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Abstract

This essay presents and contrasts two narratives on the past and future of the law of Aboriginal title. The first narrative, drawn from the Final Report of the Royal Commission on Aboriginal Peoples, grounds the law of Aboriginal title in inter-societal norms that enabled the mutual coexistence of colonists and settlers in North America. It locates Aboriginal territorial dispossession in colonial policies and practices that failed to conform to the spirit of mutual coexistence, and calls on governments to provide Aboriginal people with lands and resources necessary for self-sufficiency. The counter-narrative describes the law of Aboriginal title as a relatively minor exception to a more general legal legacy of Aboriginal territorial dispossession. It argues that the law should acknowledge that it has produced unjust distributions of title in Canada. It calls on the law of Aboriginal title to allocate proprietary power to Aboriginal people in ways that force governments to introduce reforms similar to those recommended by the Royal Commission.

Keywords

Indigenous peoples--Land tenure; Canada

WHAT'S LAW GOT TO DO WITH IT? THE PROTECTION OF ABORIGINAL TITLE IN CANADA©

BY PATRICK MACKLEM*

This essay presents and contrasts two narratives on the past and future of the law of Aboriginal title. The first narrative, drawn from the *Final Report of the Royal Commission on Aboriginal Peoples*, grounds the law of Aboriginal title in inter-societal norms that enabled the mutual coexistence of colonists and settlers in North America. It locates Aboriginal territorial dispossession in colonial policies and practices that failed to conform to the spirit of mutual coexistence, and calls on governments to provide Aboriginal people with lands and resources necessary for self-sufficiency. The counter-narrative describes the law of Aboriginal title as a relatively minor exception to a more general legal legacy of Aboriginal territorial dispossession. It argues that the law should acknowledge that it has produced unjust distributions of title in Canada. It calls on the law of Aboriginal title to allocate proprietary power to Aboriginal people in ways that force governments to introduce reforms similar to those recommended by the Royal Commission.

Cet essai présente et met en contraste deux histoires concernant le passé et l'avenir du droit relatif aux titres aborigène. La première histoire, tirée du *Rapport de la Commission Royale sur les peuples autochtones*, établie les bases de ce droit dans le contexte de normes enter-societé permettant la coexistence mutuelle des colonisateurs et des colons en Amérique du Nord. Cette histoire affirme que la dépossession territoriale autochtone découle des politiques et des pratiques coloniales n'ayant su se conformer à l'esprit de coexistence mutuelle, et demande au gouvernements d'accorder aux peuples autochtones les terres et les resources nécessaires afin d'assurer leur autosuffisance. La seconde histoire, contredisant le première, décrit le droit relatif aux titres aborigène comme une exception relativement mineure à la longue tradition légale de la dépossession territoriale autochtones. Cette histoire soutient que le droit devrait reconnaître qu'il a contribué à la distribution injuste des titres au Canada. Elle suggère que le droit relatif aux titre aborigène accorde des pouvoirs de propriété aux peuples autochtones en vue de forcer les gouvernements à introduire des réformes similaires à celles recommandées par la Commission Royale.

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I. INTRODUCTION

This essay presents two narratives concerning the role of law in relation to the protection of Aboriginal title in Canada. The first is contained in the *Final Report of the Royal Commission on Aboriginal Peoples*.[1] The second—which, for want of a better term, I will call the counter-narrative—complements the first but emphasizes different aspects of law's past and future.

The question that forms the title of this essay refers to a solution, proposed by the Commission, to problems that Aboriginal people face as a result of historic dispossession of their ancestral territories. In its *Report*, the Commission calls for a new deal for Aboriginal people:

> It is not difficult to identify the solution. Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to insure the economic, cultural and political survival of Aboriginal nations.[2]

Exploring law's relation to this solution—what law has to do with it—involves two related inquiries: (a) why does the law not already provide Aboriginal nations with sufficient land and resources? and (b) what should the law do in the future to provide Aboriginal nations with sufficient land and resources? By law, I refer to law promulgated by the judiciary, not legislative initiatives. As will be seen, the two narratives respond to these inquiries in divergent ways.

II. THE COMMISSION'S NARRATIVE[3]

Why does the law not already provide Aboriginal nations with sufficient land and resources? The answer to this question lies in history. If we go back in time, we see that despite claims of territorial

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[1] Canada, Royal Commission on Aboriginal Peoples, *Report: Restructuring the Relationship*, vol. 2, Part II (Ottawa: Minister of Supply and Services, 1996) [hereinafter *Restructuring the Relationship*].

[2] *Ibid.* at 557.

[3] This section condenses the Commission's discussion of the law of Aboriginal title and its recommendations concerning lands and resources: see *ibid* at 559-68 and 1021-22.

sovereignty to North America by European nation-states at the time of contact, Aboriginal relationships to land and its resources were initially respected by imperial and colonial authorities. Indeed, the law of Aboriginal title, as initially expressed in British colonial law, emerged out of the very process of colonization and settlement—through the practices of Aboriginal people and colonial officials in their attempt to maintain peace and cooperation with each other.

The law of Aboriginal title quickly grew to reflect inter-societal norms that enabled the mutual coexistence of colonists and Aboriginal people on the North American continent. This body of law prescribes stable ways of handling disputes between Aboriginal and non-Aboriginal people, especially disputes over land. It recognizes Aboriginal title, namely, Aboriginal occupation and use of ancestral lands, including territory where Aboriginal people hunted, fished, trapped, and gathered food, not just territory where there were Aboriginal village sites or cultivated fields. It purports to restrict non-Aboriginal settlement on Aboriginal territory until the Aboriginal interest in such territory has been surrendered to the Crown. It prohibits sales of Aboriginal land to non-Aboriginal people without the approval and participation by Crown authorities. And, in its most developed form, it prescribes safeguards for the manner in which such surrenders can occur and imposes strict fiduciary obligations on the Crown with respect to Aboriginal lands and resources.

Although the law from the outset recognized a range of inherent rights with respect to land and resources, Crown respect for the existence of Aboriginal title was most consistent during the eighteenth and early nineteenth centuries. This respect was eroded by the decline of the fur trade and the ensuing decline of Aboriginal and non-Aboriginal economic interdependence. Increased demands on Aboriginal territory occasioned by population growth and westward expansion, followed by a period of paternalistic administration marked by involuntary relocations, only exacerbated the erosion of respect. The treaty-making process fell into disuse, and treaties that had been concluded were often vulnerable to charges of manipulation and misinterpretation by government officials. Judicial doubts came to be expressed as to the existence and nature of Aboriginal title.[4] Courts began to view treaties between Aboriginal nations and the Crown as at best private contracts, ignoring their historic and fundamental

[4] See, for example, *St. Catherine's Milling* v. *R.* (1888), 14 App. Cas. 46 (P.C.) [hereinafter *St. Catherine's Milling*]; and *Re Southern Rhodesia*, [1919] A.C. 211 (P.C.).

character.[5] The law of Aboriginal title fell into disuse. It was misunderstood by legal and political actors and increasingly ignored by the governments of the day. As a result, it failed to protect Aboriginal lands and resources against non-Aboriginal settlement and exploitation.

What should the law do to provide Aboriginal nations with sufficient land and resources? The Commission noted that the judiciary has begun to develop the law of Aboriginal title along its original trajectory of respect and co-existence. The Supreme Court of Canada has affirmed that Canadian law recognizes Aboriginal title as encompassing a range of rights of use and enjoyment of ancestral land stemming not from any legal enactment such as the *Royal Proclamation* [6] but instead from the fact of Aboriginal occupancy.[7] The Court has also held that the Crown owes a fiduciary duty to Aboriginal people in its dealings with Aboriginal lands and resources.[8] In another case, the Court has ruled that treaties between the Crown and Aboriginal nations ought to be construed in light of their historic character and "not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians."[9] And, in 1990, in light of constitutional recognition and affirmation of existing Aboriginal and treaty rights by section 35(1) of the *Constitution Act, 1982*,[10] the Court ruled that:

> [t]he relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."[11]

Thus, the law of Aboriginal title provides a strong foundation for contemporary protection of Aboriginal lands and resources. Indeed, the law requires the Crown to take active steps to protect Aboriginal lands and resources. This positive dimension of the law emerges from the text, structure, and jurisprudence of section 35 of the *Constitution Act, 1982*, which cumulatively suggest that governmental action—in the form of

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[5] See, for example, *Pawis* v. *R.*, [1980] 2 F.C. 18 (T.D.).

[6] 1763 (U.K.), reprinted in R.S.C. 1985, App II, No. 1 [hereinafter *Royal Proclamation*].

[7] *Calder* v. *British Columbia (A.G.)*, [1973] S.C.R. 313.

[8] *Guerin* v. *R.*, [1984] 2 S.C.R. 335.

[9] *Simon* v. *R.*, [1985] 2 S.C.R. 387 at 402, quoting Gray J. in *Jones* v. *Meehan* 175 U.S. 1 at 11 (1899).

[10] Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

[11] *Sparrow* v. *R.*, [1990] 1 S.C.R. 1075 at 1108.

negotiations—is central to the constitutional recognition and affirmation of Aboriginal and treaty rights. It also is reflected in case law addressing the Crown's fiduciary relationship with Aboriginal people, which emphasizes the responsibility of government to protect Aboriginal rights arising from the special trust relationship created by history, treaties, and legislation. And it is supported by emerging international legal norms, which impose extensive positive obligations on governments to recognize and protect a wide array of rights with respect to lands and resources.

But beyond providing a foundation for the protection of Aboriginal title, the Commission is of the view that governments, not the law, should provide Aboriginal nations with greater lands and resources. Though true to the original purposes of the law of Aboriginal title, current jurisprudence cannot and does not accomplish all that is required to protect Aboriginal lands and resources.

Why? According to the Commission, when an Aboriginal nation asserts a particular right associated with title to engage in a relatively discrete activity, such as fishing, a ruling that defines the respective rights of the parties may well be an effective means of resolving the issue. However, when an Aboriginal nation asserts a wide range of rights with respect to lands and resources associated with title, the courtroom is not always the most effective forum to settle the dispute. Available remedies are often too blunt and reactive to reflect the detailed and complex political, economic, jurisdictional, and remedial judgments necessary to resolve the claim to the satisfaction of all interested stakeholders. These conditioning factors make the law but one part of a larger political process of negotiation and reconciliation.

Even if the law could tailor its rules and remedies to address these issues in a detailed manner, negotiations are clearly preferable to court-imposed solutions. Litigation is expensive and time-consuming. Negotiation permits parties to address each other's real needs and reach complex and mutually agreeable trade-offs. A negotiated agreement is more likely to achieve legitimacy than a court-ordered solution, if only because the parties participated more directly and constructively in its creation. And negotiation mirrors the nation-to-nation relationship that underpins the law of Aboriginal title and structures relations between Aboriginal nations and the Crown.

With respect to short-term protection, the Commission urges the judiciary to make creative use of the interlocutory injunction to facilitate negotiations, but it calls on governments to ease the judiciary's burden by providing an alternative, and more flexible and effective, form of

interim relief tailored to the particular needs and interests of all relevant stakeholders.

Specifically, the Commission calls on federal and provincial governments to recognize, in a Canada-wide framework agreement, the critical role of interim relief agreements, and to agree on principles and procedures to govern such agreements, including: (a) the partial withdrawal of lands that are the subject of claims in a specific claims treaty process; (b) Aboriginal participation and consent in the use or development of withdrawn lands; and (c) revenues from royalties or taxation of resource developments on the withdrawn lands to be held in trust pending the outcome of negotiation. Companion legislation to a proposed Royal Proclamation should state that the parties have a duty to make reasonable efforts to reach an interim relief agreement.

The Commission also urges the federal government to enter into an interim specific claims protocol with the Assembly of First Nations. The purpose of such a protocol would be to expand the scope of current specific claims policy to include treaty-based claims, enhance the definition of lawful obligation and compensation principles, obligate the federal government to attempt to provide equivalent land in compensation where a claim relates to the loss of land, and provide greater federal funding to expedite claims resolution.

The Commission also foresees a new Lands and Treaties Tribunal to supervise the negotiation, implementation, and conclusion of interim relief agreements. The tribunal would possess the power to impose interim relief agreements in the event of a breach of the duty to bargain in good faith, and to grant interim relief pending successful negotiations of a new or renewed treaty with respect to federal lands and provincial lands where provincial powers have been so delegated.

In the Commission's view, the law also ought to take a back seat to governmental action in the long term. For the reasons given elsewhere in the Commission's *Report*, current federal policy respecting comprehensive and specific claims fails to provide the necessary protection to Aboriginal people.[12] The failure of current policy forces Aboriginal nations to seek to enforce their rights in the courts, which, for the reasons stated, cannot provide the ongoing supervision required to enforce lasting solutions to disputes involving competing claims to lands and resources.

The Commission calls on governments to establish new treaty-making and treaty-renewal policies and processes to provide Aboriginal nations with greater ownership and control of lands and resources.

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[12] *Restructuring the Relationship*, *supra* note 1, at 527-56.

Specifically, it calls on federal, provincial, and territorial governments, through negotiation guided by an extensive set of principles identified by the Commission, to provide Aboriginal nations with lands that are sufficient in size and quality to foster Aboriginal self-reliance and cultural and political autonomy. Such negotiations should aim to divide the territory in question into three categories of land, in order to identify as precisely as possible the rights of each party with respect to lands, resources, and governance.

Category I lands would be lands in relation to which Aboriginal nations would have full rights of ownership and primary jurisdiction. They would include existing reserve and settlement land as well as additional lands necessary to foster self-sufficiency, and the Aboriginal nation would exercise primary and paramount legislative authority in relation to such lands. As a general rule, fee simple lands would not be converted into Category I lands unless purchased from willing sellers; but in exceptional cases, where the Aboriginal nation's interests clearly outweigh the third party's interests, such as where the land was unlawfully or fraudulently obtained in the past or where it is of outstanding traditional significance, the Crown could expropriate at fair market value. Lands on which there are third-party interests less than fee simple can be included in Category I, but the Aboriginal nation is to respect all terms of such tenures; again, in exceptional circumstances, such terms can be revoked by the Crown at fair market value. Existing parks and protected areas generally should not be selected as category I lands.

Category II lands would form a portion of the traditional territory of the nation, that portion determined by the degree to which Category I lands foster Aboriginal self-reliance. A number of Aboriginal and Crown rights with respect to lands and resources would be recognized by the agreement, and rights of governance and jurisdiction would be shared among the parties. Fee simple lands and lands burdened by interests less than fee could be included in Category II.

Category III lands would involve a complete set of Crown rights with respect to lands and governance, subject to residual Aboriginal rights of access to historical and sacred sites and hunting and fishing grounds. The Aboriginal nation would exercise limited, negotiated authority in respect of the Aboriginal citizens living on Category III lands.

Finally, as alluded to earlier, the Commission also calls for the establishment of an Aboriginal Lands and Treaties Tribunal. In addition to its supervisory functions in relation to interim relief, the tribunal would deal with specific claims by monitoring the adequacy of federal

funding and the good faith of bargaining and adjudicating claims referred to it by Aboriginal claimants. The tribunal would also play a role in the treaty-making, treaty-implementation, and treaty-renewal processes by reviewing the adequacy of federal funding to Aboriginal parties; arbitrating any issues referred to it by the parties by mutual consent; monitoring the good faith of the bargaining process; adjudicating, on request of an Aboriginal party, questions of any Aboriginal or treaty rights that are related to negotiations and justiciable in a court of law; investigating complaints of noncompliance with treaty undertakings, adjudicating disputes and awarding an appropriate remedy when so empowered by the treaty parties; and recommending to the federal government, through panels established for the purpose, whether a group asserting the right of self-governance should be recognized as an Aboriginal nation.

In sum, according to the Commission's narrative, the law of Aboriginal title exists as a backdrop to complex nation-to-nation negotiations concerning ownership, jurisdiction, and co-management. By recognizing Aboriginal title, the law serves as an instrument for the enforcement of Aboriginal rights and provides Aboriginal nations with a measure of bargaining power during negotiations. But the law cannot and should not do much more than lay down general principles that can act as baselines from which parties commence negotiations. Such legal principles may, on occasion, require governmental action, but it is governmental, not legal, action that is required to provide additional lands and resources to Aboriginal nations. According to this narrative, action must occur in the political realm. The law remains in the shadows, a relatively abstract articulation of the ideal of mutual co-existence.

III. THE COUNTER-NARRATIVE

To explain why the law does not already provide Aboriginal nations with sufficient land and resources, the counter-narrative also goes back in time, to the period of initial colonial contact and expansion in the new world. During this period, it was accepted practice among European nations that the first among them to discover vacant land acquired sovereignty over that land, to the exclusion of other future claimants. In the case of populated land, sovereignty was acquired by the discovering nation not by simple settlement, but by conquest or cession, but such land could be deemed vacant if its inhabitants were insufficiently Christian. The law deemed North America to be vacant,

and territorial sovereignty was acquired by European powers through the mere acts of discovery and settlement.

One expression and consequence of the sovereign power of the Canadian state is that Aboriginal territorial interests are governed by Canadian property law. Based on the legal fiction that the Crown was the original occupant of all the lands of the realm, Canadian property law holds that the Crown enjoys underlying title to all of Canada. Property owners possess and own their land as a result of grants from the Crown. Ownership confers a right to use and enjoy the land in question and a right to exclude others from entering onto one's land.

The fiction of original Crown occupancy was originally developed to legitimate feudal landholdings in England, along with another fiction that actual occupants of land at the time enjoyed rights of ownership as a result of grants from the Crown. Since the law had imagined the Crown as granting lands to landholders, the Crown was no longer the full owner of granted land. Ownership, or fee simple, passed as a result of these grants to landholders. This was not true in fact: the Crown was not the original occupant and therefore owner of the land. At the outset too, there were not, by and large, actual grants effected by the Crown to landholders. These were fictions developed to rationalize the existing pattern of landholdings in England, and they served this purpose well.

The fiction of underlying Crown title had different consequences in the colonial context. While, in England, underlying Crown title was accompanied by legal recognition of initially fictional grants to actual occupants, thereby having the effect of legitimating the existing pattern of landholdings, only one half of this equation was imported to Canada, thereby severely disrupting the existing pattern of landholdings in Canada. The Crown was imagined as the original occupant of all of Canada, but actual occupants were not recognized as owning their land through fictional Crown grants. Because the law posited the Crown as the original occupant but did not imagine the Crown to have granted title to Aboriginal occupants, the Crown was free to grant third-party interests to whomever it pleased, which it did: to settlers, mining companies, forestry companies, and the like. By refusing to acknowledge the full legal significance of Aboriginal occupancy, Canadian property law vested and continues to vest extraordinary proprietary power in the Crown. When coupled with its legislative power, the Crown's proprietary authority authorizes a vast array of competing claims to ancestral territories.

The law of Aboriginal title forms a small exception to Canadian law's general unwillingness to acknowledge Aboriginal legal interests

with respect to ancestral territories. It provides that, under certain circumstances, Aboriginal nations can claim rights of possession and use of remnants of ancestral territory, subject to surrender to or extinguishment by the Canadian state. But it also assumes that:

> there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.[13]

And the burden that Aboriginal title placed on the Crown's underlying interest has never meaningfully checked the exercise of Crown proprietary power, let alone the exercise of the Crown's legislative authority. As a result, Aboriginal title exists at the margins, meaningful only in geographic spaces left vacant by Crown or third-party non-use.

In response to the question of why the law does not already provide Aboriginal nations with sufficient lands and resources, this narrative suggests that law performed precisely the opposite function: namely, Aboriginal territorial dispossession. Indeed, law was instrumental in legitimating colonization and imperial expansion in two key respects. The law accepted the legitimacy of assertions of Crown sovereignty, thereby excluding or at least containing Canadian legal expression of Aboriginal sovereignty. And the law accepted the legitimacy of assertions of underlying Crown title, thereby excluding or at least containing Canadian legal expression of Aboriginal territorial interests.

With respect to the second inquiry—namely, what should the law do in the future to provide Aboriginal nations with sufficient lands and resources—the counter-narrative suggests that Canadian law must come to terms with the fact that it has been complicit in the colonization of Aboriginal people. Law's complicity in colonization specifically lies in its initial and continuing acceptance of undifferentiated Crown assertions of sovereignty and underlying title. Legal acceptance of such claims produced and continues to produce distributions of legislative and proprietary authority that severely disadvantage, in fact and law, Aboriginal nations in their efforts to achieve self-sufficiency. The law must acknowledge that colonization is an issue of distributive justice, and that its distributions of legislative and proprietary power, premised as they are on Aboriginal exclusion, are unjust.

Land claims negotiations illustrate the distributive function of the law of Aboriginal title. When the Crown and an Aboriginal nation negotiate the terms of a land claims agreement, each commences

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[13] *St. Catherine's Milling, supra* note 4 at 55.

negotiations armed with a certain amount of bargaining power which it exercises with an eye to wresting concessions from the other. Much criticism has been levelled against the process that the federal government has put in place to structure and regulate negotiations; the comprehensive and specific land claims processes suffer from a number of structural and institutional flaws that render them ineffectual instruments for achieving mutual coexistence.[14] Yet, even if the parties were to agree on procedurally fair processes for the resolution of comprehensive and specific claims, such procedural reform would not address the real problem, which is the dramatic inequality of bargaining power that exists between the parties.

The key point of the counter-narrative is that the relative bargaining power of the parties is a function of the distribution of property rights accomplished by legal choice. Imagine an Aboriginal nation involved in negotiations with the Crown over access and control of certain territory. Imagine further that Canadian law holds that (a) the nation in question enjoys Aboriginal title to such territory; (b) Aboriginal title confers exclusive rights on the nation to a wide range of activities on the territory, including exclusive rights to extract and develop surface and subsurface, and renewable and non-renewable, resources; (c) the Crown possesses no proprietary authority with respect to the territory in question; and (d) any existing third-party interests are subject to the exercise of rights associated with Aboriginal title. Contrast this with the more likely scenario that (a) the law has not yet recognized that the nation in question possesses title to anything more than a few scattered villages within the territory in question; (b) legal recognition of Aboriginal title only authorizes the Aboriginal nation to engage in pre-contact practices integral to their distinctive identity; (c) the law views the remainder of the territory as "Crown lands;" and (d) the law recognizes and enforces rights associated with third-party interests, such as timber rights, both on land conceived of as subject to Aboriginal title and lands within the territory not conceived of as subject to Aboriginal title. These two scenarios represent two different distributions of property rights, producing two different distributions of bargaining power and structuring two different outcomes in negotiations. Whether the first or the second scenario exists is a function of legal choice.

Nor was the distribution of bargaining power among the Crown and Aboriginal nations a one-shot affair, occurring some time in the distant past when the law initially accepted assertions of underlying

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[14] *Restructuring the Relationship*, *supra* note 1, at 527-56.

Crown sovereignty and title. The distribution of baseline entitlements is an ongoing phenomenon, occurring and recurring every time a court rules on the nature and extent of Aboriginal title, Crown title, and third-party interests. Indeed, legal framing of disputes between Aboriginal people and the Crown—what makes a political dispute a legal dispute—signals the distributive function of the legal system. Public highways are characterized as running through "Crown land," with the question being whether an Aboriginal person possesses certain "rights of access." Fee simple interests are characterized as stable, durable, and exclusionary, and paramount in the event of conflict with a right associated with Aboriginal title. Aboriginal title is characterized as *sui generis*, disabling Aboriginal litigants from accessing effective interim relief measures available to property right-holders.

Thus, it is not a question of whether the law ought to become involved in nation-to-nation negotiations to categorize territory for the purpose of recognizing Aboriginal and Crown rights; Canadian law is already involved in the categorization of territory by establishing and maintaining baselines, in the form of rights associated with legislative power and property entitlements, from which parties exercise their relative power and rights. To speak of law as too blunt an instrument to resolve the complex and competing interests implicated in the protection of Aboriginal lands and resources ignores the fact that the law is already there—establishing baselines, defining rights, forming and maintaining a range of interests at stake, and actively constituting the relative power of the parties. Instead of whether the law should intervene, this narrative asks on whose behalf should the law intervene. To those who believe that the law aspires to distributive justice, the answer is clear.

IV. CONCLUSION

While the Commission's narrative locates the law of Aboriginal title in initially informal inter-societal norms that have enabled the mutual coexistence of Aboriginal and non-Aboriginal people on the continent, the counter-narrative sees the development of inter-societal norms occurring within the context of a colonial legal imagination that accepted unjust claims of undifferentiated Crown sovereignty and underlying title. Legal acceptance of such claims has skewed the distribution of power between Aboriginal nations and the Canadian state in such a way that leaves Aboriginal nations severely disadvantaged, in fact and law, in their attempts to achieve territorial self-sufficiency. To ignore the distributive dimension of the law of

Aboriginal title is to ignore law's participation in the dispossession and colonization of Aboriginal people. While the Commission's narrative calls for the adherence to norms grounded in initial relations among Aboriginal and non-Aboriginal people, the counter-narrative additionally calls on law to produce just distributions of legislative and proprietary power. While the Commission's narrative demands relational justice, the counter-narrative demands distributive justice.

I believe the counter-narrative to be closer to the truth, but I also believe the two possess many points of convergence. For instance, both narratives suggest that Canada must come to terms with the fact that it has for too long refused to fully acknowledge the parallel existence of Aboriginal legal regimes. Viewing the law of Aboriginal title in distributive terms does not mean conceiving of Aboriginal title as a set of rights provided to Aboriginal people by the Canadian state; a just distribution of property rights can and should occur through Canadian legal recognition of Aboriginal systems of land tenure.

And so, in the end, the counter-narrative does not suggest that governments should act any differently than in the manner proposed by the Commission—which is why it does not conflict with, but instead complements, the Commission's narrative. But if the Commission's narrative relegates law to the shadows, the counter-narrative reveals that law hides in shadows of its own making. It suggests that it is not merely law's role but law's responsibility, borne of its relation to distributive justice, to allocate proprietary power in ways that force governmental action. To return to the title of this essay—with apologies to Tina Turner—it suggests that law is much more than a second-hand emotion.