claim of the Meriam plaintiffs from Queensland, and in doing so held that Australia was not *terra nullius* when colonized by the British.

51. *Yorta Yorta Aboriginal Community v. Victoria*, [2002] H.C.A. 58.

52. *Ngati Apa v. A.G.*, [2003] 3 N.Z.L.R. 643 (C.A.); *Aboriginal Societies and the Common Law*, *supra* note 1 at 527-28.

53. See his comments on the proposed legislation, *Aboriginal Societies and the Common Law*, *ibid.* at 527.

and seabed hearings in 2004.[54] His expertise was drawn on to develop the policy whereby the "full and plenary power" of the New Zealand legislature was harnessed to enact the *Foreshore and Seabed* legislation.

While McHugh argues that, after the 1980s, the Anglophone legal systems moved increasingly beyond the threshold struggles concerning recognition and acknowledgment of Aboriginal land and resource rights to "downstream questions of rights-integration and -management",[55] there are in fact a whole new class of Aboriginal claims coming forward for recognition. Although McHugh's book does not address intellectual property issues, there remain significant legal struggles ahead for Aboriginal peoples in this area. For example, one of the most substantial and protracted claims before the Waitangi Tribunal is the WAI 262 claim concerning Māori intellectual property rights asserted to all of the indigenous flora and fauna of New Zealand.[56] It is likely that, over the coming decade, scholarship on Aboriginal law will shift away somewhat from the focus on land rights and natural resources governance to claims for control of uses of traditional cultural knowledge concerning the arts, music, medicinal knowledge, and so on.[57]

There is also unfolding another new frontier of related Aboriginal claims, revolving around the broader theme of loss of culture. In Australia and Canada, a plethora of claims from the survivors of the Native residential schools are arising. Tens of thousands of children in each country were forcibly sent to these schools, and isolated from their families, communities and, ultimately, culture.[58] Previous assimilationist policies that denied Aboriginal peoples their customs, language, ceremonies and spiritual beliefs may give rise to genocide-type claims.[59] Thus, to preempt a possible sea of litigation, the Canadian government has established public inquiries and set up a process to mediate compensation claims from residential school

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54. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, WAI 1071 (Wellington: Waitangi Tribunal, March 2004), 47-58.
55. *Aboriginal Societies and the Common Law*, *supra* note 1 at 427.
56. See G.W. Austin, "Re-Treating Intellectual Property? The WAI 262 Proceeding and the Heuristics of Intellectual Property Law" (2003) 11 Cardozo J. Int'l & Comp. L. 333.
57. For some of the emerging literature, see *e.g.,* D.A. Posey & G. Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples & Local Communities* (Sterling, Va.: Stylus Publishing, 1996); S. Brush & D. Stabinsky, *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights* (Washington, D.C.: Island Press, 1996); S. von Lewinski *et al*., *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore* (The Hague: Kluwer Law, 2003); R. Coombe, "Intellectual Property, Human Rights, and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity" (1998) 6 Ind. J. Global Legal Stud. 59.
58. See J.J. Llewellyn, "Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR and Restorative Justice" (2002) 52 U.T.L.J. 253; J.R. Miller, "Troubled Legacy: A History of Native Residential Schools" (2003) 66:2 Sask. L. Rev. 357.
59. K. Annett, "Hidden from History: The Canadian Holocaust," online: Native Web <http://canadiangenocide.nativeweb.org>.

survivors.[60] While McHugh does not address these issues, his book nonetheless establishes an historical setting and conceptual framework to help understand how the legal system may respond to such claims.

While it is understandable given McHugh's aims that he has not looked at some of these aforementioned recent developments in the Aboriginal rights field, it is puzzling why some significant literature relevant to his research was not considered. Given the subject matter, it is unclear why McHugh did not consider Kent McNeil's seminal *Common Law Aboriginal Title*,[61] a book cited on numerous occasions in Canadian and other Commonwealth courts dealing with Aboriginal rights.[62] McNeil traced contemporary notions of land tenure and sovereignty back to their historical roots in feudal England, and documented how such notions were abused and ignored by colonialists in justifying the acquisition of "unsettled" Aboriginal territory. Nor does McHugh consider Aboriginal scholar John Borrows' prize-winning *Recovering Canada*.[63] Like McNeil, Borrows makes a radical challenge to the legal legitimacy of Indigenous dispossession, though his focus is more narrowly on Canada.[64] Borrows argues that Canadian courts must do much more to apply First Nations legal sources in resolving Aboriginal issues.[65] Perhaps what distinguishes McHugh's scholarship from these books and related literature is not only that he seems less interested in being an activist for Aboriginal rights (though he is no doubt committed to justice for Aboriginal peoples), but also because he emphasizes, as discussed earlier, a different research method regarding the roles of the lawyer and the historian.

In conclusion, however one regards McHugh's particular approach to writing the history of *Aboriginal Societies and the Common Law,* one must concede that this tome makes a significant contribution to the international literature. Its comprehensive coverage of several jurisdictions from the past to the modern era gives McHugh's work relevance to a very wide audience. The need to provide a proper historical setting to the understanding of contemporary developments in Aboriginal law is being recognized by other

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60. Government of Canada, "Indian Residential Schools Resolution Canada," online: <http://www.irsr.gc.ca/english>.
61. (Oxford: Clarendon Press, 1989).
62. For example, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R 1010 at para. 114.
63. *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).
64. *Ibid.*
65. Among other important scholarship relevant to McHugh's subject matter, but not cited are: G. Nettheim, G.D. Meyers & D. Craig, *Indigenous Peoples and Governance Structures* (Canberra: Aboriginal Studies Press, 2002); M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997); P. Butt *et al*., *Mabo, Wik and Native Title* (Sydney: Federation Press, 2001); M.C. Lam, *At the Edge of the State: Indigenous Peoples and Self-Determination (Innovation in International Law)* (New York: Transnational Publishers, 2000).

scholars; McHugh's book coincides with the release in 2005 of several related books that reflect the growing salience of Aboriginal peoples' legal history.[66] Apart from scholars and students of law researching Aboriginal law, *Aboriginal Societies and the Common Law* should appeal to non-lawyers interested in Indigenous rights, politics, imperial and colonial history, and cultural studies.

66. Notably, L.G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Land* (Oxford: Oxford University Press, 2005); P.H. Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-settler Colonialism* (Toronto: University of Toronto Press, 2005).