Conclusion

Power and Principle: State-Indigenous Relations across Time and Space

Peter W. Hutchins

Constitutional protection of indigenous difference ought to extend beyond protection of certain customs, practices, and traditions integral to Aboriginal cultures to include protection of interests associated with territory, sovereignty, and the treaty process.

-- Patrick Macklem, Indigenous Difference and the Constitution of Canada

Without a guardian of the pledged word, only force counts.

-- Alain Supiot, Homo Juridicus: On the Anthropological Function of the Law

Power and principle frame the portrait of state-indigenous relations -- irrespective of era, irrespective of place. With this portrait, Western courts have struggled for a century and a half. Aboriginal litigation of course has one predominant characteristic -- almost inevitably it involves the state as plaintiff or defendant. Politics is introduced into the brew; principle is often siphoned off.

I was honoured to be asked to give the keynote address at the conference Delgamuukw, Mabo, and Ysleta: Native Title in Canada, Australia, and United States at the University of Calgary on 18 September 2003. I used the Thirty Years War as a metaphor for the experience that I had lived (and at least to that date had survived) as a practitioner seeking justice in state-indigenous relations. Although not combative by nature, I was drawn to the parallel by the fortuitous chronology (Calder in 1973 and the conference in 2003) and other analogies. The title of my address, “The Thirty Years War: A Practitioners’ Guide to Aboriginal Litigation since Calder,” might have seemed somewhat dark and exaggerated. There could well have been protests that there had been no war and certainly not one for thirty years. It did occur to me that the title could have been “The Hundred Years War: A Practitioners’ Guide ... since St. Catharine’s Milling”
or “The Hundred and Seventy Years War: A Practitioners’ Guide ... since Cherokee Nation v. Georgia.”

From the chapters in this volume, it appears that litigation arising in Australia and New Zealand has also been a field of battle for the struggle of indigenous peoples toward state acceptance of Native title, self-governance, human rights, and human dignity. In these few pages, I wish to examine the strengths and failings of our judicial systems as they have confronted and continue to confront the challenges presented by the conflicts. For indigenous peoples, majority populations, and the states in which they cohabit, much is at stake, particularly for those who harbour what Michael Ignatieff terms a “longing to live in a fair world.”

Courts may be the guardians of principled and just outcomes. Writing in 1761 as a young lawyer, John Adams, the second president of the United States, saw an indelible link between the practice of law and a fairer world:

Now to what higher object, to what greater character, can any mortal aspire than to be possessed of all this knowledge, well digested and ready at command, to assist the feeble and friendless, to discountenance the haughty and lawless, to procure redress to wrongs, the advancement of right, to assert and maintain liberty and virtue, to discourage and abolish tyranny and vice?

Charles Dickens had a bleaker view of the denizens of the courts:

This is the Court of Chancery ... which gives to monied might the means abundantly of wearying out the right; which so exhaust[s] finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who would not give -- who does not often

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give -- the warning, “Suffer any wrong that can be done you rather than come here!”

What are they, then, these judicial systems? Are they instruments “to discountenance the haughty and lawless, to procure redress to wrongs”? Or are they instruments that give “to monied might the means abundantly of wearying out the right”? The young Adams spoke of what the law should be; the jaded Dickens said that power and the instruments of power can distort the law and break the heart.

**Sovereignty Now Is a Cinch**

Let’s be honest. Since the initial European-indigenous meetings in North America, Australia, and New Zealand, the prizes have been lands and resources. Indigenous peoples lived on and among them; European colonizers coveted them. Had Europeans applied their own common law to these meetings, the hostilities would have been over before they began. Kent McNeil in his chapter implies just this:

The second source is the common law itself, which acknowledges that persons in exclusive occupation of land have a title that is good against anyone who cannot show a better title. Applying this common law rule in the colonial context, indigenous peoples who were in exclusive occupation of land at the time of British colonization would have title to the lands that they occupied at that time, regardless of the nature of their land rights under their own legal systems. This title can be designated as “common law title.”

By definition, the first peoples used and occupied -- possessed -- lands and resources exclusively at the moment that the courts have referred to as “contact.” Haijo Westra in his chapter asks the right question: “Why should historical Native dominion be any less real than the original paper claim of the colonizing power?” The courts have

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This chapter appears in Louis A. Knafla & Haijo Westra, eds., *Aboriginal Title and Indigenous Peoples: Comparative Essays on Canada, Australia and New Zealand*, (Vancouver: UBC Press, 2010).

obfuscated the illegality and immorality of these historical moments, asserting, as the Supreme Court of Canada did in *Sparrow*, that

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed, the underlying title, to such lands vested in the Crown.4

The same court more recently in *Haida*,5 though propounding what has become the buzzword in contemporary jurisprudence (*reconciliation*), used an interesting language of counterpoint in describing the law’s sleight of hand, indeed black magic, in depriving indigenous peoples of their dominion and property: “This process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.”6

Use of the expressions *assertion of sovereignty* and *de facto control of land and resources* to describe the crown’s involvement in this colonial conjuring may well hold significance as a moment of truth in Canadian jurisprudence.

Meanwhile in this volume, we read Westra’s description of the judgment of the process of the seventeenth-century professor of theology at the University of Mexico, Alonso de la Vera Cruz: “Mere possession and time do not validate the illegal claim but increase the original injustice, a fundamental difference between natural and common law.” The great tradition of Jacques Cartier planting the flag and Captain James Cook sighting the northwest coast of what is now Canada is alive and well in the scramble for

6 Ibid., para. 32.
sovereign legitimacy in the Arctic, with the important difference that Canada now asserts sovereignty through the Inuit rather than inspite of them. Two texts illustrate this progressive change. The first is of a 1951 Canadian government telegram:

Press release the flag was raised today in fine comma clear weather that marked the opening of the Craig Harbour detachment of the RCMP stop this outpost which is situated on Ellsmere Island Northwest Territories of Canada comma is seventy six degrees twelve north latitude comma is now the most northerly active establishment of the RMP stop the ceremony opened with an address by Alex Stevenson OIC Eastern Arctic Patrol stop Captain Chouinard ... arrived from ship by helicopter to present flag on behalf of Department of Transport ... two constables will maintain establishment assisted by two eskimo families stop prayers by Rev. G. A. Ruskell ... visiting Anglican Missionary stop service included appropriate anthems stop ship passengers comma eskimo families in attendance stop snow clad mountains comma icebergs comma glaciers comma tundra and white caribou formed backdrop for impressive occasion stop film board unit coverage stop sovereignty now is a cinch. (emphasis added)7

The second is a statement from 1985 by Prime Minister Joe Clark (then Minister of External Affairs), in which he asserted:

Canada is an Arctic nation. The international community has long recognized that the Arctic mainland and islands are part of Canada like any other, but the Arctic is not only a part of Canada, it is a part of Canadian greatness. Canada’s sovereignty in the Arctic is indivisible. It embraces land, sea and ice… From time immemorial Canada’s Inuit people have used and occupied the ice as they have used and occupied the land.”8

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7 Telegram, 1951, from Alex Stevenson to J.G. Wright Dalb, Ottawa, Indian and Northern Affairs Canada.

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Let me conclude on this point by recalling that the Inuit have an understanding of Arctic sovereignty that contrasts profoundly with that held by the still flag-planting State. The version put forward by the indigenous peoples of the Arctic is one in which their rights and roles in their land are fully recognized. In a 2002 speech outlining an Inuit perspective on Arctic sovereignty, Sheila Watt-Cloutier, then President of the Inuit Circumpolar Council (Canada), used Prime Minister Clark’s above words for support of her point that Inuit have been instrumental in exerting Canadian sovereignty in the Arctic and went on to urge the involvement of Inuit as part of the Canadian delegation expressing Arctic sovereignty at the international level.9 Affirmation of the Inuit’s role in Arctic governance grew stronger this April when Inuit across the circumpolar Arctic came together to adopt the Declaration on Sovereignty in the Arctic.10 This landmark Declaration notes that the five coastal Arctic states “have neglected to include Inuit in Arctic sovereignty discussions”11 and asserts that, “[t]he inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and Inuit self-determination and other rights require states to accept the presence and role of Inuit as partners in the conduct of international relations in the Arctic.”12

Establishing Checks and Balances

Once comfortably installed on indigenous lands, the sovereign, with the assistance of some early jurisprudence, proceeded to ensure that the crown sat atop the hierarchy of rights and power in the newfound lands. With crown sovereignty established, the courts set about placing the chess pieces, establishing checks and balances.

11 Declaration on Sovereignty in the Arctic, at provision 2.6.
12 Declaration on Sovereignty in the Arctic, at provision 3.3.
Initially, the courts reinforced the crown’s position. As late as 1929, the court in *R. v. Syliboy* asserted that

A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages’ rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; *and the Indians passed with it*. (emphasis added)\(^\text{13}\)

By 1985, Chief Justice Brian Dickson, forcefully rejecting this language, stated for the Supreme Court of Canada that “it should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada.”\(^\text{14}\) We have come a long way since *Syliboy* with *Calder, Haida*, and the reasonably recent *Tsilhqot’in* case in British Columbia, although a very long stretch of road lies ahead. The classic Canadian approach to all things is perhaps most aptly expressed by Chief Justice Antonio Lamer in *Van der Peet*:

*The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined ... A morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives.*\(^\text{15}\)

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\(^{13}\) *R. v. Syliboy*, [1929] 1 D.L.R. 307 at 313 (N.S. Co. Crt) [*Syliboy*]. Interestingly, the question about Indians passing with it is still with us, as demonstrated in the positions argued in *Reference re: Secession of Quebec*, [1987] 2 S.C.R. 217.


As Bruce Rigsby observes in his chapter, legal recognition by the colonizing nation of the rights and interests that Aboriginals might have in lands and waters came late in Australia. The Thirty Years War in that jurisdiction started badly with the 1971 decision in Milirrpum, and, as I understand from the chapters here, peace has not yet been declared. Matters started peacefully enough in New Zealand with the 1847 decision in R. v. Symonds, but as Jacinta Ruru points out in her chapter the battle front has shifted over the years, starting with the 1877 judgment in Wi Parata v. The Bishop of Wellington declaring that Native title had no application in New Zealand. The front again moved with the disapproval of Wi Parata by the Privy Council in 1901 on appeal, and then again with the continued resonance of Wi Parata in New Zealand courts, particularly the 1963 Court of Appeal decision in In re the Ninety Mile Beach. Today the courts appear to have come full circle, for, as Ruru writes, “the more recent Native title decisions reiterate not the Wi Parata or Ninety Mile Beach line of reasoning but the R. v. Symonds precedent.”

Time and Education

One remarkable thing about the protracted period of conflict is that much of the Canadian populous, and I must assume those of Australia and New Zealand, have remained oblivious of the struggle and uncomprehending of its causes or outcomes.

During the turbulent Oka Crisis of 1990, I was asked by Assembly of First Nations National Chief Georges Erasmus to go into the Mohawk community of Kanesatake, situated about sixty kilometres from Montreal, and assist the besieged population to organize and seek help. Together with two other advisers, Peter DiGangi and Roger Jones, I was spirited behind the lines across the Lake of Two Mountains in the

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17 R. v. Symonds (1847), N.Z.P.C.C. 387. The court held that Māori customary interests were to be solemnly respected and not to be extinguished, at least in times of peace, without their free consent.
dead of night, and for several days we worked to help the traumatized community. When I say the community was besieged, this is no exaggeration. It was surrounded by army and police and occupied by warriors and various elements from elsewhere determined to make a last stand. At night, helicopters patrolled the skies and cast their searchlights over the village. Roads in and out were blocked, and supplies had to be negotiated past the roadblocks. It was a frightening place.

After several days, once again we had to slip away across the Lake of Two Mountains. As I sat in the small boat reflecting on the community-turned-war zone, I suddenly looked up to see a singular and, in the circumstances, bizarre scene. We were surrounded by a small armada of swank sailboats filled with swank crews. We had wandered into the midst of the Hudson Sunday Regatta. The flapping of sails replaced the beating of rotors, and suddenly the war zone was in another country and another time -- the perfect metaphor for the thirty years of struggle of Aboriginal peoples in the face of public stasis. Perhaps more judicial reprimand would help concentrate society’s mind as well as prick its consciousness. When faced with the fact that just application of the law might not accord either with precedent or with society’s views, the judiciary often must attempt to craft a compromise. In this they require, indeed deserve, a population manifesting its “longing to live in a fair world” -- in a principled world. Although this transformation is taking place, we cannot depend on politics or legislatures to insist on principle; our last best hope is the judicial system.

Perhaps, as David Yarrow observes in his chapter, “time and education are required for non-indigenous legal institutions to improve their awareness.” Yarrow quotes Allistair McIntyre, contending that time is required for mutual recognition between cultures and apparently questioning whether we have, at present, the suitable means for mutual cultural evaluation: “The coming together of two previously separate communities, each with its own well-established institutions, practices, and beliefs, either

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20 Alfred Thompson Denning (Lord Denning), *The Discipline of Law* (London: Butterworths, 1979), 314; see also *Makivik Corp. v. Canada (Minister of Canadian Heritage) (T.D)* [1999] F.C. 38 at 106 where Richard A.C.J. states that “[t]he courts should design their remedies to facilitate negotiations.”
by migration or by conquest, may open up new alternative possibilities and require more than the existing means of evaluation are able to provide.”

Lost in the Thickets and Brambles

In his signature prose, Lord Denning had this to say about clinging rigidly to bad precedent:

Let it not be thought from this discourse that I am against the doctrine of precedent. I am not. It is the foundation of our system of case law. This has evolved by broadening down from precedent to precedent. By standing by previous decisions, we have kept the common law on a good course. All that I am against is its too rigid application -- a rigidity which insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which would impede it.21

As courts tramp their way toward more principled positions in state-indigenous relations, they have, I fear, far too often found themselves lost in Lord Denning’s thickets and brambles. In Canada, high hurdles must be cleared to establish the legal legitimacy of claims to Aboriginal rights and title.22 The high and low priesthoods of the law refer to these obstacles as “legal tests” to be passed or failed. The challenge is made more

21 Ibid.
22 Hurdles abound in Aboriginal law. As I discussed in a paper given after the Supreme Court’s decision in Mitchell, another example is the legal test for the admissibility of oral history evidence. The test has been used by some adjudicators to bar or devalue the Aboriginal claimants’ this evidence, thereby taking away the factual foundation of their case and preventing their perspective from being taken into account. See Peter W. Hutchins and Tanya Whiteside, “Mixed Messages, Double Standards, Eurocentrism, and High Hurdles: Evidentiary Challenges in Aboriginal Litigation,” paper presented at the conference Aboriginal Law: Litigation Issues, organized by the Continuing Legal Education Society of British Columbia, Vancouver, 29 October 2004.
This chapter appears in Louis A. Knafla & Haijo Westra, eds., *Aboriginal Title and Indigenous Peoples: Comparative Essays on Canada, Australia and New Zealand*, (Vancouver: UBC Press, 2010).

interesting as the tests are occasionally adjusted in the midst of the race. One obvious example is the “*Van der Peet* test,” derived from Chief Justice Lamer’s determination that “in order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right” at the time of European-indigenous contact. The test carries the burden of proof to a new level: no evidence (in an unwritten record) of integrality and distinctiveness at the moment of “contact” (established in eastern Canada as 1640), no rights to assert against the state.

I have written elsewhere that the *Van der Peet* test, as it was applied subsequently in *Mitchell v. M.N.R.*, reflected the increasingly misguided attempts by courts to impose judicial positivism on history and culture. Mark Walters, in his excellent paper entitled “The Right to Cross a River? Aboriginal Rights in the *Mitchell* Case,” wrote that “within the space of three paragraphs in *Mitchell* the law of Aboriginal rights in Canada was reduced to doctrinal shambles.”

Perhaps we should ponder for our subject US Supreme Court Justice Ruth Bader Ginsburg’s observation of the court’s approach to the abortion issue: “I am not a big fan of these tests. I think the court uses them as a label that accommodates the result it wants to reach.” Sadly, that describes many of the judicial pronouncements over the past thirty years in our three jurisdictions.

Things do not appear to be much better in Australia. Nicolas Peterson opens his chapter commenting that, “while the state appears to be accepting of difference, ultimately the kinds of difference embodied by Aboriginal people are unacceptable to liberal moral sensibilities, making the preconditions for recognition set high.”

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23 For more on this point, see Peter W. Hutchins and Anjali Choksi, “*From Calder to Mitchell: Should the Courts Patrol Cultural Borders?*,” *Supreme Court Law Review* (2d) 16 (2002): 241-83.
24 *Van der Peet*, para. 46.
25 See Hutchins and Choksi, “*From Calder to Mitchell.*”
Liberal sensibilities, not to mention conservative convictions, are indeed challenged. In the tug-of-war between power and principle, look at what has been and continues to be at issue: universal human rights versus special rights and privileges; individual versus collective rights; acquired rights versus expropriated rights; Western liberal democracy versus clans, kinship, and heredity; natural resource extraction versus the seasonal round of harvesting; the crown as protector of indigenous cultures and economies versus the crown as facilitator of settlement and development; Aboriginal peoples with treaties versus those without them; universal principles of human rights versus the exercise of self-determination; domestic laws and politics versus international laws on human rights and constraints on state power; and, perhaps most importantly, as raised in this volume, claims to “tradition” versus claims to “modernity.” These are all principles and positions devoutly held and bitterly contested. The jurisprudence is replete with these struggles.

Clearly, serious social science intervention might assist in keeping “the path to justice clear of obstructions.” It is at this point that the crying need for a multidisciplinary approach to these matters becomes most apparent. Arthur Ray, in his contribution to this volume, provides fascinating insights into the role of social science “experts” in this tug-of-war. Justices involved in Aboriginal litigation are being placed in a near-impossible situation. When Ray was awarded the 2005 Bora Laskin Fellowship to examine what he calls “Canada’s biggest unresolved human rights issue, Aboriginal land claims,” he pointed out how the complexities of Aboriginal litigation are making unrealistic demands on trial judges who must develop a PhD level of knowledge on the subject almost overnight and sort through many different points of view to make decisions about new historical facts.

Justice Ian Binnie of the Supreme Court of Canada has acknowledged the dilemma for the courts if required by litigants to make a final determination on the facts:

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28 On this aspect, see Simon Young, The Trouble with Tradition: Native Title and Cultural Change (Sydney: Federation Press, 2008).
The courts have attracted a certain amount of criticism from professional historians for what these historians see as an occasional tendency on the part of judges to assemble a “cut and paste” version of history...

While the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be more nuanced. Experts, it is argued, are trained to read the various historical records together with the benefit of a protracted study of the period, and an appreciation of the frailties of the various sources. The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can.29

With respect, I am not sure that “the law sees a finality of interpretation of historical events.” Chief Justice Dickson in Simon did not seem to think so. Nor does it appear that Lord Denning did. Perhaps the litigating parties as well as the law and history would benefit from judicial restraint. In responding to Ray’s observations on the challenges facing courts involved in Aboriginal litigation, Marc Renaud, president of the Social Sciences and Humanities Research Council of Canada, cautioned that “these decisions have real consequences: for the rights of Aboriginal people, for governments who sometimes pay millions of dollars in compensation, and for our understanding of Canadian history. The work of Prof. Ray will help us learn how we can reduce the potential costs of land claim disputes, both in terms of money and human dignity.”30

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must provide the judicial process with the tools to seek, at least within the parameters of a given case, a relatively stable academic consensus.

Many answers are harboured in the rich, sensitive, at times plaintive chapters in this book. Lou Knafla has skillfully distilled their essence in his introductory chapter. I look to them as an invaluable critique or perhaps a call to arms against the disciplinary silos that have been in construction for over fifty years -- what Peterson alludes to when he asserts that “sophisticated social analysis is completely lacking, with the focus solely on power and legal relations, to the neglect of the economic and the cultural.”

**Without a Guardian of the Pledged Word, Only Force Counts**

I return with mixed feelings to the words that I spoke six years ago to open the conference at the University of Calgary. I knew then that there had been defeats in the unequal battles waged in the Canadian courts since *Calder*. I had come to understand as well that any advance in favour of indigenous peoples had been prompted, if not ordered, by court decisions, particularly those of the Supreme Court of Canada. What I had yet to appreciate was the mediating role of the courts, which has the potential to replace final judgments. Brian Ballantyne has the right idea in opening his chapter:

> The debate about Aboriginal title appears to consist of two main themes. The first theme is that various judgments define the scope and tests for Aboriginal title. These judgments are critical because, without them, there would be little legal, political, or cultural (at least by the non-Aboriginal community) acceptance of that title: “You have to get the court to make the order, or it just doesn’t happen.”

This theme is widening and deepening.

But I now ask, are there only two possible outcomes: war through litigation or an unequal peace resulting from negotiations in which the settler state makes its paper claims over the lands of indigenous peoples? Peterson contends that “the future requires the development of creative new policies that work toward negotiated rather than litigated solutions.” In my opinion, that depends entirely on what is referred to as “litigated
solutions.” The siren call of negotiations, friendly settlements, and their ilk issues from the courts and the state -- from the courts as a naive consummation devoutly to be wished; from the state as a Faustian bargain to entice indigenous peoples away from their “indigenous difference”; and, if I may speak as a member of the world’s second oldest profession, from the law’s protection. The deal with the devil is that one will enter into discussions with the state not on the basis of rights but on the basis of “interests,” not mediated by the courts, but mano-a-mano. I doubt that Rigsby had *La damnation de Faust* playing in his ears when he wrote the following, but his caution is well worth pondering:

> We and our lawyer brethren, I believe, have been too willing to overemphasize the spiritual aspect of Aboriginal traditional ownership of land, to the disregard and perhaps devaluation of its social and material features. I cannot say whether a rights-based approach in our ethnography and Native title research and writing will produce the determinations that our clients desire, but I can say that, without a rights-based approach, *we are not even in the game anymore.* (emphasis added)

I suggest that, five years on, the path to our own *Peace of Westphalia* will lie in the supervisory capacity of the courts. This may surprise those who view the courts as often “getting it wrong” or litigation as being one more battle to survive and negotiation the preferred route. Negotiation can be a frustrating, ruinous, and seemingly unending road if the power and discretion of the crown are left unchecked. There will be no progress without the assistance of the courts, assistance that can take many forms -- with due respect to Arthur Ray, Bruce Rigsby, Paul Chartrand, Nicolas Peterson, Jacinta Ruru, and Kenichi Matsui -- indeed to some extent every contributor to this volume.

Other reforms being discussed have been inspired by initiatives by courts in Australia and New Zealand, in particular those that create greater space for Aboriginal peoples’ laws and ways of sharing their knowledge. These initiatives include the recent

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amendments to Australia’s Evidence Act 2005 that make it easier for members of an Aboriginal or Torres Strait Islander group to give evidence of their traditional laws and customs. Another amendment makes it possible for a witness to give evidence in narrative form without facing the barrage of questions on cross-examination that many elders and other respected members of Aboriginal communities have found nothing short of harrowing and demeaning. Inspiration also comes from the practice in Australia of judges travelling to the territories at the centre of title claims to hear “on country evidence,” which places the court on the very lands that hold so much meaning to the Aboriginal claimants. This displacement creates space for at least portions of cases to be heard on Aboriginal peoples’ own lands and on their own terms. Canadian courts are following suit. During the trial of the recent and in many ways ground-breaking Tsilhqot’in case, the court took the unconventional yet highly respectful step of holding evening sessions in order to hear stories that could only be told by the Tsilhqot’in people after the sun had set. In my own legal practice, I have seen how efforts to hold court in Aboriginal communities have been met with considerable gratitude and resulted in much needed empowerment.

Westphalia was an important step in Western historical evolution, but the price was high. The evolution of Aboriginal law and the recognition of Aboriginal rights, title, and self-government have been great achievements, but Aboriginal peoples are still healing from the wounds inflicted by centuries of policies and laws aimed at the eradication not only of their rights but also of their very existence. Hopefully, the process of healing will be helped by the recent acceptance of responsibility for the devastation caused by the removal of Aboriginal children from their families and the regimes of residential schools. We will see. In the meantime should we not ask why it happened in the first place?

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32 Evidence Act of 1995 (as Amended), (Cth.) (Australia), s. 72.
33 Ibid., s. 29(2).
35 In his February 2008 speech, Australian Prime Minister Kevin Rudd apologized for “the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering, and loss” on Aboriginal peoples, for the removal of children and the breakup of
Courts, at least those in Canada, must become considerably more assertive in requiring best efforts to settle matters under court supervision, something almost invariably resisted by the state. What I am proposing, in effect, is that the bench, the bar, and other disciplines swept up in Aboriginal litigation work together to ensure that the judicial process as it applies in state-indigenous litigation becomes less adversarial and more professorial. Perhaps the disputes handed to the judiciary can be resolved, at least in part, through the techniques of mediation, involving a partnership of law, social science, and Aboriginal perspective. One important structural feature of this partnership must be the willingness of the courts to retain jurisdiction to see matters through to the end. I fear, however, that a significant population of litigation counsel will not only have to be led to this stream but also induced to drink from it.

The trust confided in the courts, whether exercising inherent or statutory jurisdiction, resides in the hope that they will wield power in the vindication of justice and principle -- the principle exposed so skilfully and passionately in the pages of this volume. Just and secure arrangements must reflect a genuine clasping of hands, not a winner and a loser. But that result will not be achieved by leaving power unsupervised to families, and for the “degradation inflicted on a proud people and a proud culture.” Motion by Australian Prime Minister Kevin Rudd, February 13, 2008, House of Representatives, 42nd Parliament, Parliamentary Debates, First Session, First Period, Official Hansard, No. 1, http://www.aph.gov.au/hansard/reps/dailys/dr130208.pdf.

In Canada, Prime Minister Stephen Harper’s apology to the Aboriginal peoples of Canada rightly noted that the “burden of this experience has been on your shoulders for far too long. The burden is properly ours as a government and as a country.” Speech by Canadian Prime Minister Stephen Harper, June 11, 2008, House of Commons, 39th Parliament, 2nd Session, Edited Hansard, No. 110, http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Session=2&DocId=3568890. With these apologies, majorities within states are also finding their way toward healing from this painful legacy as we all move along this more principled path.

And now, Indians of the plains, I thank you for the open ear you have given me; I hold out my hand to you full of the Queen’s bounty and I hope you will not put it back. We have no object but to discharge our duty to the Queen and towards you. Now that my hand is stretched out to you, it is for you to say whether you will take it and do as I think you ought -- act for the good of your people.

Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which They Were Based and Other Information Relating Thereto (Toronto: Belfords, Clarke, 1991), 208.
negotiate with principle. The respective perspectives on what is right and lawful may first have to be laid before the courts supported by law -- customary law, common law, indigenous law, the rule of law, constitutionalism, and international law -- for without that “we are not even in the game anymore.” Once this is done, the parties should submit to mediation by the courts, preferably voluntary, if necessary imposed, involving not just counsel but also clients, principals, and the considerable assistance of other relevant disciplines introducing the knowledge and wisdom resulting from social science research. We would no longer be dealing with “might is right” but with informed, directed, and motivated attempts to give expression to our “longing to live in a fair world.” All parties would know that failure in this quest may result in resolution by judicial dictate while at the same time being cognizant of the reality that those judicial pronouncements will, in the future, emanate from a process no longer held hostage to political or financial power. Hopefully, this will be a legacy of the current promising judicial reform and members of the bench and bar who continue to strive for that reform.

The Columbia Encyclopedia characterized the aftermath of the Thirty Years War in these words: “The war ended the era of conflicts inspired by religious passion, and the Peace of Westphalia was an important step toward religious toleration. The incredible sufferings of the German peasantry were remembered for centuries.”\footnote{Columbia Encyclopedia, 4th ed. (New York: Columbia University Press, 1975).} Let us not forget that virtually every case comprising the jurisprudence discussed in this volume involved indigenous individuals, communities, and nations with a great deal at stake, each required to make considerable sacrifices. Behind every court case is a client. The battles are fought on that client’s behalf. The law is forged through these struggles. And let us understand that the battle is not over when the war is won, for we are left to deal with the scars long after the last shots have been fired. It is a testament to the strength of indigenous peoples around the world that they have survived brutal assaults on their culture and their lives and have continued to fight back. It is true that the courts in the three jurisdictions discussed in this volume have dithered, but for me they still hold out the best hope for nudging power toward principle. It was in the Supreme Court of Canada’s landmark
Sparrow decision that the court acknowledged “it is clear, then, that s. 35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights.”38

The judges’ calling was well expressed by the young John Adams. To allow the law to work its magic, the courts need appropriate forums and the wise counsel of visitors from indigenous cultures and those professions that strive to establish connections and comprehension between cultures. The appropriate forums, I am suggesting, must include court-supervised dispute resolution through mediation, facilitation, and persuasion (gentle or not so gentle). Judges and litigation counsel seeking the principled path and the helping hand of the social science professions (including legal academics), as indeed they should, would do well to contemplate and act on the contents of this important volume.

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38 Sparrow, 1105.