Institution: University of Cambridge

Unit of Assessment: UoA 13 Architecture, Built Environment and Planning

Title of case study: The recognition of Aboriginal land and resource-related rights and claims, primarily in the common-law jurisdictions of Australasia and North America, as matters of legal status, political recognition and historical treatment.

Period when the underpinning research was undertaken: 2000-2020

Details of staff conducting the underpinning research from the submitting unit:

Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Professor Paul McHugh	Professor of Law and Legal History (2012)	01.10.1987 - present

Period when the claimed impact occurred 1 August 2013 to 31 December 2020

Is this case study continued from a case study submitted in 2014? No

1. Summary of the impact (indicative maximum 100 words)

The impact of McHugh's work is embodied in the wide and deep legal uptake of the paradigm-shift concept of aboriginal title that he pioneered and to which he continues to contribute. This concept was of critical importance in reversing the conception that aboriginal territories occupied by the British Crown were *terrae nullius* (nobody's land) rather than territories subject to the public authority of indigenous polities. McHugh's work on aboriginal title has fundamentally changed the dynamics of engagement between aboriginal people and the State, politically and legally. The most visible manifestations of this impact since August 2013 include settlements and landmark legal decisions resolving contemporary claims to traditional resource rights and of historical claims in Canada and New Zealand worth hundreds of millions of pounds as well as profound significance for the culture and economic basis of thousands of indigenous peoples and their communities. Three examples are the *Alderville* case's GBP640M settlement in 2018, benefitting thousands of people from seven First Nations in Canada; the reinterpretation of the 1840 Treaty of Waitangi, between the British Crown and the Maori in New Zealand, in a 2014 landmark decision of the Waitangi Tribunal (which refers to McHugh no less than 99 times); and the recognition of Maori customary title over the foreshore and seabed in the 2016 case *Re Tipene* (applying statutory tests derived from McHugh).

2. Underpinning research (indicative maximum 500 words)

McHugh's work has had a decisive influence on the legal framing and recognition of aboriginal claims. Up to the 1980s, national courts in many common law countries had applied variants of the *terra nullius* fiction to forestall any legal accountability of the Crown in its handling of relations with indigenous peoples. The *terra nullius* legal supposition that the aboriginal territories occupied by the British Crown lacked any pre-existing governmental authority or land ownership, meant that national political systems made little effort to accommodate traditional aboriginal resource rights into allocation and decision-making processes whilst historical land claims were dismissed as unimportant bygones. The concept of the aboriginal title introduced by McHugh's work became a platform against the *terra nullius* politics of inaction and severe marginalisation, and was effectively mobilised in litigation, most notably in Canada and New Zealand, but also in other countries, to begin a process of legal recognition of aboriginal status and redress which is still ongoing.

Two book-length monographs give the fullest statement of this research: McHugh's *Aboriginal Societies and the Common Law* **[R1]** provides a historic overview of the interactions between the common law legal system and the aboriginal peoples of North America and Australasia. The book starts by assessing the general nature of British imperialism and its position towards non-Christian people in the 17th and 18th centuries. In the second section, the book focuses on the

post-imperial states of North America and Australasia from their early national periods to the modern era. The relationship between the common law and the rights of aboriginal peoples is described in terms of the enduring but constantly shifting questions of sovereignty, status and the nature of legal thought. In a final section, these insights are applied to the political resurgence of aboriginal peoples since the 1970s and their growing calls for self-determination.

McHugh's *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* **[R2]** continues the exploration of this relationship, by focussing specifically on the proprietary notion of aboriginal title. The development of the aboriginal title is one of the most innovative and controversial doctrines in the modern history of the common law. The doctrine was adopted by the common law courts in Canada, followed by New Zealand and then Australia in the famous *Mabo No 2* case. These high-profile court cases recognised the common-law basis of aboriginal title as an enforceable proprietary interest, a transformation with huge political and economic consequence. In the allocation and regulation of resources (such as land and fisheries), Governments could no longer marginalise aboriginal claims to current and past ownership rights. Aboriginal title spread to other common law jurisdictions facing similar issues, such as Malaysia, Belize, and countries of southern Africa. This book provides a critical assessment of the doctrine, its early conceptualisation then elaboration in the common law courts.

The ideas described in these two books have been extended in a series of peer-reviewed journal articles and contributions to edited volumes. This work further develops the history of imperial practices and their importance for contextualising the emergence and evolution of the legal concept of the aboriginal title both within specific country contexts and across jurisdictions. Examples of these extensions include articles covering Canada **[R3]**, New Zealand **[R4]**, the role of legal historians in framing the past **[R5]**, and the pre-Revolutionary American colonies **[R6]**.

3. References to the research (indicative maximum of six references)

The underpinning research has been peer-reviewed and published in well-established journals and by an influential University Press.

R1: McHugh, P. G. (2004). *Aboriginal societies and the common law: A history of sovereignty, status and self-determination*. Oxford University Press. ISBN 9780198252481. [DOI]

R2: McHugh, P. G. (2011). *Aboriginal title: The modern jurisprudence of tribal land rights*. Oxford University Press. ISBN 9780199699414. [DOI]

R3: McHugh, P. G. (2014). Time whereof - Memory, history and law in the jurisprudence of Aboriginal rights. *Saskatchewan Law Review*, 77(2), 137-172.

R4: McHugh, P. G. (2015). The Crown's relationship with tribal peoples and the legal dynamics for the resolution of historical and contemporary claims. *Victoria University of Wellington Law Review*, 46(3), 875-906. [DOI]

R5: McHugh, P. G. (2018). Imperial law – the legal historian and the trials and tribulations of an imperial past. In C. Tomlins and M. Drubber (Eds.), *The Oxford handbook of legal history* (pp. 883-900). Oxford University Press. ISBN 9780198794356. [DOI]

R6: McHugh, P. G. (2020). Prerogative and office in pre-revolutionary New York: Feudal legalism, land patenting, and Sir William Johnson, Indian Superintendent (1756-1774). In E. Cavanagh (Ed.), *Empire and legal thought: Ideas and institutions from antiquity to modernity* (pp. 425-461). Brill. ISBN 9789004430983.

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

The impact of McHugh's work is embodied in the wide and deep legal uptake, in legal proceedings, statutes and legal education, of the paradigm-shift concept of aboriginal title that he pioneered in his research. This concept is now an orthodoxy in national legal systems routinely incorporated into government decision-making. The legal acceptance of the aboriginal title as a proprietary interest has fundamentally changed tribal peoples' terms of engagement with governments. It has had a lasting impact on the legal and political leverage of aboriginal

peoples and the recognition of their rights in common law jurisdictions around the world, particularly in Canada and New Zealand, as detailed below, but also in other common law countries and beyond.

The most visible impact of McHugh's work since August 2013 can be discussed around several watershed court cases and claims proceedings where his research was at the core of the paradigm-shifting argument. These have spawned settlements of contemporary claims to traditional resource rights and of historical claims worth hundreds of millions of pounds and of profound significance for thousands of people from indigenous groups.

Canada

In Canada, McHugh has appeared as an expert historical witness in a large number of court cases. Some are particularly noteworthy.

First, the *Alderville First Nation* hearing had stretched into its fifth year of trial proceedings before settlement, with McHugh providing two expert witness reports **[E1]**. First Nations challenged the legality of the last old-style land cession treaties (1923) between the Crown and indigenous peoples in Canada covering wide areas of southern Ontario. Referring specifically to the CAD 1.11 billion (over GBP640M) settlement reached in August 2018 in the *Alderville* case, Carole Lindsay, General Counsel in the Aboriginal Law Division in the Ontario Regional Office of Canada's Department of Justice, emphasises the specific impact of McHugh's work in the outcome: '[i]*n historical cases such as these* [footnote 1 refers to the *Alderville* case]*, the credibility of the expert witnesses is central to the litigation and often dispositive of the issue before the court. The AGC* [Attorney General of Canada] *has adopted the results of Professor McHugh's research because the AGC considers him to be the most credible expert in his field*' **[E2]**.

The settlement of the case, which affects seven First Nations amounting to approximately 3800 people, was unanimously welcomed by their leaders. Some quotes from the chiefs of these First Nations are telling of the profound significance of the settlement both symbolically, culturally and economically: '*I am extremely proud that the negotiations team has successfully resolved our longstanding battle for constitutionally protected hunting and fishing rights. Our ancestors have fought since 1923 to exercise our rights freely and without encumbrance and finally we have been able to secure this for our people and for future generations*' (Chief Kelly LaRocca, Mississaugas of Scugog Island First Nation); '*On this historic day, we acknowledge the hard work of our ancestors, our elders, our leaders and knowledge keepers in their determination to have our collective Treaty rights recognized and affirmed*' (Chief Phyllis Williams, Curve Lake First Nation); '*It is with honour and pride to our ancestors and our people today that we have settled the Williams Treaties claim for our Seven Generations to come*' (Chief Laurie Carr, Hiawatha First Nation); '*Rama First Nation joins with Williams Treaties leadership in celebrating the conclusion of the work our ancestors began so long ago, the resolution of this long-standing claim. The restoration of harvesting rights throughout our territories is a part of our cultural identity that these treaties compromised*' (Chief Rodney Noganosh, Rama First Nation) **[E3]**.

Second, McHugh appeared recently in the ongoing *Chippewas of Saugeen et al v. The Attorney General of Canada* and the *Chippewas of Nawash Unceded First Nation, et al. v. The Attorney General of Canada, et al.* cases (known as the 'Treaty 72' or *Bruce Peninsula* claim proceedings). These cases concern an indigenous claim to Crown breach of treaty involving valuable and scenic land on an isthmus between Lake Huron and Georgian Bay as well as the claim to a subsisting aboriginal title over the lakebed itself **[E4]**. Like the *Alderville* case (before its settlement), this is one the highest-stakes cases on aboriginal title in the Canadian legal system. Carole Lindsay's testimonial specifically refers to the AGC's reliance on McHugh's expert report in these cases **[E4]** (footnote 1), again '*because the AGC considers him to be the most credible expert in his field*'. The complexity of the case is exemplified by the fact that, during the tribunal hearing of December 2019, Professor McHugh was examined in Court for three full days **[E5]** (examination starts at page 8755).

McHugh's role in these proceedings is evidence, more generally, of the influence and stature of his work in the understanding of the role of the law in British imperial history and the Crown's relations with indigenous polities, including specifically the legal effect of the Royal Proclamation

1763 and its bearing upon official land dealings in the pre- and early-Confederation eras. McHugh's historical work retrieves the legal frame within which key past actors, Crown officials, especially, functioned. Senior General Counsel in Canada's Department of Justice between 2001 and 2019, with overall responsibility for the management of aboriginal litigation involving the federal Crown, describes the impact of McHugh's scholarship as an '*exceptional result*' which played a '*crucial role … in the gradual unfolding of the Canadian constitutional framework in relation to the relationship between the Crown and indigenous peoples*' **[E6]**.

McHugh has been commissioned by the Attorney-General of Canada as an expert legal historian on several other equally high-profile occasions **[E2]**. Examples of these other research impacts include the role of the law in numerous land cessions and transactions in the Great Lakes region of pre-Confederation Canada, the Crown's Indian land policy in colonial Vancouver Island and British Columbia, the admission of Rupert's Land to the Canadian Confederation, and to the two Williams Treaties in southern Ontario (1923). This work characteristically historicises the notion of public authority as it would have been understood within official circles at the time, paying particular attention to the interaction of office and prerogative in contextualised settings.

New Zealand

In New Zealand, McHugh's research has been widely relied on a matter as fundamental as the interpretation of the 1840 Treaty of Waitangi (*Te Tiriti o Waitangi*) whereby Britain and the Māori organised public authority over New Zealand. In 1975, New Zealand established by statute the Waitangi Tribunal to handle a wide range of territorial and natural resources claims by Māori groups against the Crown under the Treaty of Waitangi. Since its creation the Tribunal has registered over 2500 claims, partly or fully reported on over 1000 claims, and issued over 120 reports covering 80% of New Zealand's landmass. One report **[E7]**, issued on 14 October 2014, set the direction the Tribunal would take in subsequent reports (see e.g. **[E8])** on the process, meaning and effect of the Waitangi Treaty. The Tribunal solicited reports from scholars distinguished for their work in national and indigenous history. The report drew widely upon McHugh (99 references) in the substantive text (see e.g. pp. 44-46, 327-331, 412-413, 460-462, 474-475), the conclusions (at p. 525), and in endnotes (see e.g. Chapter 2, endnotes 154, 218, 223, 229, 235, 237, 239, 248, 250, 252, 256, abundantly referring to R1).

McHugh's research has also been central to the advancement and settlement of proprietorial claims (commercial sea fisheries) by Ngai Tahu, the South Island's primary Maori *iwi* (tribe) **[E9]**. Aboriginal title is fundamental to the present dispute over freshwater rights as well as in determining Maori rights in the marine regions of the South Island. By way of context, the indigenous fisheries sector in New Zealand appeared in the early 1990s as a result of the increasing acceptance of Maori sea-fishing rights, which today employs over 3000 people in regional ports around the country. This industry is now a global flagbearer for indigenous resource development, emblematic of cultural as well as economic and social revitalization.

In 2014, McHugh, together with C. Bell, provided an expert report for the New Zealand Government (expressly based on McHugh's research) on the role of the aboriginal title tests as incorporated into the Marine and Coastal Area (*Takutai Moana*) Act 2011 **[E10]** and, before that, the Foreshore and Seabed Act 2004. The first-ever recognition of a Maori customary title over the foreshore and seabed in the case *Re Tipene* (2016) **[E11]** was an outcome impossible without McHugh's work. **[Text removed for publication].** It can be seen in the 2004 and 2011 statutory mechanisms for recognition of Maori coastal rights (such as the section 58 requirements for a customary marine title (CMR)), outcomes like *Re Tipene* case (2016) where the CMR test was satisfied (at paras. 149 and 179), and Ngai Tahu's commencement of legal proceedings for recognition of their aboriginal freshwater rights.

Wider influence

While McHugh's own research and legal involvement primarily focuses on Canada and New Zealand, his work has been picked up in other jurisdictions, such as South Africa and Malaysia **[E13; E14]**. It has also received attention in Israel (as regards the Bedouin) **[E15]**. So far, this influence is intellectual, but it is noted because such was also the case in the early stages of the recognition of the concept of aboriginal title in Canada and New Zealand in the 1980s, which over time led to a paradigm-shift.

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

E1: McHugh, P. G. (2016). *A history of the development of the legal principles for Crown relations with First Nations*.
Filed 19 August 2016, evidence in chief and cross-examination, February 2017 in Alderville Indian Band v Canada. Settled September 2018.

E2: Testimonial: Senior General Counsel, Aboriginal Law Division, Ontario Regional Office, Department of Justice Canada. 27 November 2020.

E3: 'Canada, Ontario and Williams Treaties First Nations reach negotiated settlement agreement for Alderville Litigation', 13 September 2018, Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC).

E4: McHugh, P. G. (2015). *Treaty 45½ (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: A report on British imperial policy and practice in Upper Canada during the 1830s*.
Filed 28 September 2015, evidence in chief and cross-examination, December 2019 in Bruce Peninsula Claim (94-CQ-50872CM).

E5: Superior Court of Justice of Ontario, Bruce Peninsula Claim (94-CQ-50872CM), Tribunal hearings day 67 (09/12/2019), 68 (10/12/2019), and 69 (11/12/2019)

E6: Testimonial: Senior General Counsel/Senior Advisor to the Assistant Deputy Minister (ADM) for Justice Canada. 11 March 2020.

E7: *Te Whakaputanga me te Tiriti/The Declaration and the Treaty. Report on Stage 1 of the Te Paparahi o Te Raki inquiry*. Wai 1040. Waitangi Tribunal Report 2014 (14 October 2014).

E8: *Te Mana Whatu Ahuru. Report on the Te Rohe Pōtae claims. Pre-publication version. Parts I and II*. Wai 898. Waitangi Tribunal Report 2018. (5 September 2018).

E9: Testimonial: Director of Ngāi Tahu Research Centre, University of Canterbury, New Zealand. 23 November 2020.

E10: McHugh, P. G. and Bell, C. (QC), *Satisfying the requirements of section 95 of the Marine and Coastal Area (Takutai Moana) Act 2011 (New Zealand) for 'recognition agreements' of customary marine title [CMT],* 4 February 2014.

E11: *R v. Tipene*, High Court of New Zealand, Judgment of 22 December 2016, CIV 2011-485-806 [2016] NZHC 3199.

E12: Testimonial: **[text removed for publication]** New Zealand.

E13: Gilbert, J. (2017). Litigating indigenous people's rights in Africa: Potentials, challenges and limitations. *International & Comparative Law Quarterly*, 66(3), 657-686. [DOI]

E14: Subramanian, Y., Nicholas, C. (2018). The courts and the restitution of indigenous territories in Malaysia. *Erasmus Law Review*, 1, 67-79. [DOI]

E15: Kedar, A., Amara, A., Yiftachel, O. (2018). *Emptied lands: A legal geography of Bedouin rights in the Negev* (excerpts). Stanford University Press. ISBN 9781503603585. [DOI]