

Impact case study (REF3b)

<p>Institution: University of Cambridge</p>
<p>Unit of Assessment: Uo16</p>
<p>Title of case study: The Legal Status and Political Management of Aboriginal Land Rights and Land Claims</p>
<p>1. Summary of the impact (indicative maximum 100 words)</p> <p>Paul McHugh’s academic research on the legal status and rights of tribal peoples in Australasia and North America has had a direct impact on legal decisions on tribal land rights; on the political management as well as settlement of land claims in those jurisdictions; and has influenced the evolving legal systems and political developments in these matters in New Zealand, Australia and Canada. His work has contributed significantly to a fundamental shift in the legal and constitutional foundations of government relations with the indigenous peoples and to the political and economic consequences of that shift.</p>
<p>2. Underpinning research (indicative maximum 500 words)</p> <p>McHugh (University Assistant Lecturer, 1987; Lecturer, 1992; Senior Lecturer, 2002; Reader 2004; Professor from 2012) studies the legal status and rights of tribal peoples in the common law jurisdictions of Australasia and North America, including the historical origins and pathways of those rights. He has been a prominent member of a small group of legal academics that from the 1980s attempted to convince the courts of Canada and Australasia that the impasse of the political system in the recognition of traditional tribal property rights and historical land claims could be broken by a therapeutic judicial use of the common law. Until then, and for over a century, national courts had eschewed making the relationship between the Crown and tribes justiciable, whilst the political branches of government had together failed to legislate any nationwide accommodation of tribal property claims. ‘<i>Common law aboriginal title</i>’ was formulated as an academic revision of what was then the received position. It was based upon a less deferential approach towards executive discretion, the more careful exploration and representation of legal material and practice from Britain’s imperial past and across its various theatres in the light of more modern public law notions of justiciability and Crown accountability.</p> <p>The courts adopted this scholarship and a series of high-profile cases upset the old order. By the early 1990s the courts had taken the initiative and there formed an increasingly complex jurisprudence and academic scholarship of aboriginal rights. McHugh has been and remains an intellectual instigator and leader in what has grown into a vast field straddling numerous disciplines. He describes the mushrooming of this new legal field and its significant impact for related disciplinary practices (those of history, anthropology and political theory especially) in his recent book <i>Aboriginal Title – the modern jurisprudence of tribal land rights</i> (Oxford: Oxford University Press, 2011), chapter 5.</p> <p>His work has been historical as well as doctrinal in character, demonstrating his stature as both a scholar of contemporary doctrine and as a legal historian, as well as commentator on the interstices and compass of these disciplinary practices. As an historian he has demonstrated not only a strong grasp of the diverse pathways and historiography of British imperial history across several centuries as shown in <i>Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination</i> (Oxford University Press, 2004) but he has also completed detailed historical studies of the role of law in particular colonial settings such as British annexation of New Zealand in 1840, land transactions in colonial Canada of the 1860s, the admission of Rupert’s Land to Canadian Confederation in the 1870s and land claims in southern Ontario between the two World Wars.</p>
<p>3. References to the research (indicative maximum of six references)</p> <p>1. McHugh, P. <i>Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination</i> (Oxford: Oxford University Press, December 2004) ix</p>

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pp, 661pp ISBN 0-19-825248-X

2. McHugh, P *Aboriginal Title: the Modern Jurisprudence of Tribal Land Claims* (356 pages, Oxford University Press, publication August 2011).
3. McHugh, P. "The Property Rights of Tribes" in Martin Dixon, ed., *Modern Studies in Property Law, Volume 5* (Oxford: Hart Publishing, 2009) at 433 – 472.
4. McHugh, P. "The Politics of Historiography and the Taxonomies of the Colonial Past: Law, History and the Tribes" in C Stebbings and A Musson, editors *Making Legal History: Approaches and Methodology* (Cambridge University Press) at pp 164-195.
5. McHugh, P. "Aboriginal Identity and Relations in North America and Australasia" One of two major essays accompanied by short commentaries in *Kokiri Ngatahi: Living Relationships - The Treaty of Waitangi in the New Millenium* (Wellington: Victoria University Press, 1998) at 107-186.
6. McHugh, P. "Sovereignty in Australasia: Comparatively Different Histories" (2009) 13:1 *Legal History* 57 - 92.

4. Details of the impact (indicative maximum 750 words)

In the past twenty-five years there has been a fundamental shift in the legal and constitutional foundations of government relations with the indigenous peoples in the common law jurisdictions of Canada and Australasia. McHugh's work has been pivotal and highly influential in securing the political changes that these not uncontroversial legal changes have generated and continue to generate. McHugh's work has influenced national legal systems and political development in a manner and to an extent rare for a legal and historical scholar. Much of this influence occurs at the high-policy level in the proverbial corridors of power where governments strategise the management of claims (in court presentation as well as more generally). This impact is less outwardly visibly though in its effect much more significant than the more usual 'impact' setting of citation by fellow academics and other more public forms.

Over the REF period McHugh's impact includes the following:

- Citation and appearance before courts and tribunals in Canada and New Zealand as independent constitutional and historical expert;
- Retention by the governments of Canada and New Zealand to provide advice in the management of land claims;
- Providing the underpinning concepts embodied within New Zealand's Marine and Coastal Area (Takutai Moana) Act 2011;
- The recognition by Commonwealth courts of the doctrine of common law aboriginal rights which renders tribal land rights justiciable in local courts.

The cases and issues in question are high-profile, often with associated media coverage. Claims involve sums of billions of dollars and considerable political sensitivity involving a history of difficult relations and tribal distrust of government and claims of an extent and nature that in the past two decades have proven to be electorally costly for governments.

One such claim was the Canadian Ross River Kaska Dena land claim. In Justice Gower's 91-page decision[1], McHugh is cited 108 times. Justice Gower accepts the evidence supplied by McHugh in reaching his conclusion on the substantive issues – for example "*Having generally accepted Dr. McHugh's expert opinion evidence that the relevant provision was not intended to have justiciable legal force and effect "at that time", I am left struggling to discern any reason how or why the relevant provision could have subsequently acquired legal force and effect in order to be enforceable in this Court.*" [para139] "*Dr. McHugh's evidence, as a legal historian, was not significantly challenged on cross-examination.*" [para 149] "*This is an important distinction, and it is best explained by Dr. McHugh in his text, Aboriginal Title, The Modern Jurisprudence of Tribal Land Rights ...*" [para 149] "*Dr. McHugh opined, and I accept, that the honour of the Crown would not have been considered a justiciable principle at that time and in the specific context of the 1870 Order ...*" [para 150].

Another is the Alderville claim in southern Ontario. The Head of the Toronto Office of the Aboriginal

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Litigation Team of the Canadian Department of Justice writes[2]:

“Dr. McHugh is currently acting as an expert on Alderville First Nation et al. v. Canada which is presently in trial. The litigation involves a number of First Nations who are contesting the validity of the 1923 William Treaties on the basis of Crown misconduct. The plaintiffs seek damages in excess of \$1 billion... It raises issues of national importance and, necessarily, political sensitivity. “The Crown’s preparation and argument in this case relies strongly on Dr. McHugh’s expertise associated with his published work, including Aboriginal Societies and the Common Law (2004), Aboriginal Title (2011) and his paper “The Politics of Historiography and the Taxonomies of the Colonial Past: Law, History and the Tribes” (2011). Dr. McHugh’s unique expertise as a legal historian of imperial and early national Canada – and specifically the Crown’s relationship to aboriginal peoples -- plays an important role in the Crown’s defence in the claim... “...through his research interests and published works Dr. McHugh has made a significant impact on the way the Attorney General of Canada responds to litigation involving First Nations.”

The former Senior General Counsel and team leader of the Aboriginal Law Litigation Section, Department of Justice, Canada, Ontario Regional Office, as well as detailing a number of cases for which McHugh is or has provided expert testimony (including The Douglas Treaties (1851) claims on Vancouver Island, BC, and the T’kemplups (British Columbia interior) claim on pre-confederation Indian policy in BC, both current), speaks more generally about McHugh’s impact on the DOJ strategy[3]:

“It is not the same as the positioning of self-interested parties in private litigation. It requires a sense of the overriding public interest as well as the accommodation of the rightful sensitivities of First Nations claimants and maintenance of consistency in the Crown’s position across a series of proceedings in different parts of the country. Professor McHugh’s published work, supported and detailed by his expert reports in particular proceedings, has had a direct impact on enabling the Attorney-General of Canada to address this task”

McHugh’s work has also had impact in New Zealand. This began pre-period, most notably by the Court of Appeal’s indication in the *Ngati Apa* case (2003) that there might be residual Maori property rights around the NZ coastline, an argument pioneered by McHugh’s work. In period, as well as his contribution to individual cases, his work has informed legislation and has become part of the context in which issues concerning indigenous peoples rights are judged:

[Text removed from publication]

Legal advisor to the Prime Minister of New Zealand[4]

“Professor McHugh’s work has had a very significant impact in this country. Indeed he is undoubtedly regarded as the most important commentator on Native title issues that New Zealand has produced. In New Zealand, moreover, these questions are not in any way marginal but are pivotal to national political and legal developments, given the very high profile of Maori historic claims and the fact that about 15% of the national population is Maori. The foreshore and seabed issue, in which Paul’s work was especially influential, was a major national controversy which caused substantial protests and fundamental changes to national politics.”

Member of Panel to review operation of New Zealand’s Foreshore and Seabed Act[5]

5. Sources to corroborate the impact (indicative maximum of 10 references)

[1] Ross River Dena Council v. the Attorney General of Canada, 2012 YKSC4
<http://caid.ca/RRDCDec%20YKSC%204%202012.pdf>

[2] Letter (October 2014) from General Counsel with Canadian Department of Justice and Head of the Aboriginal Litigation Team, Toronto Office

[3] Letter (October 2014) from former Senior General Counsel and team leader of the Aboriginal Law Litigation Section, Department of Justice, Canada, Ontario Regional Office

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[4] Letter (October 2014) from a Senior Legal Advisor to the Prime Minister of New Zealand

[5] Letter (October 2014) from Member of Panel to review operation of New Zealand's Foreshore and Seabed Act