

PROTECTING ABORIGINAL CULTURAL HERITAGE
IN AUSTRALIA:

LOOKING FOR SOLUTIONS IN THE
CANADIAN EXPERIENCE

by

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ABSTRACT

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In recent decades Australian aboriginal paintings have become increasingly sought after as "high art" and as part of the nationalist iconography. The paintings often incorporate the communal designs of the artists' communities or clan groups, which are subject to aboriginal laws administered by traditional custodians. The popularity of the paintings has fostered increased respect for aboriginal cultures and has provided a source of income for many aboriginal communities. However, a corollary of their popularity is their unauthorised reproduction by tourist industry operators onto t-shirts and other mass produced objects, causing serious violations of aboriginal laws.

Aboriginal sanctions are not enforceable in Australian settler courts. Aboriginal artists and their communities have therefore turned to copyright law for relief in what are now known as the "aboriginal copyright cases". However, it has become increasingly apparent that copyright law neither recognises the communal, ancient and spiritual aspects of the paintings, nor adequately compensates the serious spiritual or religious damage caused by the unauthorised reproductions. Australian government bodies and commentators have therefore turned to exploration of reform proposals.

Reform proposals to date range from amendments to copyright law to the recognition of aboriginal rights in communal designs as an extension of the *Mabo* doctrine of native title. However, some commentators have argued that the issues raised by the aboriginal copyright cases are intricately linked with other debates concerning appropriation of aboriginal cultures and, more widely, issues of decolonisation.

Taking this wider approach, the thesis turns to the Canadian experience of decolonisation, and in particular developments in the areas of aboriginal rights and self-government. The thesis examines the potential advantages and disadvantages of using aboriginal rights litigation and self-government agreements to address the issues raised by the aboriginal copyright cases. It concludes that the Canadian experience in these two areas is instructive and worthy of further consideration as reform proposals are considered. Drawing on this experience, the thesis argues for reforms which acknowledge aboriginal peoples' right to cultural self-determination within a state constitutional framework.

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Chapter 1

Introduction

Cultural appropriation is not politically neutral but implies power and domination by that part of society appropriating...The effects of appropriation of Aboriginal culture are to deprive us of our integrity as distinct peoples and to destroy our Nations.

Cynthia Callison, 1995.¹

...I paint pictures of Northwest Coast native mythological characters in a modern representational style. I'm often asked how I'm doing this when I'm not a native. Sometimes I am even accused of the sin of 'cultural appropriation'...

Ron Stacy, northwest coast artist, 1997.²

Aboriginal peoples³ in Australia and Canada are protesting what many term the "appropriation"⁴ of their cultural heritage. Recently, some have turned to settler laws for relief. The result is frequently a "clash of world views"⁵ as aboriginal peoples challenge settler legal regimes to address their perspectives. These challenges are part of Fourth World⁶ aboriginal peoples' attempts to renegotiate their relationship with settler societies as "distinct peoples"⁷ with rights of cultural self-determination.

¹C. Callison, "Appropriation of Aboriginal Oral Traditions" (1995) U.B.C. L. Rev. (Sp. Iss.) 165 at 170.

² R. Stacy, "On Cultural Appropriation" (on internet site entitled *Art Vision International: Voice of the People: A Cultural Forum (Essay Section)* (internet:<http://www.islandnet/forum/approp/html>).

³The term "aboriginal" is used throughout the thesis to refer to all indigenous peoples of the territories now known as Australia and Canada. The plural "peoples" is used to emphasise the diversity of aboriginal communities and cultures. Its political connotation in international law is noted.

⁴ The contested meanings of "appropriation" demonstrated above are discussed in Chapter 2.

⁵The imagery of "clashing world views" is used frequently in this field: see for example A. Pask, "Cultural Appropriation and the Law - An Analysis of the Legal Regimes Concerning Culture" (1993) 8 I.P.J. 57 at 64; G.L. Pullar, "The Qikertarmiut and the Scientist: Fifty Years of Clashing World Views" (1995) U.B.C. L. Rev. (Sp. Ed.) 119 at 121; C. Bell, "Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate" (1993) 17 Am. Indian L. Rev. 457 at 465.

⁶The term "fourth world" refers to tiny internal colonies of original inhabitants within colonising nation states. It is, like the term "peoples", political: N. Dyck, "An Introduction to the Analytical Issues" in N. Dyck, ed., *Indigenous Peoples and the Nation State: Fourth World Politics in Canada, Australia and*

The thesis focuses on an Australian example of these aboriginal legal challenges to cultural appropriations. In recent years, various Australian aboriginal artists have attempted to prevent the unauthorised reproduction of their paintings by the tourist industry. These paintings often incorporate communal designs and stories belonging to the artists' aboriginal communities.⁸ Aboriginal laws regulate the use, reproduction and disclosure of these designs, and breach may result in serious sanctions. However, the communities have been unable to enforce their laws against outsiders. Accordingly, the artists have turned to copyright law in a series of cases now sometimes known as the "aboriginal copyright cases." They have obtained some relief in settler courts but, for reasons outlined below, the relief has often been inadequate. As a result there is now a wide-ranging debate on possible reforms of settler laws. This thesis examines some developments in Canadian settler law to see how they could inform this debate.

1. The Aboriginal Copyright Cases: Brief Overview

In recent decades Australia has witnessed a boom in the demand for aboriginal imagery in the domains of tourism, high art and "official Australian culture".⁹ Various different artistic regions of Australia now have their own stables of "celebrity" artists

Norway (Social and Economic Papers No. 14) (St Johns, Newfoundland: Institute of Social and Economic Research, Memorial University of Newfoundland, 1985) 1 at 22.

⁷ Callison, *supra* note 1.

⁸ An exception is "urban aboriginal art", examples of which are discussed in chapter 3. These paintings do not incorporate communal designs regulated under aboriginal laws, but do contain aboriginal "themes" that have also been the subject of unauthorised reproduction. The special issues surrounding urban aboriginal art are discussed in Chapter 4.

⁹ V. Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies (Touring Exhibition 1996 Catalogue)* (Sydney: National Indigenous Arts Advocacy Association and Macquarie University, 1996) at 14.

supplying this demand. Clearly this boom has had advantages for aboriginal peoples, promoting increased respect for their cultures and providing income to many artists and communities. However, the effects have not all been good. The boom in demand for aboriginal paintings has been met with a rising tide of unauthorised reproductions. These reproductions, created with modern technologies, are most often cheap tourist souvenirs such as tea-towels. Apart from denying the artists and their communities fair commercial returns, these reproductions often offend aboriginal laws and cause serious ‘cultural damage’.¹⁰

In a series of cases now spanning over a decade, aboriginal artists have attempted to use copyright law to prevent these unauthorised reproductions. Initially, facing assumptions that their designs were too ‘generic’ to warrant copyright protection, these artists simply sought equal protection under the settler law. However, in more recent cases artists have sought to push the boundaries of copyright law to incorporate aboriginal legal perspectives. In the latest decision, *Milpurrruru v. Indofurn Pty Ltd*,¹¹ the defendants had illegally reproduced important Dreaming story paintings onto carpets. The aboriginal artists and their communities considered this use of the designs extremely inappropriate and in breach of aboriginal laws. However, framing an action to remedy these wrongs under settler laws involved difficult legal translations. Under copyright law only individual artists are able to sue, and courts generally award copyright damages only for harm to commercial interests. In this case, the judge took the unprecedented step of awarding the

¹⁰This term originates from von Doussa J in *Milpurrruru v. Indofurn Pty Ltd* (1994) 54 F.C.R. 240; 130 A.L.R. 659; 30 I.P.R. 209; [1995] A.I.P.C. 39,051 (Fed. Ct. Aust.) (hereinafter *Milpurrruru* cited to I.P.R.) at 244, referring to harm in the artist’s “cultural environment”.

¹¹*Ibid.*

artists exemplary damages for harm suffered in their “cultural environment.”¹² However, he was not able to compensate the communities for the violation of their laws.

The Court’s sympathetic approach in *Milpururru* has earned it a title as the “*Mabo*” of copyright.¹³ However, *Milpururru* is far from bringing aboriginal legal perspectives into the framework of copyright law. Rather, *Milpururru* demonstrates the continuing “clash of world views” between aboriginal and settler legal perspectives. As noted above, *Milpururru* and its predecessors have spawned a vigorous and increasingly wide-ranging debate on the subject of possible reforms to settler laws. In addition to the protection of communal designs, the debate has also touched on whether ancient rock art, painting styles and the representation of mythical figures may be protected.¹⁴ At this point, copyright law has been stretched to its limits, and new directions are being sought.

2. The Wider Issues: Decolonisation in the Fourth World

The aboriginal copyright cases concerned disputes between identifiable parties on particular issues of settler law. However, these cases have a wider context. That is aboriginal peoples’ struggle towards decolonisation, as they seek to regain control of their cultural heritage, traditional lands and political autonomy in the face of massive dislocations. Commentators have increasingly suggested that these wider issues must be

¹²*Ibid.* at 692.

¹³After the groundbreaking High Court case recognising aboriginal laws conferring land title, *Mabo v. Queensland [No 2]* (1992) 175 C.L.R. 1; 66 A.L.J.R. 408; 107 A.L.R. 1 (High Ct.). The impact of the decision is discussed in Chapter 6.

¹⁴Even more broadly, the debate merges with other cultural appropriation debates such as those concerning the adoption by non-aboriginal persons of aboriginal spirituality and identity, the repatriation of aboriginal cultural objects and the desecration of culturally significant sites. These wider cultural appropriation debates are discussed in Chapter 2.

taken into account in addressing the issues raised by the aboriginal copyright cases. Indeed, some have argued that the real problem is the denial of aboriginal sovereignty, and have called for settler courts to acknowledge an aboriginal right of "self-determination" over cultural heritage. It will be argued that such calls are valuable for setting an agenda, but must address practical questions associated with the implementation of "internal decolonisation".¹⁵ One such question is how aboriginal law-making power under a right of self-determination would be reconciled with Crown sovereignty. Certain legal developments in Canada are instructive in this area.

3. The Canadian experience of "Legal Decolonisation"

Canada and Australia share some common features that make a comparative analysis fruitful. Both established the rule of (English settler) law in their newly colonised territories despite the prior existence of organised aboriginal societies. In both countries settlers consolidated their dominance with colonialist policies that defined aboriginal peoples as separate and inferior and then attempted to assimilate them. Today, both Australia and Canada are "First World"¹⁶ countries. A feature of aboriginal peoples' attempts to advance decolonisation in First World countries is their claims for land and for

¹⁵As discussed in Chapter 5 the settler courts of Australia and Canada have consistently upheld Crown sovereignty, making further challenges by aboriginal peoples a matter of international law. Accordingly the thesis focuses on internal legal solutions.

¹⁶According to Dyck (*supra* note 6 at 22) "First World" countries are "highly developed, capitalist, liberal-democratic" countries such as Australia, Canada, Norway, New Zealand and the United States.

the recognition of distinct status.¹⁷ In both countries, the settler legal system has begun to respond to and absorb these claims in what might be called “legal decolonisation”.

In Australia a turning point in the process of “legal decolonisation” through the courts came in 1992 with the historic *Mabo* decision.¹⁸ However, in Canada this process began almost twenty-five years ago with the Supreme Court’s decision in *Calder v. British Columbia (Attorney-General)*.¹⁹ Since then, the Canadian courts and legislatures have begun the practical exploration of how decolonisation may be framed within Canadian state sovereignty. The thesis will examine the potential application to the aboriginal copyright cases of principles developed in two of these areas.

3.1 Aboriginal Rights: the “Integral to a Distinctive Culture” Test

The first of these areas, discussed in Chapter 5, is aboriginal rights. In Canada aboriginal rights have a relatively long pedigree in the courts. Unlike *Mabo*, which focuses on the incidents of native title, Canadian aboriginal rights jurisprudence has taken a different path, culminating in the recent Supreme Court decision of *R v. Vanderpeet*.²⁰ This case sets out the “integral to a distinctive culture” test for the recognition of aboriginal rights to cultural practices. The *Vanderpeet* test is of significance for the aboriginal copyright cases, particularly for its consideration of how cultural practices may adapt to a commercial setting. Also of significance are two recently commenced

¹⁷Dyck, *ibid* at 2-3. Another distinguishing feature is the high value of intellectual property in these societies, making aboriginal peoples’ cultural heritage a significant “resource”.

¹⁸*Supra*, note 13.

¹⁹[1973] S.C.R. 313; [1973] 4 W.W.R. 1; 34 D.L.R. (3d) 145.

²⁰(1996) 137 D.L.R. (4th) 289; 200 N.R. 1; [1996] 1 W.W.R. 1; [1996] 23 B.C.L.R. (3d) 1; (1996) C.C.C. (3d) 1. (S.C.C.) The recent decision in *Delgamuukw v. British Columbia* [1997] S.C.J. 108 (S.C.C.) was received too late for consideration in this thesis.

proceedings in British Columbia that attempt to apply the *Vanderpeet* test to rights in aboriginal cultural heritage. The first, *Nuxalk Nation v. Roloff*,²¹ concerns the Nuxalk Nation's attempt to prevent sale of its culturally significant 'Echo Mask' by an individual Nuxalk to an outside dealer. The second, *Queneesh Studios Ltd v. Queneesh Developments Inc.*,²² concerns the Comox Band's attempt to defend a culturally significant name from outside commercial use. These cases are instructive in the context of the aboriginal copyright cases. The Canadian experience demonstrates the difficulty faced by aboriginal peoples in submitting their cultures for interpretation by settler courts. However, it also suggests that aboriginal rights may be a useful tool for preventing some forms of cultural appropriation by outsiders.

3.2 Self-Government: The Nisga'a Treaty Agreement in Principle

The second area of Canadian 'legal decolonisation', discussed in Chapter 6, is self-government. In Canada, governments and aboriginal communities are implementing a form of domestic aboriginal self-determination through negotiations for 'self-government agreements'. Through these agreements, participating aboriginal peoples will regain control over core elements of their political affairs, and share jurisdiction over other areas with settler governments. The thesis focuses on the *Nisga'a Treaty Agreement-in-Principle*²³ signed between the province of British Columbia, the federal government and the Nisga'a Nation of north-western British Columbia in 1996. The Agreement contains

²¹Unreported; proceedings no. 96 2676, Victoria Registry, B.C.S.C. (a consent order for an interim injunction was filed on June 27 1996).

²²Proceedings no. s 4019, Courtenay Registry, B.C.S.C., (interlocutory judgment reported at (1996) 67 C.P.R. (3d) 452).

²³Government of Canada, Province of British Columbia and Nisga'a Tribal Council, *Nisga'a Treaty Agreement in Principle* (Ottawa: Queens Printer, 1996).

groundbreaking provisions on self-government of cultural heritage. The Nisga'a example will be used to explore the potential advantages as well as practical difficulties for aboriginal peoples in using self-government to prevent cultural appropriation. Because of current practical shortcomings in implementation, Canadian self-government policy falls short of a solution to the *Milpurrurru* situation. However, it will be argued that self-government might be adapted to do so provided aboriginal peoples can secure the co-operation of settler governments.

3.3 General Observations

The thesis examines the issues raised by the aboriginal copyright cases from a broad perspective. In addition to making a comparative analysis of Australia and Canadian settler laws, the thesis draws on interdisciplinary fields including post-colonial studies and anthropology to critique the way those laws operate in relation to aboriginal peoples in a contemporary setting. However, the thesis is also reductionist in the sense that it focuses on the use of settler law to combat cultural appropriation. This is not to suggest that settler law will provide the only solution, or that it is unproblematic given its continuing role in legitimising Crown sovereignty in Australia and Canada: on one view aboriginal peoples' use of the settler legal system is "capitulation to assimilation".²⁴ However, an alternative argument may be made. Fourth World aboriginal peoples commonly attempt to "*use one part of the settler system against other parts*,"²⁵ and to

²⁴ Pask, *supra* note 5 at 81.

²⁵ D. Sanders, "The Nisga'a Agreement", (Address to the American Anthropological Association Conference, San Francisco, 21 November 1996) [unpublished] at 3.

challenge its concepts from within.²⁶ Such attempts might be seen as “acts of resistance” in which settler laws are “mobilised” against the settler society.²⁷ The thesis will examine the Canadian experience of legal decolonisation with both these perspectives in mind. Drawing on this experience, the thesis will conclude with some observations on how aboriginal peoples might use settler laws to prevent cultural appropriations within an Australian state framework.

²⁶Pask argues that aboriginal peoples might use this strategy of challenging settler concepts from within in making legal challenges to cultural appropriations. She cites Patricia Williams, who, in a related field, discusses the language of individual rights in “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” (1987) 22 Harvard Civ. Rts-Civ. Lib. L. Rev. 402. As Pask explains (*supra* note 5 at 79-80): “Williams argues that the language of individual rights can be addressed by exploding the language from the inside, by applying it beyond its initial parameters through the inclusion of those who it has been used to exclude”. Pask notes that this idea is echoed in the field of post-colonial literary criticism (*ibid.*).

²⁷This sentence paraphrases Pask, *supra* note 5 at 81: “On the view of matters taken by Williams and the ‘post-colonial’ critics, it can be an act of resistance, as much as a capitulation to assimilation, when intellectual property law is mobilized against the colonizer”... See also S.E. Wright, “Aboriginal Cultural Heritage in Australia” (1995) U.B.C. L. Rev. (Sp. Ed.) 45 at 57, commenting on the impact of the *Mabo* decision: “What *Mabo* has done is to provide a further means by which these resistant voices can be included (or co-opted) into the mainstream culture”...

Chapter 2

Law, Art and Decolonisation **The Context Surrounding the Aboriginal Copyright Cases**

Specific historical experiences and contemporary political struggles provide the contemporary context for considering cultural appropriation claims.

Rosemary J. Coombe, 1993.¹

The aboriginal copyright cases raise particular questions about the intersection of the cultures and laws of aboriginal and settler societies. However, they should not be seen in isolation. This Chapter contextualises these cases within the framework of settler and aboriginal laws and within the wider debates over cultural appropriation and decolonisation.

1. Defining Concepts

1.1 "Aboriginal Cultural Heritage"

"Aboriginal cultural heritage"² is difficult to define exhaustively in a general sense.

As a starting point, it might include the ceremonies, cultural objects, hereditary names and

¹ R.J. Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy" (1993) 6 Can. J. Law & Jur. 249 (hereinafter *Properties of Culture*) at 271.

²The term "aboriginal cultural heritage" appears to be becoming increasingly current, and is now used by the United Nations: see for example *Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples* E.CN.4/Sub.2/1995/27, 31 July 1995 (hereinafter *UN Principles*) (using the even broader term "heritage"). In Australia, see for example T. Janke, *Our Culture, Our Future: Proposals for Recognition of Indigenous Cultural and Intellectual Property* (Discussion Paper commissioned by the Australian Institute of Aboriginal and Torres Strait Islander Studies) (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997) (hereinafter *Our Culture*); S.E. Wright, "Aboriginal Cultural Heritage in Australia" (1995) U.B.C. L. Rev. (Sp. Iss.) 45. This is probably because it is a neutral term avoiding conceptually narrow or biased settler categories such as "artefacts"; "relics"; "folklore"; "intellectual property"; "myths"; "art"; and "ethnographic specimens" which are, as discussed in this Chapter and Chapter 3, the subject of extensive critique.

symbols, styles of visual expression; songs, natural medicines, technical expertise, oral traditions, associations with particular natural phenomena,³ and more broadly, religious traditions and languages of aboriginal communities.⁴ However, it should be stressed that any definition should ultimately reflect the perspective of a particular aboriginal community.⁵ Many aboriginal peoples in Australia and Canada have claimed the right to cultural self-determination,⁶ including the right to define what their cultural heritage is. As one Canadian commentator notes:

*For many, the right of self-governance includes the right to determine their own cultural priorities, [and] identify what is and is not essential to their cultural integrity...*⁷

In addition, many aboriginal peoples have emphasised the holistic relationship between their cultural heritage and all other aspects of their lives, in particular their relationship to

³For an explanation of significant sites and animals by geographical area in Australia, see Burnum Burnum, *Burnum Burnum's Aboriginal Australia*, (North Ryde: Angus & Robertson, 1988). In Canada, aboriginal activist Harold Cardinal writes that "*beyond mere sustenance, wildlife, game, and fish have a tremendous religious significance to the Indian...the use of such natural elements in the Indian religion is just as important as the use of bread and wine is to the Christian Church*"... H. Cardinal, *The Rebirth of Canada's Indians* (Edmonton: Hurtig Publishers, 1977) at 39. An interesting example of aboriginal associations with natural phenomena the Haida association with certain trees on the Queen Charlotte Islands: D.N. Edgar and R. K. Paterson, "The Context and Practice of Repatriation Law" (Report Prepared for the Royal Commission on Aboriginal Peoples, February 1, 1994) (hereinafter *Edgar & Paterson*) at 52-53 and references cited therein; F. Luba, "Death in the Family Tree Haunts Haida" *The Province* (26 January 1997) A4.

⁴ See for example the discussion by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Peoples: Intellectual Property of Indigenous Peoples: Concise Report of the Secretary-General* E/CN.4/Sub.2/1992/30 (hereinafter *UN Indigenous Intellectual Property Report*).

⁵*Our Culture*, *supra* note 2 at 24.

⁶ As Coombe writes in the Canadian context (*Properties of Culture*, *supra* note 1 at 284), ..."*First Nations peoples are engaged in an ongoing struggle to articulate, define, exercise, and assert Aboriginal Title, not only in terms of a relationship to territory, but in connection to the cultural forms that express the historical meaning of that relationship in specific communities.*"

⁷C. Bell, "Aboriginal Claims to Cultural Property In Canada: A Comparative Legal Analysis of The Repatriation Debate" (1993) 17 Am. Indian L. Rev. 457 at 457. This assertion of the right to self-definition of cultural heritage is echoed in statements such as article 1.1 of the Mataatua Declaration on Indigenous Rights, signed by representatives of 150 aboriginal groups in 1993: see *Our Culture*, *supra* note 2 at 24.

land.⁸ For this reason a general definition should attempt to avoid narrow or distorting settler categorisations which deny this interrelation. It should also be emphasised that aboriginal cultural heritage should not be seen as static and unchanging. Many aboriginal peoples have resisted confinement of their cultural heritage within settler constructions of "authenticity";⁹ and promoted recognition of its contemporary vitality in modern circumstances. This is an important point in the context of aboriginal peoples' sale of paintings using communal designs.

Because of these considerations, the thesis defines "aboriginal cultural heritage" as loosely and neutrally as possible, namely as aboriginal peoples' cultural expression, objects, knowledge, identity and histories, whether material or intangible, based in their diverse and adapting cultural traditions.¹⁰

1.2 "Cultural Appropriation"

"Cultural appropriation" will in this thesis refer to any unauthorised or illicit taking of aboriginal cultural heritage, a taking that is or could be contested by the particular aboriginal community or "people" who claim that heritage as their own.¹¹

⁸ See below, *infra* note 112 and accompanying text.

⁹ For a discussion of the ideological connotations of "authenticity", see Chapter 4.

¹⁰ As discussed in the next section, the concept of culture as something which can be "owned" is highly contested. Accordingly, the definition avoids explicit reference to concepts of ownership. However, as will be seen below, aboriginal peoples have often had to assert ownership of their cultural heritage in order to bring it within the protection of the settler category of "property".

¹¹ Clifford notes that the word "appropriate" comes from the Latin, "*to make one's own*": J. Clifford *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art* (1988) (Cambridge: Harvard University Press, 1988) (hereinafter *Predicament of Culture*). Definitions of cultural appropriation often depend on the particular context of a debate. For a survey of definitions in a range of different contexts, see for example J. Marcus, "The Journey Out to the Centre: The Cultural Appropriation of Ayers Rock" (1988) X:1&2 *Kunapipi* (Sp. Iss.) 254 (hereinafter *Journey Out to the Centre*) at 254: "*the process by which meanings are transformed within a political hierarchy*"; T. Davies, "Aboriginal Cultural Property" (1996) 14:2 *Law In Context* (Sp. Iss.) 1 at 1: "*the process of disempowerment central to the colonial project*"; A.E. Reynolds, *Of Symposiums and Doorkeepers: Theorising Cultural Appropriation and*

The aboriginal copyright cases are one example of cultural appropriation claims made by aboriginal peoples. As discussed in Chapter 3, the validity of these claims is today generally accepted in academic circles. However, it should be noted that what will constitute an "unauthorised or illicit taking" of aboriginal cultural heritage is a controversial subject. Many forms of cultural appropriation are not "illicit" under settler laws, and therefore exist only as political or moral claims. These claims are often contested. This section examines the meanings of cultural appropriation according to the different perspectives of various members of aboriginal and settler communities.

(a) A Diverse Range of Issues

A brief survey of cultural appropriation claims in Australia and Canada reveals a spectrum of diverse but related issues.¹² They include controversies over the "institutional appropriation and misrepresentation" of aboriginal cultures by museums;¹³ repatriation of

Authenticity (Faculty of Graduate Studies, University of British Columbia, 1993) [unpublished] at (ii): "the depiction of the members of one socially defined group by the members of another".

¹²For recent general surveys of aboriginal cultural appropriation issues in Australia, see *Our Culture*, *supra* note 2; Aboriginal Copyright Council, *Protecting Indigenous Intellectual Property* by I. McDonald (Redfern: Australian Copyright Council, 1997). In Canada, see Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services, 1996), 5 volumes (hereinafter "*RCAP Report*"), vol. 3, ch. 6; C. Callison, "Appropriation of Aboriginal Oral Traditions" (1995) U.B.C. L. Rev. (Sp. Ed.) 165.

¹³A well-known example from Canada is the controversy around the 1988 exhibition *The Spirit Sings* by the Glenbow Museum in Calgary, Alberta. The exhibition, which included temporary exhibits of aboriginal cultural objects loaned from museums all over the world, was boycotted by aboriginal peoples across Canada. As one commentator noted: "*The 1988 exhibition The Spirit Sings by the Glenbow Museum in Calgary is viewed by many as a watershed in First Nations-museums relations. The exhibition opened the floodgates of aboriginal people voicing their opposition to what they perceive as institutional appropriation and misrepresentation of their cultures...*": C. Notzke, "Co-Managing Aboriginal Cultural Resources" (1996) 14(3) *Muse* 53 (hereinafter *Co-Managing Aboriginal Cultural Resources*) at 55. See also "Museums and Politics: *The Spirit Sings* and the Lubicon Boycott", *Point/Counterpoint* essays by J. D. Harrison ("Co-ordinating Curator's Statement"), B. G. Trigger ("Who Owns the Past?") and M. M. Ames ("Boycott the Politics of Suppression!"), *Muse* (Autumn, 1988) 12-16; M. Stott, "The Spirit Sings: Artistic Traditions of Canada's First Peoples" *Muse* (Autumn, 1988) 78; E. Proulx, "The Spirit Sings: Shell's Triumph of Good Citizenship" (1988) *Canadian Speeches* 2(4) 30; R. Clements, "Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law" (1991) 49 U. of T. L. Rev. 1 at 10. The controversy led to the joint task force report, Canadian Museums Association and Assembly of First

cultural objects collected during the "salvage" period of colonialism;¹⁴ appropriation of aboriginal "voice";¹⁵ the negative stereotyping of aboriginal peoples in popular culture;¹⁶ commercial exploitation of traditional aboriginal expertise, knowledge and even human biodiversity;¹⁷ objections to the bastardisation of aboriginal spirituality by "New Agers"¹⁸

Nations, *Turning the Page*, (Ottawa: Supply and Services Canada, 1992). See further B.J. Winter, "New Futures for the Past: Cooperation Between First Nations and Museums in Canada" (1995) U.B.C. L. Rev. (Sp. Iss.) 37.

¹⁴For a survey of the "golden age" of collecting on Canada's pacific northwest coast, see D. Cole, *Captured Heritage: The Scramble for Northwest Coast Artefacts* (Vancouver: UBC Press, 1985, reprinted with new foreword 1995). For a general survey of repatriation issues in Canada, see *Edgar & Paterson*, *supra* note 3. For a survey of legal issues surrounding repatriation in Canada, see *Aboriginal Claims*, *supra* note 7; N. Cuk, "Carrying the Battle Into the Form: Repatriating First Nations Cultural Artefacts" (1997) 6 Dalhousie J. of Leg. Studies 157; Clements, *supra* note 13; P. Walker & C. Ostrove, "The Aboriginal Right to Cultural Property" (1995) U.B.C. L. Rev. (Sp. Ed.) 13. For a discussion of the most famous example of a successful repatriation in Canada, (the repatriation of the Kwakwaka wakw "potlatch" collection confiscated via criminal prosecution in 1922), see G. Cranmer Webster, "The R Word" (1988) *Muse* 43 at 43; at 475; *Properties of Culture*, *supra* note 1 at 277-278; *Edgar & Paterson*, *supra* note 3 at 53; gii-dahl-guud-sliiaay, "Cultural Perpetuation: Repatriation of First Nations Cultural Heritage" (1995) U.B.C. L. Rev. (Sp. Ed.) 183. For references to repatriation issues in Australia, see *Our Culture*, *supra* note 2 at 29; M. Harris, "Scientific and Cultural Vandalism" (1996) 21:1 *Alt. L.J.* 1 For a discussion of current Canadian museum attitudes towards the issue of repatriation, see *Edgar & Paterson*, *ibid.* at 55-60; Notke. In Australia, see *Our Culture*, *ibid.* at 84-90.

¹⁵For discussions of particular appropriation of voice controversies in Canada, see *Properties of Culture*, *supra* note 1; A. Pask, "Cultural Appropriation and the Law - An Analysis of the Legal Regimes Concerning Culture" (1993) 8 *I.P.J.* 57; M. Crosby, "Construction of the Imaginary Indian" in S. Douglas, ed., *Vancouver Anthology: The Institutional Politics of Art* (Vancouver, Talonbooks, 1991); Clements, *supra* note 13. In Australia, a recent and very intense controversy concerns a series of revelations that various supposedly "aboriginal" artists and authors are in fact non-aboriginal. See for example, V. Lawson, "Fresh Hoaxes Bring Resignation and Ire" *The Sydney Morning Herald* (14 March 1997) 7; D. Jopson, "Writing Wrongs", *The Sydney Morning Herald* (March 15 1997) 38; C.H. Farnsworth, "2 Exposed Artists, Neither Aboriginal (Nor Original) After All" *The New York Times* (2 April 1997) B1. For further discussion of this controversy in the context of "authenticity" claims, see Chapter 4.

¹⁶ See for example J. Meagher, "McGill Drops Indian From Sports Insignia" *The [Montreal] Gazette* (7 March 1992) Final Edition, A1. For a discussion of issues of commodification of colonialist native imagery, see R. Coombe, "Embodied Trademarks: Mimesis and Alterity on American Commercial Frontiers" (1996) 11:2 *Cultural Anth.* 200 (hereinafter *Embodied Trademarks*).

¹⁷ See *Our Culture*, *supra* note 2 at 27-28, 30; M. Mansell, "Barricading Our Last Frontier - Aboriginal Cultural and Intellectual Property Rights" in G. Yunupingu, *Our Life Is Our Land - Land Rights - Past, Present and Future* (Brisbane: Queensland University Press, 1997); A. Te Paraehe Mead, "Geneology, Sacredness and the Commodities Market" (1996) 20:2 *Cultural Survival Quarterly* (Sp. Iss.) 48.

¹⁸In Canada, see for example Callison, *supra* note 12. In Australia, see for example Marcus, *supra* note 11; A. Lattas, "Nationalism, Aesthetic Redemption and Aboriginality" (1991) 2:3 *T.A.J.A.* 307. Cf *Properties of Culture*, *supra* note 1 at 278-279 where Coombe contrasts universalist (settler) and culturally specific (aboriginal) views of the appropriateness of taking aboriginal ceremonies.

and unethical settler research practices.¹⁹ The diversity of these claims is paralleled in other areas of the Fourth World.²⁰ All these claims are, it can be generally argued, based on aboriginal peoples' assertion of the right to cultural self-determination. As an Australian commentator writes:

*Generally, Indigenous peoples are concerned that cultural heritage legislation fails to recognise them as the legal owners of their own cultural heritage... Under indigenous customary laws, Indigenous knowledge is collectively owned by the descendants of the particular group. In this respect, Indigenous people request that the ownership of Indigenous cultural heritage and property be vested in the local community of origin.*²¹

¹⁹A famous example of such a controversy in Australia is the case of *Foster v. Mountford*, (1976) 29 F.L.R. 233 (Fed. Ct. of Australia) where an aboriginal group succeeded in obtaining relief for breach of confidence against an anthropologist who had recorded tribal secrets and then purported to publish them in a book. For other more recent instances see *Our Culture*, *supra* note 2 at 31-33. In Canada, Callison, *supra* note 12 at 170 notes that the Haida have now passed a resolution restricting further research on their islands. For a general discussion of the ethical and legal issues surrounding research on aboriginal communities collected in anthropological fieldwork, see L. Robertson, *A Penny For Your Thoughts: Properties of Anthropology in a Transnational Present* (Faculty of Anthropology and Sociology, University of British Columbia, 1996) [unpublished].

²⁰ See for example *UN Indigenous Intellectual Property Report*, *supra* note 2. For a non-exhaustive survey of aboriginal cultural appropriation issues in other countries see: K. Puri, "Protection of Cultural and Intellectual Property Rights of Indigenous Peoples" (1995) 7 N.L.S.J. 1; J.C. Roberts, "The Protection of Indigenous Populations' Cultural Property in Peru, Mexico and the United States" (1997) 4 Tulsa J. of Comp. & Int. L. 327. W. Maneerungsee, "80 States to Discuss Folklore Protection" *The Bangkok Post* (1 April 1997); J.D. Murphy, "The Imperilment of Cultural Property in the PRC" (1995) U.B.C. L. Rev. (Sp. Ed.); R. Huang, "Imperfect Harmony" *Far Eastern Economic Review* (26 August 1996); G. Likourezos "A Case of First Impression: American Indians Seek Cancellation of the Trademarked Term 'Redskins'" (1996) 78 J. J. of the Patent and Trademark Office Society 274; N. Roht-Arriaza, "Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities" (1996) Michigan J. of Int. Law 919; T. Simpson, "Claims of Indigenous Peoples to Cultural Property in Canada, Australia and New Zealand" (1994) 18 Hastings Int. Comp. L. Rev. 195; S. Harding, "Justifying Repatriation of Native American Cultural Property" (1997) 72 Indiana L.J. 723; N. Jessup, "Memory and Misrepresentation: Representing Crazy Horse" (1995) 27 Connect. L. Rev. 1003; G. Johnson, "Indian Tribes' Creationists Thwart Archaeologists" *The New York Times* (22 October 1996); L. Ledwon, "Native American Life Stories and 'Authorship': Legal and Ethical Issues" (1996) St Thomas L. Rev. 77; G.L. Pullar, "The Quikertarmiut and the Scientist: Fifty Years of Clashing World Views" (1995) U.B.C. L. Rev. (Sp. Iss.) 119; J. McGuire, "The Concept of Tangata Whanua and Collective Interests" (1996) N.Z.L.J. 28; A.M. Mead, "The Mataatua Declaration and the Case of the Carved Meeting House" (1995) U.B.C. L. Rev. (Sp. Ed.); Te Parache Mead, *supra* note 17.

²¹*Our Culture*, *supra* note 2 at 49, citing an unpublished submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner's Response to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs at 22.

This quotation demonstrates aboriginal peoples' willingness to engage with settler concepts of "property" and "ownership" in relation to culture in order to protect their heritage and uphold their laws.²²

(b) Aboriginal Perspectives on Cultural Appropriation

Cultural appropriation does not generally involve the breach of settler laws as they currently stand. As discussed later in this Chapter, settler laws generally obscure aboriginal perspectives on cultural appropriation by promoting the interests of individual commercial rights and the national interest. Cultural appropriation may, but does not always, involve the breach of aboriginal laws. The aboriginal copyright cases almost all involved breach of aboriginal laws concerning reproduction of communal designs. However in other cases aboriginal peoples have protested against appropriations of their cultural heritage that are not strictly in breach of their laws. In these cases it may be that aboriginal laws never contemplated the relationship of appropriation between aboriginal and settler cultures. However, it will be argued in Chapter 6 that many aboriginal laws can be adapted as sources of law enforceable against settlers as aboriginal rights.

Whether or not settler or aboriginal laws are breached, aboriginal peoples have argued that cultural appropriation causes a variety of harms. These harms can include the misrepresentation of aboriginal peoples in the settler society;²³ the loss of fair commercial returns;²⁴ religious harms caused by the disclosure of sacred or secret knowledge and the

²² Cf Coombe, *Embodied Trademarks*, *supra* note 16 at 217.

²³ See for example the analysis by A. Jabbour, *Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protection of Folklore* XVII No 1 Copyright Bulletin 10 (cited in McDonald, *supra* note 12 at 3).

²⁴ See for example Jabbour, *ibid.*; C. Golvan, "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" (1989) 10 E.I.P.R. 346.

denigration of important ceremonies and imagery,²⁵ and damage to the process of cultural transmission between generations.²⁶ On a broad level, some aboriginal commentators have argued that cultural appropriation denies them the right to self-determination as peoples and constitutes "ethnocide".²⁷ There is a number of related arguments raised by various elements of the settler society against aboriginal cultural appropriation claims. They are examined in the next section.

(c) Settler Perspectives on Cultural Appropriation

A contemporary Canadian West Coast artist recently wrote:

*I am Ron Stacy, of Dutch and British descent, and I paint pictures of Northwest Coast native mythological characters in a modern representational style. I'm often asked how I'm doing this when I'm not a native. Sometimes I am even accused of the sin of 'cultural appropriation'....*²⁸

Perhaps the most common argument against recognition of cultural appropriation claims is that it would stifle others' creativity and freedom of expression. For example, Stacy argues that:

*Artists in their work mustn't concern themselves with boundaries of convention, racism, sexism, religion, chauvinism, etc., except perhaps to expose the human vagaries involved therein. To do so is to be not an artist, but a propagandist.*²⁹

Censorship, he argues, is not an appropriate sanction for offensive "art":

An artist's work should be judged on artistic merit and the skills involved in the production of the work. It's up to the individual to judge whether or not they like

²⁵See for example the aboriginal copyright cases discussed in Chapter 3.

²⁶This harm is most often cited in the context of repatriation claims for significant ceremonial objects. For references to repatriation issues see *supra* note 14.

²⁷See for example Callison, *supra* note 12 at 165: "The Canadian state and society have a duty to end the ethnocide of Aboriginal culture".

²⁸R. Stacy, "On Cultural Appropriation" (on internet site entitled *Art Vision International: Voice of the People: A Cultural Forum (Essay Section)* (internet: <http://www.islandnet/forum/approp/html>).

²⁹*Ibid.* at 2.

*or approve of the work, but there is no inherent right by the individual to censor the work. On the other hand, the artist should seek no sanction from anyone for the creation of the work, but must be prepared for rejection by anyone or all of the public, no matter how incorrect or unfair the reaction as perceived by the artist.*³⁰

Another related argument is that "culture" is a universal and indivisible resource, and that, as a melting pot of anonymous, cumulative contributions and intersecting influences, its ownership by one segment of society is impossible.³¹ As Stacy argues, we are all inevitably involved in the processes of cultural borrowing and interchange:

*We appropriate culturally on an on-going basis when non-black, non-slaves play or listen to the Blues; when a black person converts to Judaism; when a North American eats a soufflé; when a French person says 'O.K'...*³²

And as Coombe notes, an essentialised vision of cultures as separate, static and able to be wholly "possessed" in an individualistic, seamless way is not only false but damaging:

*By representing cultures in the image of the undivided possessive individual we obscure peoples' historical agency and transformations, their internal differences, the productivity of intercultural exchange, and the ability of peoples to culturally express their position in a wider world.*³³

How can aboriginal peoples justify their cultural appropriation claims against these considerations? Some commentators make what might be termed a two-step "deconstructive/contextual" argument. They begin by critiquing the existing regulation of

³⁰*Ibid.*

³¹For a discussion of differing perspectives on cultural appropriation see *Properties of Culture*, *supra* note 1. In Australia, differing views on ownership of "culture" have recently been aired in the controversy over the appropriation of aboriginal identity by non-aboriginal artists and writers (see references cited *supra* note 14).

³²*Supra* note 28 at 1.

³³*Properties of Culture*, *supra* note 1 at 266: see extensive references cited therein. See also *Predicament of Culture*, *supra* note 11 at 217. For further discussion of the conceptualisation of aboriginal cultures see Chapter 4.

culture in First World countries. As discussed later in this Chapter, intellectual property laws in these regimes are based on a conception of culture as a storehouse of ideas available for commodification by individuals. The concept of artistic freedom, (or in Coombe's words, the "Romantic author") argued by Stacy is heavily linked with this concept of culture. As a starting point these commentators ask whose interests are being served by this concept and its continuing embodiment in settler laws.³⁴ They argue that such concepts should be viewed as "peculiar" and historically contingent.³⁵

The second step of the argument is to see cultural appropriation claims "in context".³⁶ Drawing on various streams of post-modernist theory,³⁷ Coombe argues that:

*[o]nly by situating these claims in...context, can we understand how supposedly abstract, general, and universal principles (like authorship, art, culture and identity) may operate to construct systematic structures of domination and exclusion...*³⁸

On this basis, cultural appropriation must be seen against the legacy of "dispossession and appropriation" of colonialism.³⁹

Taking this analysis a step further, commentators such as Canadian aboriginal academic Marcia Crosby argue that cultural appropriation had a specific role in colonialism. Crosby argues that settlers appropriated aboriginal cultures in order to

³⁴Pask, *supra* note 15 at 73.

³⁵ See Pask, *supra* note 15 at 73-78, *Properties of Culture*, *supra* note 1 at 265, and see generally the discussions in Wright, *supra* note 2; Clements, *supra* note 13.

³⁶*Properties of Culture*, *ibid.* at 270.

³⁷Coombe notes that the call to context is "a characteristic that unites philosophical pragmatists, feminists, and critical race theorists": (*Properties of Culture*, *supra* note 1 at 270, citing M. Minow & E. Spelman, "In Context" in M. Brant & W. Weaver, eds, *Pragmatism in Law and Society* (Boulder, Co.: Westview Press, 1991) 247 at 247.)

³⁸*Properties of Culture*, *supra* note 1 at 271.

³⁹McDonald, *supra* note 12.

establish "roots" from which to forge a new identity and consolidate their dominance over aboriginal peoples.⁴⁰ Viewed within this context, cultural appropriation is associated with an historical relationship of power which continues to assert an assimilatory force today.⁴¹ This colonial legacy, which is discussed further below, is one which aboriginal peoples now seek to renegotiate through cultural appropriation claims.⁴²

As should be clear from the preceding discussion, the concept of cultural appropriation is a highly contested one, involving fine questions of perspective. The question therefore arises as to how settler societies should respond. Coombe's contextualised view of aboriginal peoples' cultural appropriation claims suggests the importance of listening to aboriginal peoples' own perspectives on what cultural appropriation is. However, she argues, this does not foreclose one's own moral judgment.

In her view:

*Whereas it may be impossible to delineate formal rules defining, sanctioning, and prohibiting certain acts of 'cultural appropriation', it is possible to enact and practice an ethics of appropriation that attends to the specificity of the historical circumstances in which certain claims are made, in which they must be assessed.*⁴³

⁴⁰Crosby, *supra* note 15 at 289 footnote 7, citing from T. Goldie in *Fear and Temptation* (Montreal: Queens University Press, 1989). See also Cuk, *supra* note 14; Davies, *supra* note 11.

⁴¹Clements, *supra* note 13. See also Callison, *supra* note 12. In Australia, see for example J.V.S. and R. Megaw, "The Dreamers Awake: Contemporary Australian Aboriginal Art" in [1992] *Aboriginal Culture Today* 159 at 168.

⁴²Coombe, *Properties of Culture*, *supra* note 1 at 267. For a general discussion of issues surrounding cultural appropriation in this context see M. Halpin, *Course Notes, Expressive Culture of BC First Nations, Anthropology 221* (Vancouver: Department of Anthropology and Sociology, University of British Columbia, 1997).

⁴³*Properties of Culture*, *supra* note 1 at 270.

Another commentator, Professor Marjorie Halpin, asserts that the keystone to this practical "ethics of appropriation" is "respect".⁴⁴ Stacy also adopts this keystone. In his view, his artistic pursuits are legitimate because:

*I am attracted to an aspect of culture with which I have no genetic connection, and I do what I do with respect and no sense of cynical exploitation...An artist doesn't have to be a pirate to depict Long John Silver, or a Christian to paint the sermon on the Mount. However, to do justice to their avocation and their project, it's important to have some understanding of the subject. That demonstrates respect and integrity.*⁴⁵

However, "respect" does not solve all the issues. Some aboriginal peoples have asserted that outsiders must always seek permission for borrowings, because only the aboriginal custodians know what is appropriate.⁴⁶ In their view, the imposition of outsider ideas of what constitutes "respect" for aboriginal cultures may simply continue colonialist practices. As Coombe notes:

*...it is precisely the inability to name themselves and a continuous history of having their identities defined by others that First Nations peoples foreground when they oppose practices of cultural appropriation.*⁴⁷

Many aboriginal peoples therefore assert the right to cultural self-determination over such issues of cultural integrity. However, there are strong vested interests opposing the extension of aboriginal cultural self-determination beyond existing intellectual property regimes. Artists like Ron Stacy, the pharmaceutical industry, museums and tourist industry advertisers are examples of those who would be constrained from their existing activities if

⁴⁴Halpin, *supra* note 42.

⁴⁵Stacy, *supra* note 28 at 2.

⁴⁶This issue is most clearly highlighted in *Milpurrurru v. Indofurn* (1995) 30 I.P.R. 209 (Fed. Ct. of Australia) discussed in Chapter 3.

⁴⁷*Properties of Culture*, *supra* note 1 at 267.

aboriginal peoples were recognised as having, in effect, property in all aspects of their cultural heritage.⁴⁸ Some have voluntarily agreed to respect aboriginal perspectives.⁴⁹ However, others have not. Because of the continuing clash of perspectives between aboriginal peoples and these elements of the settler society, many aboriginal peoples have begun to seek relief in settler courts.

2. Contextualising Aboriginal Cultural Appropriation Claims

2.1 The Legacy of Colonialism in Australia and Canada

The legacy of colonialism in Australia and Canada is still being worked through today.⁵⁰ In both countries, aboriginal peoples were until recently subjected to extensive and debilitating official projects of "civilisation" and assimilation.⁵¹ These projects defined settler cultures as superior and inevitably triumphant,⁵² and aboriginal cultures as primitive and inevitably doomed to extinction. Professional forms of knowledge, including law,

⁴⁸ See above, text accompanying note 22.

⁴⁹ An example is the closer relationship of museums and aboriginal peoples as a result of the *Spirit Sings* controversy, referred to *supra* note 13).

⁵⁰ Post-colonial studies now recognise that there will never be a return to pre-colonial "purity". As Australian commentator Helen Tiffin observes, "*Decolonisation is process, not arrival; it invokes an ongoing dialectic between hegemonic centrist systems and peripheral subversion of them; between European or British discourses and their post-colonial dismantling*": H. Tiffin, "Post-Colonial Literatures and Counter-discourse" (1987) 9:3 *Kunapipi*, reproduced in B. Ashcroft, G. Griffiths & H. Tiffin, eds., *The Post-Colonial Studies Reader* (St Ives: Clays, 1995) 95 at 95.

⁵¹ In Australia, this policy became known as 'smoothing the dying pillow', as it was thought that aboriginal people would eventually die out (if full-blooded) or be "bred out" (if "half-castes"): see D. Sweeney, "Reflections from the Past: Conceptualisation of State, Citizen and Aboriginality in Australian Law" (Paper delivered at the Annual Conference of the Canadian Law & Society Association, Memorial University, Newfoundland, June 6-9, 1997) [unpublished] at 24 and extensive sources on assimilation policy cited therein. In Canada, comprehensive treatments of assimilation policy in Canada are found in the *RCAP*, *supra* note 12; and K. Peppitas, *Severing the Ties that Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (University of Manitoba Press, Winnipeg, 1994).

⁵² See eg R.C. Ryser, "Nation-States, Indigenous Nations, and the Great Lie" in L. Little Bear, M. Boldt & J.A. Long, *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University Of Toronto Press, 1984) 27, arguing that everywhere indigenous peoples have been subject to the "great lie" of European superiority.

social sciences and history, officially endorsed an image of aboriginal peoples as "savages".⁵³ This image was mirrored in advertising and other forms of popular culture.⁵⁴ Aboriginal peoples were considered at best suitable for retraining as a lesser class of European, or left to die out in the practice of their supposedly outmoded traditions. In both countries entire populations were removed onto "reserves", breaking their relationship as custodians of their traditional territories. Their physical, political and spiritual beings were placed under the precise control of government agents and missionaries in a comprehensive project of resocialisation towards settler ideals. A particularly virulent aspect of this project concerned aboriginal children, many of whom in both countries were removed from their parents for resocialisation.⁵⁵ Although considered enlightened policy at the time, the removal of these children is now one of the most painful legacies of colonialism now being confronted in both Canadian and Australian societies.⁵⁶

⁵³The seminal work in this area is Edward Said's *Orientalism* (Cambridge: Harvard University Press, 1978).

⁵⁴See for example Crosby, *supra* note 15, and *Embodied Trademarks*, *supra* note 16.

⁵⁵In Canada the residential schools system involved the forced boarding of aboriginal children at schools run by churches. The system began in the 1870s and ran as a joint government-church initiative until the 1960s. For a discussion of the residential schools system and its problems see the *RCAP Report*, *supra* note 12 vol 1, ch. 10. For a personal account, see S. Sterling, *My Name is Seepeetza* (Toronto: Douglas & McIntyre, 1992). In Australia government policy in this century until the 1960s was to salvage "half-caste" children for reeducation by removing them to church run schools or placing them into foster care. See Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the Australian Human Rights and Equal Opportunity Commission of the Inquiry into the Removal of Aboriginal Children* (Canberra: Australian Government Printing Service, 1997) (hereinafter "*Bringing Them Home*").

⁵⁶In both countries, churches involved in the project have apologised to aboriginal peoples, but the federal governments have not. This is a source of continuing anger for many aboriginal peoples in both countries: in Canada, see *RCAP Report*, *supra* note 12; in Australia, see for example I. Watson, "Reconciliation" in J. Elliott et al, *Indigenous Australians and the Law* (Sydney: Cavendish Publishing (Australia), 1997) 213 at 213.

The impact of colonialism on aboriginal cultures in Australia and Canada can only be described as massive.⁵⁷ Under assimilation aboriginal peoples' languages⁵⁸ and religions⁵⁹ were suppressed and many of their culturally significant sites were desecrated. Their oral traditions, in which were encoded their laws, religions, systems of government and histories, were recorded for the benefit of research as they were being lost to their living communities. British Columbia provincial court Judge Alfred Scow, a Kwakiult person from Vancouver Island, recently observed that the criminalisation of ceremonies such as the potlatch:

*...prevented the passing down of our oral history. It prevented the passing down of our values. It meant an interruption of the respected forms of government that we used to have, and we did have forms of government be they oral and not in writing before any of the Europeans came...*⁶⁰

Missionaries told aboriginal peoples that their living cultural heritage was evil and worthless and, on Canada's northwest coast, encouraged them to cut down their totem poles.⁶¹ At the same time however, their past was the subject of settler fascination. In what

⁵⁷In Canada, see for example G. York, *The Dispossessed: Life and Death in Native Canada* (Toronto: Little, Brown (Canada), 1990); *RCAP Report*, *supra* note 12, vol. 1, ch 9. In Australia, reports such as the Royal Commission into Aboriginal Deaths In Custody (Royal Commission into Deaths In Custody, *Report of the Royal Commission Into Deaths in Custody -Final Report*) (Canberra: Australian Government Printing Service, 1991) and the *Stolen Generations Report* (*supra* note 55) have raised consciousness of the continuing effects of the past on aboriginal peoples.

⁵⁸ See D.F. Jordan, "Education and the Reclaiming of Identity: Rights and Claims of Canadian Indians, Norwegian Sami, and Australian Aborigines" in J. R. Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stuart, 1986), ch. 10.

⁵⁹ In Canada, this occurred through criminal prohibitions against ceremonies such as the potlatch in force from 1884 to 1951 under the *Indian Act*, R.S.C. 1985 c.I-5: see *RCAP*, *supra* note 12, vol. 1, ch. 9 at 291-293.

⁶⁰ Cited in *RCAP Report*, *supra* note 12, vol. 1, ch. 9 at 292.

⁶¹See for example Cole, *supra* note 14; Nisga'a Tribal Council, *Nisga'a: People of the Nass River* (Vancouver: Douglas & McIntyre, 1993); P. Kramer, *Totem Poles* (Vancouver: Altitude Publishing Canada, 1995).

is now called the "salvage paradigm",⁶² totem poles and other objects were collected almost obsessively.⁶³ Similarly, during this period aboriginal imagery fed into the building of a nationalist identity that prided itself on the domestication of the new, wild lands of Australia and Canada. The unknowable "savages" were elevated as a vanishing symbol of the exotic challenges faced by the settlers in these new frontiers.⁶⁴ Their past was taken over by their colonisers. As Crosby writes in the Canadian context:

*...interest in First Nations people by Western civilization is not such a recent phenomenon; it dates back hundreds of years, and has been manifest in many ways: collecting and displaying 'Indian' objects and collecting and displaying 'Indians' as objects or human specimens, constructing pseudo-Indians in literature and the visual arts. This interest extended to dominating or colonizing First Nations peoples, our cultural images and our land, as well as salvaging, preserving and reinterpreting material fragments of a supposedly dying native culture for Western 'art and culture' collections. Historically, Western interest in aboriginal peoples has really been self-interest...*⁶⁵

Today many aboriginal languages and traditions have died out, and many aboriginal people today are unconnected with any particular aboriginal communities.⁶⁶ The current cultural dislocation of many aboriginal people is due in no small part to the forced suppression and removal of their cultural heritage during this period. However, the resilience and adaptability of aboriginal cultures even under these circumstances should not be under-

⁶²Crosby, *supra* note 15, G. Chalmers, "European Ways of Talking About the Art of the Northwest Coast First Nations" (1995) 15:1 Can. J. Native Studies 113; Halpin, *supra* note 42.

⁶³For general discussions see *Predicament of Culture*, *supra* note 11; Cole, *supra* note 14. An expedition to salvage totem poles from the British Columbian interior is described in Royal British Columbia Museum, *Histories, Territories and Laws of the Kitwano* (Anthropology in British Columbia, Memoir No. 4 - 1959), by W. Duff, ed. (Victoria: Royal British Columbia Museum, 1989).

⁶⁴Crosby, *supra* note 15; *Properties of Culture*, *supra* note 1.

⁶⁵Crosby, *supra* note 15 at 267 (footnotes omitted).

⁶⁶Writing in the mid-1970s, Harold Cardinal (*supra* note 3 at 11) remarked that "For a long time much of the heritage of our culture has been lost even to Indians and is only now beginning to be understood again". See further in Canada, *RCAP*, *supra* note 12, vol. 1, ch. 3; in Australia, Council for Aboriginal Reconciliation, *Valuing Cultures* (Key Issues Paper No 3) (Canberra: Australian Government Printing Service, 1994).

estimated. Aboriginal peoples in both Australia and Canada have consistently resisted the assimilation of their cultures within the settler societies.⁶⁷ Since the 1960s and 1970s this resistance has gained ground in a large-scale cultural revival associated with the wider movement towards aboriginal self-determination.⁶⁸ Cultural appropriation claims, although always a concern of many aboriginal peoples, are part of this strengthening resistance to assimilation. As Canadian aboriginal writer Loretta Todd has remarked:

*The current flurry about the appropriation of Native culture is not new. It may be newsworthy...But the issue of cultural appropriation and awareness of this by First Nations began when the first Europeans arrived.*⁶⁹

⁶⁷ During the assimilation period tactics of resistance included the concealment of their ceremonies and cultural objects from outsiders, collaboration with researchers and collectors who could help to preserve traditions for the community's future benefit, and the production of cultural heritage for the tourist trade. As Canadian academic John Borrows points out, there is still work to be exploring the "active and transformative role that we have played when reacting to settler institutions": J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291 at 297. The "agency" point is also made by Douglas Cole in the revised preface to his book *Captured Heritage* in relation to the trade of aboriginal cultural objects: "To view museum collections as largely plunder risks making a travesty of the past. More seriously, it may verge on patronizing arrogance - a view of Natives as naïve victims of shrewd Westerners - itself a stereotype of some antiquity"...revised preface (1995), *supra* note 14 at xii. Cole remarks that an examination of the "other side" of the collecting exchange on the northwest coast may raise interesting questions about the meaning of "appropriation" so frequently applied to that process today: *ibid* at xiii. For accounts of the history of modern resistance, see for example, in Australia, S. Bennett, *Aborigines and Political Power* (Sydney: Allen & Unwin, 1989); in Canada, Cardinal, *supra* note 3; V. Harper, *Following the Red Path: the Native Peoples' Caravan*, 1974 (Toronto: N.C. Press, 1974).

⁶⁸ In Canada, examples of aboriginal cultural revival are illustrated in D. Hanna & M. Henry, eds., *Our Tellings: Interior Salish Stories of the Nlha7kapmx People* (Vancouver: UBC Press, 1996); and D. Neel, *The Great Canoes: Reviving a Northwest Coast Tradition* (Vancouver: Douglas & McIntyre, 1995). In Australia, aboriginal activist Charles Perkins has remarked that a "cultural renaissance", along with economic growth, is the key to survival of aboriginal peoples: "Self-Determination and Managing the Future" in C. Fletcher, ed., *Aboriginal Self-Determination in Australia* (Canberra: Aboriginal Studies Press, 1994). The aboriginal copyright cases alone demonstrate the strength of this "cultural renaissance" today. Aboriginal cultural survival is commemorated on Australia Day, which for aboriginal people is "Survival Day" or "Invasion Day": see J. Tabakoff, "Songs of Survival", *The Sydney Morning Herald* (25 January 1997) 13.

⁶⁹L. Todd, "Notes on Appropriation" (1990) 16:1 Parallelogramme 24 at 26, cited in Pask, *supra* note 15 at 60.

2.2 Settler Representations of Aboriginal Cultural Heritage

The unbridgeable gap between savage and civilised was taken for granted, and obviously art was on the civilised side.⁷⁰

A major aspect of the shifting political landscape regarding aboriginal cultural appropriation claims has been changes in settler perceptions of aboriginal cultural heritage. This change mirrors general shifts in settler representations of cultural difference, and has important consequences for the legal treatment of aboriginal cultural heritage. As discussed below, aboriginal cultural heritage was in the colonial period relegated to an inferior status. However, today certain forms of aboriginal cultural heritage are regarded as "art".⁷¹ Aboriginal cultural heritage has thus reached the most privileged category of settler cultural production, entitling it to protection as private property or "copyright". It is, for aesthetic and legal purposes, formally equal to settler cultural production. However, the question now arises as to whether recognition of aboriginal cultural heritage as "art" in fact assimilates it by obscuring the culturally specific communal interests behind it.

(a) The Changing Social and Legal Status of Aboriginal Peoples

As many commentators have noted, representations of aboriginality in settler thought have changed, reflecting the political projects of the day.⁷² In the colonial period,

⁷⁰J. Maquet, *An Introduction to Aesthetic Anthropology* (Philippines: Addison-Wesley Publishing, 1971) at 3.

⁷¹ The question of how to interpret or even identify "art" across cultures, like other debates concerning universals versus relativism, has been the subject of intense anthropological debate for decades. See generally, Maquet, *supra* note 70; J. Clifford, "Art as a Cultural System" (1976) 91 *Modern Language Notes* 1473; *Predicament of Culture*, *supra* note 11; Chalmers, *supra* note 62; T. Hill, "Indian Art in Canada: An Historical Perspective" in E. McLuhan & T. Hill, eds., *Norval Morriseau and the Emergence of the Image Makers* (Methuen: Art Gallery of Ontario, Toronto); gii-dahl-guud-sliiaay, *supra* note 14.

⁷² The most famous of these commentators is Said, *supra* note 53. More recent theoretical work is collected in Ashcroft, Griffith & Tiffin, *supra* note 50. For an analysis of the role of law in this ideological

aboriginal peoples in countries such as Australia and Canada were savage, unknowable "others". Their conceptions of the aesthetic, of relationships to land and of religion were regarded as so inferior as to be beyond comprehension. In Canada, "Indians" were supposed to shed these "heathen" beliefs and be redeemed through assimilation. In Australia aboriginal peoples were initially thought to be dying out under the impact of the superior settler culture. As time went on policies became more "enlightened" and some "half-castes" were considered suitable for assimilation into the settler society.⁷³ As in Canada, aboriginal peoples' languages and beliefs were thought to be heathen and inferior.

Having begun from this position of legal and social inferiority, aboriginal peoples in both countries eventually became formally enfranchised as citizens of the new states. At this time it was thought that assimilation would eventually end the need for special treatment of aboriginal peoples under settler laws and policies.⁷⁴ However, this was not to be. Aboriginal peoples in Australia, Canada and elsewhere are now resisting assimilation and renegotiating the recognition of their distinct group status in a positive light.⁷⁵ As discussed in Chapters 5 and 6, in Canada the settler legal system has begun to recognise these claims for distinct group status through aboriginal rights and self-government policy.

construction of aboriginal peoples, see P. Fitzpatrick, *The Mythology of Modern Law* (London, Routledge, 1992). For a recent examination of the changing status of aboriginal peoples under Australian law see Sweeney, *supra* note 51.

⁷³ A major part of this program was the stolen generations policy, noted *supra* at 55.

⁷⁴ In Canada this policy of equalisation came to a head with the introduction of the infamous "White Paper" of 1969, discussed in Chapter 5.

⁷⁵ See N. Dyck, "Aboriginal Peoples and Nation-States: An Introduction to the Analytical Issues" in N. Dyck, ed., *Indigenous Peoples and the Nation-State: 'Fourth World' Politics in Canada, Australia and Norway* (St Johns, Newfoundland: St Johns Institute of Social and Economic Research, Memorial University of Newfoundland, 1985), Chapter 1 at 13-14: "an inversion has occurred: indigenous peoples are insisting upon retaining their historically distinct status as an essential means for achieving their aims and improving their situation."

These developments are also occurring, albeit more slowly, in Australia. Self-government and the recognition of aboriginal peoples as special interest groups is now accepted policy in both countries. What must now be worked out is how liberal democratic principles of equality might apply to these groups and, where self-government is implemented in practice, how separate aboriginal law-making powers might be reconciled with Crown sovereignty.⁷⁶ This is the "dilemma of difference" faced by modern First World nations with Fourth World populations.⁷⁷

(b) From Museum to Gallery: the Gradual Embrace of Aboriginal "Art"

A number of commentators have observed the shifting categorisation of aboriginal cultural heritage in settler thought. As noted earlier in this Chapter, during the colonial period settlers collected aboriginal peoples' "curios" as they collected the natural flora and fauna of the new lands.⁷⁸ Although an early tourist trade in "curios" existed in both countries,⁷⁹ further cultural production was officially discouraged, or even, as noted

⁷⁶ See further Chapter 6.

⁷⁷ This phrase has been used by various commentators to describe the "dilemma" of attempting to reconcile recognition of cultural difference with the formal equality of individuals: see for example F. Pommersheim, "Liberation, Dreams and Hard Work: An Essay On Tribal Court Jurisprudence" [1992] Wiscounsin L. Rev. 411. This dilemma has been particularly evident in Canadian constitutional debates surrounding aboriginal cultural difference: see for example M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989) Can. Hum. Rts. Y.B. 3; J. Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics" (1994) 43 N.B. L. J. 19; M. Asch, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity" (1992) 30 Alta. L. Rev. 465; M. Asch, "Aboriginal Rights in the Context of Democracy", in *Home and Native Land* (Marlborough, Ont: Nelson Canada, 1988), ch. 6; P. Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1992) 29 Alta. L. Rev. 174; P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1992) 36 McGill L. Rev. 383; Dyck, *supra* note 75; M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference* (Vancouver: UBC Press, 1997). For an analysis of the effects of formal equality discourse in Australian legal debates about aboriginal cultural difference, see generally D. Sweeney, *supra* note 51.

⁷⁸ Chalmers, *supra* note 62 at 116. See *Valuing Cultures*, *supra* note 66 for a discussion of the continuing associations of aboriginal peoples in Australia with flora and fauna on the currency.

⁷⁹ This was particularly evident on the northwest coast of Canada, where the Haida and other aboriginal communities produced their own "hybrid" tourist art from the very early stages of contact: see generally

above, actively prohibited. However, in the early twentieth century, as assimilation policies began to emerge, the settler society saw utilitarian value in production of "crafts". These sanitised crafts were thought to be a useful way for aboriginal peoples to employ themselves and, albeit in a highly regulated way, participate in the modern settler economy. From this period onwards, government funding promoted aboriginal craft industries in both countries.⁸⁰ These "crafts" were regarded as inferior to the settler category of "art". They were not regarded as contemporary creative efforts, but like their producers, quaint folkloric reminders of the past.⁸¹ Pieces that reflected a contemporary engagement with the world were often rejected.⁸² Aboriginal cultural heritage was during this period constructed as domesticated, decorative and largely unthreatening. As one contemporary aboriginal dance group leader recently commented:

*These were dances that, from the first contact, were defined as folkloric, not as art. That definition has been killing us ever since....*⁸³

Since then, aboriginal cultural heritage has become officially integrated into the tourist economies of Australia and Canada, growing increasingly important in the pantheon of cultural exotica consumed by ever more voracious foreign travellers.⁸⁴ As noted above,

Cole, *supra* note 14. In Australia, the history of aboriginal cultural production for the tourist market stretches back to the early days of contact when aboriginal artists transferred body painting to bark for missionary and anthropologist collectors: see C. Golvan, "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" [1989] E.I.P.R. 346 at 348.

⁸⁰ For a discussion of government funding of aboriginal craft industries in this period see in Canada, T. Hill, *supra* note 71; in Australia, see F. Nicholl, "The Art of Reconciliation: Art, Aboriginality, and the State" (1993) 52:4 *Meanjin* 705 at 709-710, Megaw & Megaw, *supra* note 41 at 159-165.

⁸¹ See Chalmers, *supra* note 62 at 116-118, noting that settlers tended to see these "crafts" as "crude".

⁸² See for example the discussion of the Inuit "Elvis sculpture" in Hill, *supra* note 71.

⁸³ Alejandro Ronceria, choreographer, "Chinook Winds" (Aboriginal Arts Program) in C. Dafoe, "Native Artistry Being Revived" *The Globe and Mail* (August 31 1996).

⁸⁴ In Australia, see Brokensha, Peter & Guldberg, Hans H; *Cultural Tourism in Australia: A Report on Cultural Tourism* (Canberra: Australian Government Printing Service, 1992). See also Wright, *supra* note 2 at 58-62 and references therein. In Canada, a recent newspaper report noted that "The two guiding

aboriginal cultural heritage also had an early role in the construction of national identity. This role continues today. In Canada, it appears as official symbols of welcome at airports and on internationally circulated items such as the Commemorative Medallion for the 1994 Commonwealth Games.⁸⁵ In Australia, as one commentator writes:

*The works of Aboriginal artists have become our national artistic symbols. It has become inconceivable for any major public building to be opened today which does not feature some Aboriginal art.*⁸⁶

In the past couple of decades both countries have experienced a new evaluation of aboriginal cultural heritage.⁸⁷ Settler society has now taken to "celebritising" individual "artists", allowing aboriginal cultural heritage into the privileged settler category of "art".⁸⁸ This is evidenced in Australia by recent record-breaking sales in "top end" aboriginal art,⁸⁹ and in Canada by the popularity of "master carvers" such as Bill Reid and Robert Davidson. These artists produce "aboriginal" style work, but it is regarded as "art" and accordingly highly valued as a commodity.

beacons of the tourist industry are 'adventure' and 'culture' - a.k.a. aboriginal or First Nations experiences. Aboriginal tourism is already in big demand in Canada, especially in B.C., but is destined to become an even more important part in B.C.'s mushrooming tourism industry": Editorial, The Province (May 18 1997) M3.

⁸⁵This medallion was designed by aboriginal artist Richard Krentz. For a discussion of his work, see Chapter 6.

⁸⁶C. Golvan, "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) X E.I.P.R. 227 at 227.

⁸⁷For general descriptions see in Australia, Megaw & Megaw, *supra* note 41; in Canada, see Hill, *supra* note 71.

⁸⁸See *Predicament of Culture*, *supra* note 11 discussed in *Properties of Culture*, *supra* note 1, B. Sherman, "Of Authors and Origins" (Oxford: Clarendon Press, 1994) (referred to in Davies, *supra* note 11 and Cuk, *supra* note 14).

⁸⁹The Report of the Review Committee into the Aboriginal Arts and Craft Industry reported that retail sales of Aboriginal art in 1988 was \$18.5 million: cited in C. Golvan, "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 7 EIPR 227 at 227. This June 1997 Sotheby's auction in Melbourne, Australia, was reportedly the most comprehensive collection ever sold. It fetched record prices, peaking at AUD\$206,000 for a 1972 painting by Johnny Warangkula Tjupurrula titled "Water Dreaming". The previous record for sale of an aboriginal painting was AUD\$86,000: B. Hutchings & E. Yaman, "Black Art Breaks Sales Records" *The Australian* (1 July 1997).

Finally, most recently, Australian aboriginal art has become intricately connected with the nationalist issue of "reconciliation" between settler and aboriginal societies now promoted in federal government policy.⁹⁰ This in turn has increased its commercial value as art. As Sotheby's art expert Tim Klingender recently remarked on the eve of a record-breaking auction of aboriginal art:

There's a lot more interest in things indigenous and our indigenous people these days. It's the issue of the moment - it's Wik, it's stolen children, it's reconciliation
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...

(c) The Current Dilemma of Difference

As the discussion above shows, aboriginal cultural heritage has moved through various settler categories to a position where it is now, ostensibly, celebrated as a national treasure and rewarded with commodification as "art".⁹² At this stage it might be argued that aboriginal cultural heritage had reached a position of mutual cultural respect. However, as some have argued, this may not be entirely on aboriginal peoples' terms. It is settler intellectuals who continue to anoint aboriginal "art" as aesthetically valuable,⁹³ and "authenticity" that generally constitutes its selling points.⁹⁴ Crosby suggests that this sudden demand for aboriginal "art" coincides with the post-modernist settler embrace of

⁹⁰Nicholl, *supra* note 80. For a discussion of the different meanings of "reconciliation" see Chapter 4.

⁹¹ Quoted in K. Strickland, "Buyers are Restless for Natives" *The Australian* (June 20 1997).

⁹² Clifford (*Predicament of Culture*, *supra* note 11 at 200) argues that aesthetic discourse seeks to save or "redeem" aboriginal cultural heritage by placing it in the timeless category of "art".

⁹³ Crosby, *supra* note 15 at 288, footnote 1, citing M. Featherstone, "Lifestyle, Theory and Consumer Culture" in (1987) 4 *Theory, Culture and Society* 55.

⁹⁴ Crosby, *supra* note 15 at 288. As noted by the Council for Aboriginal Reconciliation, it is the settler ... "desire for 'authenticity, whether in art or in tourist experiences (a largely imagined 'authenticity') which is perhaps the source of some of the commercial success of the indigenous art industry to date as well as one of its greatest limitations". (*Valuing Cultures*, *supra* note 66). Nichol (*supra* note 80 at 708) notes an academic debate dating back to as early as 1988 regarding whether the success of aboriginal art in the public sphere advanced aboriginal peoples' political agendas. For further discussion of "authenticity" see Chapter 4.

"difference", and Australian commentator Michael Blakeney refers to "the current vogue for folkloric ornamentation."⁹⁵ Sally Merry Engle argues that tourism is a "neo-colonial practice" in which former colonial subjects are "*reconstituted as 'primitive' or 'exotic' objects*"⁹⁶... Others argue that the official promotion of aboriginal arts in public spaces may be a cynical way for states to imply a harmonious relationship with aboriginal peoples, despite whatever the political reality may be.⁹⁷ That such symbolism operates in the official use of aboriginal art is not lost on aboriginal artists in Australia or Canada. Both countries have seen prominent aboriginal artists withdrawing their work from commissioned public spaces to make political protests.⁹⁸

Perhaps most importantly, there is, as earlier foreshadowed, the question of whether the elevation of aboriginal cultural heritage to "art" assimilates it by decontextualising it. In post-modernist discourse, it is the viewer, and not the artist, who controls meaning.⁹⁹ Accordingly, in art galleries, the aboriginal or "first order"¹⁰⁰ meanings of a work, which may include intimate connections with land, land title, place and history, are lost,¹⁰¹ and replaced by the universalised self-reflections of settlers.¹⁰² For this reason,

⁹⁵ M. Blakeney, "Protecting Expressions of Aboriginal Folklore under Copyright Law" (1995) 9 E.I.P.R. 442 at 442.

⁹⁶ S.M. Engle, "Anthropology, Law, and Transnational Processes" (1992) 21 Annual Review of Anthropology 357 at 365.

⁹⁷ In Australia, see Nicholl, *supra* note 80 at 706: "*the deployment of Aboriginal art has become part of the state's response to the articulation of Aboriginal grievances, past and present*"...

⁹⁸ In Australia, see Nicholl, *supra* note 80 at 714-715, describing Michael Nelson Tjakamarra's ceremonial "taking back" of his mosaic design for the new Australian Parliament House in protest at political moves to limit the effect of the *Mabo* decision on native title. In Canada, see Crosby, *supra* note 15 at 287 describing Bill Reid's refusal to complete a sculpture in protest at Canadian government policies.

⁹⁹ See the discussion in McDonald, *supra* note 12 at 15-16.

¹⁰⁰ Crosby, *supra* note 15 at 279.

¹⁰¹ For example, in Canada Wilson Duff (*supra* note 63) chronicled the oral traditions associated with certain totem poles of the "Kitwancool". The oral traditions stated that the histories and stories of the poles were land deeds to the territories of their origin. However, these "first order" meanings now compete

some have argued that ethical curatorial practice requires each work to be documented to indicate its region, community of origin and subject matter. In this way, it is argued, some control will be maintained over viewer interpretation.¹⁰³ On the other hand however, some have queried the appropriateness of continuing to "ghettoise" aboriginal cultural heritage away from other, "mainstream" works and risking its devaluation in status in the settler society.¹⁰⁴ Chalmers argues that the exhibition of aboriginal cultural heritage as "fine art" with very little documentation means that *"the work is perhaps decontextualized but, to a certain extent, it is also decolonized"*.¹⁰⁵ Still others defend the right of individual aboriginal artists to draw on their traditions for their own, uniquely personal interpretations.¹⁰⁶ As these debates indicate, it is not apparent how aboriginal cultural heritage should be categorised within settler discourse.¹⁰⁷

with those of viewers. The poles today stand among poles from numerous other communities in the Museum of Anthropology, and competing interpretations are debated by students in Halpin's anthropology course (Halpin, *supra* note 42). See further S. Wright, "Intellectual Property and The Imaginary Aboriginal" in G. Bird, G. Martin & J. Nielson et al, *Majah: Indigenous Peoples and the Law* (Sydney: Federation Press, 1996) at 146.

¹⁰² Crosby, *supra* note 15; *Predicament of Culture*, *supra* note 11; Lattas, *supra* note 18 at 313 referring to settlers' use of aboriginal culture to perform "acts of ventiloquism".

¹⁰³ See *Valuing Cultures*, *supra* note 66 for a discussion of current curatorial practices.

¹⁰⁴ For discussions of this issue, see for example R. Houle and C. Hargittay, "The Struggle Against Cultural Apartheid: Where Does Indian Art Belong?" (1988) *Muse* 58; R.B. Phillips, "Indian Art: Where Do You Put It?" (1988) *Muse* 64.

¹⁰⁵ Chalmers, *supra* note 62 at 124. See a recent report that Australian bark paintings have now reached the status of "fine art": D. Jopson, "Barks in 'Fine Art' Domain", *The Sydney Morning Herald* (3 September 1997) 12.

¹⁰⁶ Two such aboriginal artists whose works are found in the Museum of Anthropology are Bill Reid, whose "Raven and the First Men" reveals his humanistic interpretation of northwest coast carving traditions, and Connie Sterrit, whose recent work "Vereinigung", on temporary exhibit, reinterprets northwest coast formline techniques and traditional animal imagery to reflect her personal reaction to her mixed aboriginal ancestry. In Australia, Sally Morgan uses aboriginal imagery to express her own "hybrid" identity.

¹⁰⁷ In Canada, the Glenbow Museum controversy, discussed above, represents the turning point of museum policy in this area. For other commentary on curatorial practices in relation to representations of aboriginal culture in Canada, see S. Watson, "Whose Nation? First Nations Art in the Past and Present" (1993) 10 *Canadian Art* 34; D. Doxtator, "The Home of Indian Culture and Other Stories in the Museum" (1988) *Muse* 26. In Australia see the review of curatorial practices in *Valuing Cultures*, *supra* note 66.

These issues surrounding the dilemma of difference are played out against a more serious background where legal issues are concerned. As discussed in Chapter 3, in the aboriginal copyright cases aboriginal artists have now achieved "equality" within the settler system by obtaining copyright protection for their works as "art". However, their dilemma is now how to deal with the extra dimensions of communal aboriginal laws controlling the use of communal designs. In other words, they must reconcile the dilemmas of decontextualisation and decolonisation faced by curators in a legal setting. They must attempt to obtain what Canadian commentator Michael Asch terms "respect for difference"¹⁰⁸ while maintaining the protection of their hard-won formal equality.

3. Settler and Aboriginal Laws Regulating Cultural Heritage

As Canadian commentator Amanda Pask argues, aboriginal peoples' cultural appropriation claims concern "*an interaction between legal systems with different organising principles.*"¹⁰⁹ In this section, a comparison of basic aboriginal and settler legal concepts regarding culture is made in order to highlight points of disjunction between them.

¹⁰⁸ See M. Asch, "Introduction", in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference*, *supra* note 77 at ix.

¹⁰⁹ Pask, *supra* note 15 at 64. I would contest the universal applicability of this statement. As discussed earlier, (*supra*, text accompanying notes 21-23) some cultural appropriation claims do not involve the breach of aboriginal laws.

3.1 Aboriginal Laws Regulating Cultural Heritage

There have been numerous attempts by courts, academics and international bodies to interpret aboriginal laws.¹¹⁰ Many have emphasised the risks of over-generalising between different aboriginal cultures.¹¹¹ However, they have nevertheless pointed to frequently appearing themes of communal rights, concepts of custodianship and responsibility, and the holistic relationships between land, spirituality, culture, the past and present, social relationships and law in aboriginal cultures.¹¹² For example, as aboriginal lawyer Terri Janke writes in the context of the aboriginal copyright cases:

*...under Aboriginal law, the right to create artworks depicting creation and dreaming stories, and to use pre-existing designs and totems of the clan, resides in the traditional owners as custodians of the images. The traditional owners have the collective authority to determine whether these images may be used in an artwork, by whom the artwork may be created, to whom it may be published, and the terms, if any, on which the artwork may be reproduced.*¹¹³

Attempts to fit such aboriginal legal concepts into the categories of settler laws, like attempts to view aboriginal ceremonial objects as merely “artefacts”,¹¹⁴ aboriginal

¹¹⁰The aboriginal copyright cases, discussed in Chapter 3, are an example. Other examples include judicial attempts to compare aboriginal and settler concepts of land ownership. For a further discussion of these attempts see Chapter 5.

¹¹¹See for example in Canada; *Aboriginal Claims*, *supra* note 7; and in Australia; *Our Culture*, *supra* note 2.

¹¹²See for example, *UN Intellectual Property Report*, *supra* note 5; L. George, “Native Spirituality: Past, Present and Future” in D. Jensen & C. Brooks, eds., *In Celebration of Our Survival: The First Nations of British Columbia* (U.B.C. Press, Vancouver, 1991) 160; Callison, *supra* note 12 at 172. These relationships are particularly emphasised in repatriation debates. For a survey of literature in these debates, see *supra* note 14. See more generally, in Canada, *RCAP Report*, *supra* note 12 vol. 2, ch. 3; Cuk, *supra* note 14; in Australia, G. Yunupingu, “Introduction” in G. Yunupingu, ed., *Our Land is Our Life - Land Rights - Past, Present and Future* (Brisbane: University of Queensland Press, 1997); D. Ellinson, “Unauthorised Reproduction of Traditional Aboriginal Art” (1994) 17 U.N.S.L.J. 337.

¹¹³T. Janke, “The Carpets Case” (1995) 20 Alt. L.J. 36 at 37.

¹¹⁴The term “artefact” has been critiqued on the basis that it connotes a “dead” object from the past, fit only for scientific research, rather than a living ceremonial object: see for example, *RCAP Report*, *supra* note 12, vol. 3 ch. 6 at 592; gii-dahl-gud-sliiaay, *supra* note 15 at 125.

paintings as merely “art”¹¹⁵ and aboriginal oral traditions as merely “stories”,¹¹⁶ are often criticised as artificial.¹¹⁷ For example, in the context of intellectual property laws, Coombe argues that settler law:

*...rips asunder what First Nations people view as integrally related, freezing into categories what Native peoples find flowing in relationships.*¹¹⁸

This sentiment has been echoed by former Aboriginal Reconciliation Commissioner, Mick Dodson, remarking on the Australian legal system’s apparent “addiction” to:

*...isolating components of Aboriginal law in order to place them into the artificial compartments which Western legal systems are familiar with.*¹¹⁹

The laws of particular aboriginal communities are discussed further in the context of the aboriginal copyright cases in Chapter 3.

3.2 Settler Laws Regulating Aboriginal Cultural Heritage

Intellectual property and, to a lesser extent, cultural heritage legislation are themselves both a product of, and the legal basis for creating and maintaining, a society which sees culture as the object of commodification, alienation and sale.¹²⁰

¹¹⁵ See generally the discussion earlier in this Chapter.

¹¹⁶ See generally J. Cruickshank, “Oral Tradition and Oral History”: Reviewing Some Issues” (1994) LXXV Can. Hist. Rev. 3; T.M. Trinh, “Granma’s Story” in T.M. Trinh, *Woman, Native, Other* (Bloomington: Indiana University Press, 1989).

¹¹⁷ See *Properties of Culture*, *supra* note 1; Clements, *supra* note 13; Pask, *supra* note 15. See Cuk, *supra* note 14, aboriginal worldview for recent discussion and summary of the north american worldview.

¹¹⁸ *Properties of Culture*, *ibid.* at 269. See also the *United Nations Intellectual Property Report*, *supra* note 2.

¹¹⁹ M. Dodson, “From Lore to Law: Indigenous Rights and Australian Legal Systems” (1995) 20 Alt. L.J. (Sp. Iss. 2 at 2).

¹²⁰ Wright, *supra* note 2 at 64 citing S.E. Wright, “A Feminist Exploration of the Legal Protection of Art” (1994) 7 C.J.W.L. at 59.

(a) The General Scheme: The Individual/Universal Dichotomy

Both Australia and Canada's settler legal systems have been built on settler (and in particular, western European) understandings of property, culture and the public interest. These understandings split legal rights in cultural heritage between private "property"¹²¹ on the one hand, and public or "universal" interests, on the other.¹²² The private property domain is marked off by intellectual property laws. Intellectual property laws protect the commodity value of works as "property".¹²³ Individuals producing the works are regarded as "authors"¹²⁴ of works, thus obliterating, for legal purposes at least, their debt to the collective traditions and prior works on which they have drawn. Intellectual property laws therefore obscure the contribution of collective cultural heritage to individual intellectual efforts.¹²⁵ Conversely, in the public domain, cultural heritage is regarded as an undivided resource, owned by all in the "public interest". At a domestic level the contributions of individuals to cultural production are merged within a collective national or universal interest.¹²⁶ This creates a split between individual and state interests in culture.

¹²¹The ideological and historically contingent aspects of the western European concept of "property" have been exhaustively discussed elsewhere. For a discussion in the context of aboriginal cultural heritage see for example *Aboriginal Claims*, *supra* note 7 at 460; G. Couvalis & H. McDonald, "Cultural Heritage, Property, and the Position of Australian Aborigines" (1996) 14 *Law in Context* (Sp. Iss.) 141; *Properties of Culture*, *supra* note 1.

¹²²See generally Pask, *supra* note 15.

¹²³At the private level, cultural production is therefore conceptualised as something which can be commodified, alienated and otherwise dealt with, like any other "property" interest, according to the exclusive wishes of the individual who "owns" it.

¹²⁴The ideological and historically contingent western European concept of authorship has also been exhaustively discussed. See for example the references cited in *Properties of Culture*, *supra* note 1 at footnote 18. For a critical discussion of the links between the concepts of possessive individualism, authorship and copyright see *Properties of Culture*, *ibid.* at 258-259.

¹²⁵*Properties of Culture*, *supra* note 1 at 266.

¹²⁶At the international level, these states have also asserted "cultural property" rights in material objects associated with their histories, and have agreed to protect sites of "universal" importance within their territories. At an international level, therefore, cultural heritage is conceptualised solely in terms of the interests of nation-states and the "universal" public. For a discussion of the ongoing academic debate over

As Clements states in the Canadian context:

*...legal understandings of culture are based in a homogenous Anglo-European society premised on, among other things, sovereignty in territorial terms and the pre-eminence of the individual.*¹²⁷

The following is a brief analysis of some particular settler legal systems of Australia and Canada concerning culture.

(b) Intellectual Property Laws

Intellectual property is, despite its disparate origins,¹²⁸ a growing field of law, representing its increasing importance in economic terms.¹²⁹ Australian commentators McKeogh & Stewart offer the following generalised definition of intellectual property:

*Broadly speaking, we can say that intellectual property is a generic term for the various rights or bundles of rights which the law accords for the protection of creative effort - or, more especially, for the protection of economic investment in creative effort.*¹³⁰

Consistently with their capitalist origins, intellectual property regimes are based on a balancing thought to be consistent with the fostering of individual reward and economic growth.¹³¹ Patents and designs reward the creators of useful objects or methods with a limited period of exclusive economic exploitation. Similarly, trademarks, and in Australia, related trade practices legislation, protects the "goodwill" of a trade symbol or name that

national versus universal interests in cultural property, see *Properties of Culture*, *supra* note 1 at 260-265; Clements, *supra* note 13.

¹²⁷ Clements, *supra* note 11 at 11.

¹²⁸ The origins of "intellectual property" as a group of associated legal regimes are spread among a number of different systems which evolved independently: see J. McKeogh & A. Stewart *Intellectual Property Law in Australia* (Sydney: Butterworths, 1991) at 3.

¹²⁹ *Ibid.* foreword.

¹³⁰ *Ibid.* at 3.

¹³¹ For a critique of the effectiveness of intellectual property laws in achieving these goals, see D. Vaver, "Some Agnostic Observations on Intellectual Property" [June 1991] 6 I.P.J. 125.

the owner has built up in the public mind through its economic endeavours. These private interests are balanced with the "public interest" in free trade, the circulation of ideas and protection of the public from misleading practices. As the aboriginal copyright cases concern the intersection of aboriginal laws and copyright, copyright is now outlined in more detail.

Copyright¹³² protects reproduction (and hence exploitation) rights in various expressive forms created by identifiable authors. The traditional forms protected are the "high arts",¹³³ namely literary, dramatic, musical or artistic "works". However protection has been extended to modern developments such as computer software. Copyright protection is automatic, and remains (in the case of works) until 50 years after the author's death.¹³⁴ The first and most significant feature of copyright is that it does not protect ideas, but only material expressions or "fixations" embodying the idea.¹³⁵ Only a reproduction which "substantially reproduces" the exact material expression of an idea will infringe copyright.¹³⁶ Others may reproduce the idea itself in different material forms at will. By this is meant that some creative effort is required, rather than a simple copying of another work. However, the requirement is not as strict as it may appear. The creative effort does not have to have merit or exhibit skill, and the cases have shown that very little beyond a slight rearrangement or putting together is required to satisfy it.¹³⁷ Second, the

¹³² In Australia, see *Copyright Act 1968* (Cth) (hereinafter "*Australian Copyright Act*"). In Canada, see *Copyright Act* R.S.C. 1985 c.C-42 (hereinafter "*Canadian Copyright Act*").

¹³³ See McKeogh & Stewart, *supra* note 128 at 3, 6.

¹³⁴ *Australian Copyright Act*, section 33(2); *Canadian Copyright Act*, section 6, *supra* note 132.

¹³⁵ In Australia there is an exception for performers' rights, introduced in 1989 under Part XIA of the Act, which gives performers limited rights to prevent unauthorised recordings or broadcasts of their live dramatic performances.

¹³⁶ See *Milpurrurru v. Indofurn*, *supra* note 46, discussed in Chapter 3.

¹³⁷ *Ibid.*

author (or authors, in the case of a collaborative work) must be identifiable.¹³⁸ Anonymous works cannot be protected. Finally, copyright is subject to established exceptions in the “public interest”. These exceptions include “fair” dealing, which allows reproduction without permission for scientific, critical or artistic purposes so long as the use does not exceed reasonable or “fair” limits. The rights associated with copyright may be alienated like any other property right under settler law. Remedies generally compensate damage to commercial interests.¹³⁹

In Canada, the Royal Commission on Aboriginal Peoples recently observed that intellectual property law is:

*...inherently unsuited to protecting the traditional knowledge and cultural heritage of Aboriginal peoples.*¹⁴⁰

The difficulty with applying intellectual property laws (such as copyright), which focus on protecting individual creative efforts as commodities, to aboriginal cultural heritage (such as communal designs), which focus on continuing collective traditions, is discussed in the context of the aboriginal copyright cases, in Chapter 3. However, at this point two contrasting statements may be noted. Coombe argues that:

*...simplistic reductions of Native concerns to trademark or copyright considerations and the assertion of intellectual property rights fail to reflect important dimensions of Native aspirations and impose colonial juridical categories on postcolonial struggles in a fashion that reenacts the cultural violence of colonization.*¹⁴¹

In contrast, Pask argues that:

¹³⁸ *Australian Copyright Act*, section 32; *Canadian Copyright Act*, section 5(1), *supra* note 132.

¹³⁹ *Cf Milpurrruru v. Indofurn*, *supra* note 46.

¹⁴⁰ *RCAP*, *supra* note 12, vol. 3, ch. 6, at 597.

¹⁴¹ *Properties of Culture*, *supra* note 1 at 272. See also Callison, *supra* note 12 at 174-178.

*Native withdrawal from the copyright system does nothing to counter the exploitation of native cultural objects by others.*¹⁴²

It will be argued in Chapter 3 that the dilemma posed by these two conflicting statements epitomises the dilemma faced by aboriginal artists who decide to use copyright to protect communal designs, and on a wider scale, that faced by aboriginal peoples in protecting their cultural heritage in settler societies.

(c) Heritage Regimes

There is a variety of heritage legislation in both Australia and Canada concerned with the protection and preservation of historically and culturally significant sites and buildings.¹⁴³ Here the individual/public dichotomy is again seen. These statutory regimes attempt to affect a balance between the private property rights of real estate owners, particularly private home owners, and the public interest in preservation and planning considerations.¹⁴⁴ Although some regimes provide for aboriginal peoples to be consulted in relation to developments affecting their particular cultural heritage, in general aboriginal peoples have been regarded as having little claim to standing above the general community in matters of heritage concern.¹⁴⁵

¹⁴²Pask, *supra* note 15 at 79.

¹⁴³See for example, in Australia, *Heritage Act 1977* (NSW); *Queensland Heritage Act 1992* (Qld); *The Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld); *Heritage Act 1993* (SA); *Heritage of Western Australia Act 1990* (WA); *Historic Buildings Act 1981* (Vic); *Land (Planning and Environment) Act* (ACT); *Heritage Conservation Act* (NT). Provision is also made for heritage considerations under local government planning and zoning laws. The predominance of state regimes is owed to the Australian constitutional division of powers: see R. Davis, "Heritage: Opening the Castle to the Public" (1996) 14 *Law in Context* (Sp. Iss.) 69. For an outline of Canadian laws, see *Aboriginal Claims*, *supra* note 7; *RCAP Report*, *supra* note 12, vol. 2, pt. 2, ch.4.

¹⁴⁴For a discussion of the *New South Wales Heritage Protection Act 1977*, see Davis, *supra* note 143.

¹⁴⁵A "radical" case in this area was *Onus v. Alcoa of Australia* (1981) 149 C.L.R. 27, which established in a majority decision of the High Court that a particular aboriginal group with connections to a particular site or group of objects had standing as a special interest group to enforce the Act.

There is some special Australian legislation concerning the preservation of aboriginal cultural heritage. Of these, the federal *Aboriginal & Torres Strait Islander Heritage Protection Act*¹⁴⁶ is the best known and most controversial. It also forms the subject of an important proposal, discussed in Chapter 3, for reforms to address the aboriginal copyright cases. Under this Act, an aboriginal group can ask the Minister for a declaration to protect an area or object of significance to Aboriginal people in accordance with "Aboriginal tradition".¹⁴⁷ The area or object must be under threat of injury or desecration, which includes use or treatment in a manner inconsistent with "Aboriginal tradition". The Minister may make an emergency declaration if a significant aboriginal area is under "immediate or serious threat of injury or desecration".¹⁴⁸ The Minister can also make long term declarations.¹⁴⁹ The Minister's discretion is assisted by experts appointed by him or her. If made, a declaration is backed up by criminal sanctions. Special provisions applying only to Victoria protect "folklore" of significance to Victorian "local aboriginal communities", which are incorporated bodies listed in the Schedule to the Act.¹⁵⁰ The Act is discussed further in Chapter 3.

¹⁴⁶ *Aboriginal & Torres Strait Islander Heritage Protection Act 1984* (Cth) (hereinafter "*Heritage Act*"). For a discussion of the Act, see Wright, *supra* note 2 at 48-52.

¹⁴⁷ Section 3(1), *ibid.* defines "Aboriginal tradition" as "*the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals; and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships*".

¹⁴⁸ *Ibid.* section 9(1).

¹⁴⁹ *Ibid.* section 10(1).

¹⁵⁰ *Ibid.* Part 2A.

The Act recently came under fire because of the "Hindmarsh Island Affair", in which two competing groups of aboriginal women gave conflicting evidence of the significance of an area proposed to be developed for a bridge.¹⁵¹

While taking account of aboriginal perspectives on cultural significance, such legislation does not acknowledge aboriginal peoples' "property" rights in their cultural heritage under settler law.¹⁵² While their voices may now be heard, and in some cases must even be afforded natural justice, they are not determinative. Accordingly, such legislation does not alter the general individual/universal split in property rights in culture under settler regimes discussed earlier.¹⁵³

(d) International Cultural Property Arrangements

The interests of aboriginal peoples are also obscured at the level of international regulation of the trade in cultural property. Both Australia¹⁵⁴ and Canada¹⁵⁵ have passed domestic legislation to implement their obligations under the UNESCO 1970 *Convention*

¹⁵¹ For discussions of the affair, which resulted in a Royal Commission, see M. Tehan, "A Tale of Two Cultures" (1996) 21:1 Alt. L.J. 6; m. Harris, "The Narrative of Law in the Hindmarsh Island Royal Commission" (1996) 14:2 Law in Context (Sp. Iss.) 115. The affair subsequently resulted in an inquiry into the Act conducted by the Hon. Justice Evatt. For a discussion of the report's recommendations, see McDonald, *supra* note 12 at 36-37. The Affair is now the subject of a bill attempting to ensure that a declaration over the bridge cannot be made: see J. Clarke, "Should Parliament Enact the Hindmarsh Island Bill 1996?" (1997) 88 A.L.B. 15.

¹⁵² See McDonald, *supra* note 12 at 62. In Canada, the Royal Commission on Aboriginal Peoples recently recommended that "federal, provincial and territory governments enact legislation recognizing...Aboriginal peoples as the owners of cultural sites, archaeological resources, religious and spiritual objects, and sacred and burial sites located within their traditional territories" if these are within Crown land: RCAP, *supra* note 12, vol. 2, pt. 2, ch. 4, at 648.

¹⁵³ Cf McDonald, *supra* note 12 at 62.

¹⁵⁴ *Protection of Moveable Cultural Property Heritage Act* 1986 (Cth). For a discussion of the origins and operation of this Act see generally C. Simpson, "Cultural Heritage On the Move: Significance and Meaning" (1996) 14 Law in Context (Sp. Iss.) 45 (hereinafter *Cultural Heritage on the Move*).

¹⁵⁵ *Cultural Property Import and Export Act* R.S.C. 1985 c. C-51. For a discussion of the Act see D. Cameron, *An Introduction to the Cultural Property Export and Import Act* (Ottawa: Supply and Services Canada, 1977); Clements, *supra* note 13 at 17-19.

on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property. Both the Canadian and Australian legislation focuses on objects deemed important to national identity,¹⁵⁶ by setting up general schemes facilitating public acquisitions of objects proposed for private export. The schemes provide for the “national significance” of objects to be assessed by state-appointed experts, and if recommended, for interim bans to be imposed on export while public institutions are given an opportunity (and public funding support) to bid. Aboriginal cultural objects are explicitly identified as targets for acquisition in both countries. However, aboriginal peoples themselves have no right to be notified when a significant object is proposed to be exported, and unless they are able to obtain classification as a public institution,¹⁵⁷ are not eligible for public funding. The Acts therefore obscure aboriginal rights in cultural objects of aboriginal origin and maintain the salvage paradigm that, as Crosby comments, facilitated “*the smooth transference of our land and heritage to public institutions, corporations, private enterprise and individuals.*”¹⁵⁸ As Australian commentators Couvalis & McDonald write:

*We do not allow something to be the cultural property of an Aboriginal community but treat it as the property of all Australian people, ie the Australian Nation. It seems that Aboriginal cultural property is subsumed under the collective property of this nation.*¹⁵⁹

¹⁵⁶The object of the Australian Act, as explained by the Minister for Arts, Heritage and Environment in parliament, is to “*see that those objects the export of which would constitute an irreparable loss to our cultural heritage remain in Australia*”: *Cultural Heritage on the Move*, *supra* note 158 at 49 (citing the Hon. Barry Cohen, Minister for Arts, Heritage and the Environment, Hansard, House of Representatives, 27 November 1985, p 3740). The object of the Canadian Act was explained by the Secretary of State as follows: “*I have supported this legislation because, while I believe we must maintain a basically free market in cultural property, it is the duty of the state to preserve and maintain in Canada collections of the best objects of national cultural significance*”: cited in Cameron, *supra* note 155, foreword.

¹⁵⁷ To my knowledge this has happened only on one occasion so far, in the case of the Nuxalk Nation. See further Chapter 6.

¹⁵⁸ Crosby, *supra* note 15 at 282.

¹⁵⁹ Couvalis & McDonald, *supra* note 121 at 157.

(e) **Concluding Remarks**

The dichotomy between individual property rights and the “public interest” in settler regulation of culture appears neutral until sub-groups or collectivities assert their presence. In both Australia and Canada, aboriginal peoples have emerged as sub-groups claiming an intermediate position as groups with separate cultural identities associated with their particular histories and territories. However, except for some minor recent concessions, their position, like their laws, remains obscured in the settler legal system. As Pask writes:

*The opposition between private and universal interests which frames the debates concerning the current regimes of intellectual and cultural property is intended and understood to ‘cover the field,’ with the result that the claims of Aboriginal people are all but unthinkable within the legal arena.*¹⁶⁰

In Chapters 5 and 6 the effects of aboriginal rights and self-government on this individual/universal split are examined. It will be argued that these are methods by which communal aboriginal interests cultural heritage may be conceptualised.

4. Cultural Appropriation in the Context of Decolonisation

Aboriginal peoples’ cultural appropriation claims can be understood as part of their wider struggle towards “decolonisation”. As will be discussed in the next Chapter, Australian commentators have increasingly argued that these wider issues associated with

¹⁶⁰Pask, *supra* note 15 at 64.

decolonisation must be taken into account in addressing the issues raised by the aboriginal copyright cases. For example, Ian McDonald, writing for the Australian Copyright Council, observes that:

*In the Australian context, it is unlikely that the issues surrounding the protection of Australian indigenous intellectual property are separable from other Indigenous issues such as land rights, deaths in custody, self-determination or the forced separation of children from their parents or communities. Each of these issues relates to or has an impact on cultural identity and stamina in the face of sometimes overwhelming hostility - hostility often structurally embedded in the white dominant culture.*¹⁶¹

More radically, Macquarie University academic Tony Davies argues that the real problem is the denial of aboriginal sovereignty, and has called for settler courts to acknowledge an aboriginal right of "self-determination" over cultural heritage:

*To address the issue of appropriation is to address the issue of Aboriginal control over their art, and this is a political question. Put another way, it is almost facile to discuss the law at great length, because the issue of appropriation can only be resolved by coming to terms with this prior issue of sovereignty...*¹⁶²

Davies acknowledges that the Australian High Court has foreclosed the sovereignty issue, but suggests that:

*...an innovative court could recognise a right to self-determination, at least in relation to art, rather than attempt to subsume Aboriginal concepts within Anglo-Australian legal categories...*¹⁶³

Such calls are valuable for their assertion that critiques of settler laws must go further than surface issues of legislative change. However, arguably they should be seen as agenda-

¹⁶¹ McDonald, *supra* note 12 at 2.

¹⁶² Davies, *supra* note 11 at 21.

¹⁶³ *Ibid.* (citation omitted). The range of possible reform solutions addressing the issues raised by the aboriginal copyright cases is discussed in Chapter 3.

setting statements and not as practical solutions in their own right. As discussed in Chapter 5 the settler courts of Australia and Canada have consistently upheld Crown sovereignty. Accordingly, any practical challenge by aboriginal peoples to Crown sovereignty is now a matter of international law. In addition, it seems clear that the majority of Fourth World aboriginal peoples prefer "negotiating into" state structures rather than attempting to live in isolation.¹⁶⁴ Accordingly the thesis focuses on internal solutions, or "internal" decolonisation,¹⁶⁵ rather than secessionist calls to aboriginal sovereignty. In particular, the thesis will focus on aboriginal peoples' use of settler laws to open up room for their perspectives. This process might be termed "legal decolonisation."

How can Fourth World aboriginal peoples advance internal decolonisation in practical terms? The key is widely argued to be autonomy, "self-government" or "self-determination."¹⁶⁶ As noted above, an aspect of this right is *cultural* self-determination. Aboriginal peoples in both Australia¹⁶⁷ and Canada¹⁶⁸ have asserted this right. At the international level, the United Nations Sub-Commission for the Prevention of

¹⁶⁴The Special Rapporteur for the United Nations Sub-Commission for the Prevention of Discrimination Against Minorities, Erica-Irene Daez, has remarked that the majority of indigenous peoples throughout the world prefer constitutional reform within existing states over secession: cited in B. Hollingsworth, "Self-Determination and Reconciliation" in Fletcher, *supra* note 68, 57 at 60.

¹⁶⁵This phrase is used by commentators Loos and Thomson to describe the negotiation of "*a new relationship between coloniser and colonised*": N. Loos & J. Thomson, "Black Resistance Past and Present: An Overview" in E. Olbrei, ed., *Black Australians: The Prospects for Change* (Townsville, Queensland: James Cook University of North Queensland Union, 1982) 9 at 15-16.

¹⁶⁶ See further Chapter 5.

¹⁶⁷ General aboriginal statements on various aspects of cultural self-determination in Australia include the Jumbulil Statement; the Central Land Council Policy on Sacred Objects (1992) and the "authenticity" guidelines being developed by the National Indigenous Arts Advocacy Association as preparation for an "Authenticity Trademark" for aboriginal cultural heritage produced for commercial sale. See further *Our Culture*, *supra* note 2.

¹⁶⁸ In Canada, such statements include the statement of the Union of BC Chiefs of 1992 (*Ownership, Jurisdiction, Repatriation: Draft Position Paper on First Nations Graveyards, Burial Areas, Sacred Sites and Heritage Objects*, October 20 1992; reproduced in Edgar & Paterson, *supra* note 3 at Appendix B.)

Discrimination and Protection of Minorities has done extensive research on aboriginal cultural heritage issues and has asserted that aboriginal peoples have the right to control the use, representation, preservation and development of their cultural heritage.¹⁶⁹

An important practical development in this area is the Draft Declaration on the Rights of Indigenous Peoples.¹⁷⁰ The Draft Declaration was completed by the Working Group on Indigenous Populations¹⁷¹ in consultation with aboriginal representatives in 1993. The Declaration¹⁷² is intended as a minimum benchmark of aboriginal rights¹⁷³ and it is hoped that it will be adopted by the United Nations General Assembly. The Draft Declaration contains important provisions on the right to cultural self-determination which may serve as bench-marks for debates in countries such as Canada and Australia.¹⁷⁴ In its current form, the Declaration states that aboriginal peoples have the right to autonomy or "self-government" over their culture,¹⁷⁵ the right not to be subjected to assimilation or any other form of cultural genocide,¹⁷⁶ and rights to the recognition of the full ownership, control and protection of their cultural and intellectual property.¹⁷⁷

It is not known whether Australia and Canada will support the Declaration in its current form. However, if they do, the main issue will be that of practical implementation.

¹⁶⁹ *UN Principles*, *supra* note 2.

¹⁷⁰ Draft Declaration As Agreed Upon by the Members of the Working Group at its 11th Session, UN, ESC, E/CN.4/Sub.2/1994/2/add.1, 20 April 1994 (reproduced at (1994) 1 C.N.L.R. 40) (hereinafter *Draft Declaration*).

¹⁷¹ For a history and description of the Group, see D. Sanders, "The UN Working Group on Indigenous Populations" (1989) 11 Human Rights Quarterly 406.

¹⁷² For a history of the Draft Declaration, see J. Burger, "The UN Draft Declaration on the Rights of Indigenous Peoples" (1996) St. Thomas L. Rev. 209.

¹⁷³ Article 42, *Draft Declaration*, *supra* note 170.

¹⁷⁴ For a critique of the Draft Declaration on the basis of its dichotomy between intellectual and cultural property, see Callison, *supra* note 12 at 172.

¹⁷⁵ Article 31, *Draft Declaration*, *supra* note 170.

¹⁷⁶ *Ibid.* article 7..

¹⁷⁷ *Ibid.* article 29; see also articles 12-14 and article 24.

This implementation process will be less controversial in some areas. For example, aboriginal peoples' right to internal self-regulation of cultural heritage issues is relatively well accepted. As Sanders puts it in the Canadian context, debates over self-government "are not about preventing the recriminalisation of the potlatch".¹⁷⁸ However, the question becomes more difficult where outsider interests are involved, as in the field of cultural appropriation claims. Cultural appropriation claims concern the interaction of aboriginal peoples' right to cultural self-determination with settler interests such as those of artist Ron Stacy. How these interests are to be "reconciled" while settler legal regimes concerning culture remain sovereign is a complex question. Aboriginal commentators such as Cynthia Callison argue that Canada has a "duty" to end the "ethnocide" of aboriginal cultures by extending special protection beyond that afforded under existing settler regimes.¹⁷⁹ However, the question of how to do so is still unsolved. The Draft Declaration does not supply practical answers here.

As discussed in the next Chapter, it is this question that remains unsolved in the aboriginal copyright debate. Accordingly, the thesis turns to two areas of Canadian law where issues surrounding the "dilemma of difference" have been debated extensively at a practical level. These are self-government and aboriginal rights, considered in Chapters 5 and 6 respectively. It will be argued that the Canadian experience in these two areas

¹⁷⁸D. Sanders, *Indian Self-Government*, (paper produced for the course "Aboriginal Self-Government) (Faculty of Law, University of British Columbia, 1996) at 11.

¹⁷⁹ Callison, *supra* note 12 at 165. See also the *RCAP Report* (*supra* note 3, vol. 1 part 2, ch. 1 at 238) where the Commission makes this argument on the basis of Canada's relationship of "trust" with aboriginal peoples. According to the Commission, this duty of trust obliges Canada to support the Draft Declaration and sign the ILO Convention on Indigenous Peoples. For further discussion, see D.B. Suagee, "Human Rights and Cultural Heritage: Developments in the United Nations Working Group on Indigenous Populations" in T. Greaves, ed., *Intellectual Property Rights for Indigenous Peoples: A Sourcebook* (Oklahoma City: Society for Applied Anthropology, 1994) 193.

demonstrates at least *potential* ways in which the state may exercise its “duty” to end cultural appropriation while both respecting aboriginal peoples’ right to cultural self-determination and avoiding challenges to its own sovereignty.

5. Other Issues Concerning Aboriginal Cultural Heritage

Although cultural appropriation is a major issue concerning aboriginal cultural heritage today, it is not the only one. Other issues involve internal disputes within communities, and disputes between members of different communities. These disputes can be seen as conceptually different from “cultural appropriation” disputes in the sense that they do not directly involve a colonial relationship of power between aboriginal peoples and the settler society. However, the increasing commodification of aboriginal cultural heritage in the settler society may indirectly contribute to the growth of these “insider disputes”. There is also the issue of whether urban aboriginal artists should be treated in the same way as non-aboriginal persons for the purposes of protecting traditional communal designs. These issues are discussed further in Chapter 4.

Chapter 3

The Aboriginal Copyright Cases

It seems that this cultural theft from our people is intensifying as people seek to justify the last 200 years of occupying our land...

Galarrwuy Yunupingu, 1990.¹

1. Introduction

Vivien Johnson, a long time patron and supporter of Australian aboriginal artists, recently wrote:

*Aboriginal art is now a highly priced and keenly sought after commodity on the local and international art market. Illegal exploitation of its imagery is the antithesis of the respectful recognition which has been accorded to contemporary Aboriginal art by Australian art audiences and cultural institutions. But there is nevertheless a close connection between Aboriginal art's success in this sphere and its exploitation in others.*²

These 'illegal exploitations' are the subject of the aboriginal copyright cases. As discussed below, the 'rip-offs' in these cases have come from two angles. One is the private sector, where 'rip-off' organisations have often reproduced prints of important works on cheap tourist products. However, another source of concern is government bodies who have used aboriginal art³ without permission for nationalist publicity campaigns.⁴ These uses,

¹Cited in M. Hardie, "The Aboriginal Copyright Cases" (1990) 10:1&2 Artlink 39 at 39.

²V. Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies* (Touring Exhibition Catalogue) (Sydney: National Indigenous Arts Advocacy Association and Macquarie University, 1996) (hereinafter Johnson, *Copyrites*) at 3.

³As discussed in Chapter 2, the classification of aboriginal cultural heritage within the settler category of "art" is somewhat distorting. However, the term also denotes the acceptance of aboriginal cultural heritage as equally meritorious of copyright protection under settler law, an important step in the "copyright campaign", discussed below.

apart from being copyright infringements, are often considered sacrilegious by the artists and their communities. More broadly, aboriginal people have felt these uses trivialise and assimilate aboriginal art, merely compounding the colonial relationship:

Every week we find that non-Aboriginal people are stealing our designs for decorating T-shirts, dress fabrics, restaurant menus, and so on. They are using the same old tactics of assimilation, except this time they are trying to assimilate our culture into their world because it is fashionable in their eyes and will make money.⁵

Indeed, these ‘rip-offs’ have inflamed allegations that settlers are ‘misappropriating’ aboriginal cultural heritage in the same way that they misappropriated aboriginal land.⁶ However, aboriginal peoples have not sat by in silence. In a series of highly publicised and debated cases over the past decade, aboriginal artists and communities have fought back, turning settler laws back against the perpetrators. This fight is what Vivien Johnson calls the ‘copyright campaign’. The campaign demonstrates the ‘museum to art gallery’ shift in

⁴The most famous example is the Reserve Bank, whose use of aboriginal art on the currency without the permission of the artist in 1966 was the subject of the first aboriginal copyright ‘case’, discussed below. *Copyrites* also features on its cover the Department of Aboriginal Affairs’ use of part of a 1976 painting by Anatjari Tjakamarra without permission or acknowledgment for a drink can design for ‘National Aborigines Week 1983’.

⁵ Galarrwuy Yunupingu, quoted in Hardie, *supra* note 1 at 39.

⁶ See for example Galarrwuy Yunupingu, cited in Hardie, *supra* note 1 at 39; as well as the following recent statements: “How much longer will Aboriginal art be considered an artistic “terra nullius” by those who now raid its cultural treasurehouse to further their own commercial or nationalistic ends, with total disregard for the feelings or the legal rights of the artists and communities whose designs they are using?” (Johnson, *Copyrites*, *supra* note 2 at 4); “As in the case of the land, invaders have taken and used objects, images, and iconography from Aboriginal people without permission...such practice is an expression of terra nullius” (T. Davies, “Aboriginal Cultural Property?” (1996) 14:2 *Law in Context* 1 at 1); “Concern had been expressed that the unauthorised reproduction of designs which are of significance to Aboriginal religious beliefs and cultural identity is as damaging as the desecration, through mining, of traditional dreaming places which was canvassed in *Mabo*.” (M. Blakeney, “Protecting Expressions of Australian Aboriginal Folklore Under Copyright Law” (1995) 9 *E.I.P.R.* 422 at 422); “Without effective protection of the special interests indigenous people have in their culture, that culture is open to pillage in the same way that Aboriginal lands and resources have been for over 200 years.” (K. Puri, “Cultural Ownership and Intellectual Property Rights Post-*Mabo*: Putting Ideas into Action” (1995) 9 *I.P.J.* 294 at 294). For a discussion of the terra nullius doctrine in the acquisition of Australian aboriginal lands by the British Crown, see Chapter 5.

settler representations of aboriginal cultural heritage discussed in Chapter 2 and its reflection in the changing responses of settler courts.

2. The Aboriginal "Copyright Campaign"

The growth of aboriginal resistance towards unauthorised reproduction of traditional communal designs has been well documented in *Copyrites: Aboriginal Art in the Age of Reproductive Technologies*, a special exhibition mounted in 1996 in a collaborative project of the National Indigenous Arts Advocacy Association (N.I.A.A.A.) and Macquarie University.⁷ The exhibition drew together a unique display of the original works of aboriginal artists alongside the unauthorised reproductions of these works on tea-towels, t-shirts, carpets and other items. Many of these works and reproductions were the subject of litigation in the aboriginal copyright cases. The catalogue to the exhibition, written by Vivien Johnson, is unusual. Rather than merely describing the works, the catalogue contextualises them as part of the aboriginal "copyright campaign". The *Copyrites* exhibition and catalogue seeks to educate the settler society about these issues and stimulate debate about them. The following discussion draws heavily on *Copyrites*.

2.1 The Dollar Note Case: 1966

The first event documented in *Copyrites* is the "dollar note case".⁸ This "case", occurring just before the historic "aboriginal referendum" of 1967⁹ demonstrates the

⁷*Supra* note 2.

⁸For a discussion of the "dollar note" case see Johnson, *Copyrites*, *supra* note 2 at 13-14; Hardie, *supra* note 1 at 40.

⁹This referendum, passed on 27 May 1967, gave the Commonwealth constitutional power to legislate in respect of aboriginal peoples under the "race power" in section 51(xxvi) of the Australian Constitution: See further P Hanks, "A National Aboriginal Policy?" (1993) 16 N.S.W.L.J. 45 at 48-49.

Australian settler society's attitudes towards aboriginal peoples at that time. These attitudes were, although in many circles good-willed, predominantly paternalistic and ignorant. In 1966, the Reserve Bank of Australia, seeking designs for the new decimal currency, chose a design from a bark painting for the new one dollar note. Assuming the design to be the work of some 'anonymous and probably long dead artist',¹⁰ the Bank commissioned an 'interpretation' of the design. However after going to print it was discovered that the original artist, David Malangi of northern Arnhem Land, was still alive. As Johnson writes, the desire to include aboriginal imagery on the currency indicated 'its elevation into the domain of official Australian culture'.¹¹ However, the Bank's failure to make even basic attempts to establish authorship demonstrated that it was not aboriginal peoples' contemporary participation in Australian society which was being celebrated, but their supposedly 'long dead' traditions. As Johnson writes, the incident illustrates the continuing perception of aboriginal art as:

*...the work of nameless tribesmen (always men) located in the mysterious ahistorical time zone of the 'ethnographic present'. Its designs were seen as a common Australian cultural heritage for anyone to make use of in any way they saw fit.*¹²

Eventually Mr Malangi received \$1,000, a fishing kit and a silver medallion from the Bank as symbolic thanks for his unwitting contribution.¹³ Meanwhile, the Bank's

¹⁰Johnson, *Copyrites*, *supra* note 2 at 13, quoting H.C. "Nugget" Coombes, then Governor of the Reserve Bank.

¹¹Johnson, *Copyrites*, *supra* note 2 at 14.

¹²*Ibid.*

¹³ For an explanation of how the oversight occurred and further references, see Johnson, *Copyrites*, *ibid.* at 13-14.

"interpretation" of his work appeared on one dollar notes until their replacement with coins in the early 1990s.¹⁴

2.2 Wandjuk Marika's Statement to the Australia Council for the Arts: 1974

Johnson traces the beginnings of the "copyright campaign" to almost a decade after the dollar note case. At this time aboriginal artists had begun to travel outside their communities and realise the extent of unauthorised reproduction of their works occurring in the outside world.¹⁵ In 1974, one of these more travelled artists made a statement to the Australia Council for the Arts. This artist was Mr Wandjuk Marika of Yirrkala in north-eastern Arnhem Land. He explained the aboriginal laws governing painting in aboriginal communities and the importance of adhering to them. He also explained the distress he felt at seeing restricted stories displayed to the public in the National Gallery of Victoria, and his inability to paint for some years after seeing an important story painted by him reproduced on tea-towels:

*For three years I've been unable to paint...I did not know why. Now I understand. These men have stolen my spirit.*¹⁶

Mr Marika stressed the need for aboriginal art to be recognised as worthy of protection on the same footing as other art, and that what was desired was not to hide aboriginal art away, but to ensure that it is treated with respect.¹⁷ This statement led to the establishment

¹⁴ Aboriginal imagery continues to be used on the currency: now it is the Australian two dollar coin, which carries a generic "aboriginal head". This work too may have been the subject of copyright issues with the Reserve Bank, although the artist in this case was apparently non-Aboriginal: see Hardie, *supra* note 1 at 40.

¹⁵ Johnson, *Copyrites*, *supra* note 2 at 5.

¹⁶ Quoted in an article by Phillip Adams "The Shame of the White Man" of October 1974, reproduced with permission in Johnson, *Copyrites*, *ibid.* at 12.

¹⁷ See excerpt of statement in Johnson, *Copyrites*, (*ibid* at 11); reproduced by permission of Mr Marika's daughter from W. Marika, "Copyright on Aboriginal Art" (1975) 3:1 Aboriginal News 7.

of the Aboriginal Artists Agency in 1976 with Mr Marika as founding chair. The Agency was given a mandate to protect copyright of aboriginal artists and advise the government on how sacred sites, ceremonies and other aspects of aboriginal culture outside copyright might be protected under special legislation.¹⁸ However it was not until the 1980s that the Agency brought its first case, and that the government began to look at the issue seriously with its Working Party on the Protection of Aboriginal Folklore.¹⁹ By this time the commodification - both authorised and unauthorised - of aboriginal art was well underway. As Johnson writes:

*By the mid 1980's, T-shirts had replaced tea towels as the most popular items on which to reproduce Aboriginal designs without authorisation - and they were to be found everywhere, in department stores and shopping malls as well as tourist and Australiana shops. The mass circulation of aboriginal imagery in mainstream Australian culture echoed the growing popularity of Aboriginal art in contemporary art circles - accompanied by the progressive individuation of its producers as contemporary artists.*²⁰

The "progressive individuation" of aboriginal art producers referred to by Johnson was, in other words, the creation of a "star system" of producers who, in the commercial settler world, were elevated above the other communal owners of the designs they painted.²¹ However, at this time questions lingered on about the "originality" of works by these

¹⁸Johnson, *Copyrites*, *ibid.* at 14.

¹⁹Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (Canberra: Australian Government Printing Service, 1981). For a discussion of the Report, see below text accompanying notes 79-87. As Johnson notes (*ibid.*), the Working Party remained focussed on conceptualising aboriginal art as anonymous and generic. Accordingly, its work did not focus on copyright protection; Australian Copyright Council, *Protecting Indigenous Intellectual Property* by I. McDonald (Redfern: Australian Copyright Council, 1997) at 30-31.

²⁰Johnson, *Copyrites*, *ibid.* at 16.

²¹ Cf Megaw, J.V.S. & Megaw, R., "The Dreamers Awake: Contemporary Aboriginal Australian Art" (1992) *Aboriginal Culture Today* 159 at 165-166.

producers because of their incorporation of communal designs.²² These questions were put to rest by aboriginal peoples' initiatives in bringing copyright actions in the settler courts.

2.3 The First Aboriginal Copyright Case: 1985

The first aboriginal copyright case, *Yangarriny Wunungmurra v. Peter Stripes Fabrics*,²³ was mounted by the Agency against the unauthorised reproduction of the bark painting "Long-necked freshwater tortoises by the fish trap at Gaanan" painted by Yangarriny Wunungmurra in 1975. The painting had been reproduced on fabric for retail sale without authorisation. In the proceedings, the court ordered the retailer to deliver up the material, and ordered the designer (who had slightly modified the painting design, in ways which offended aboriginal law) to pay \$1500 damages. The case was ultimately settled. As Johnson notes, the case has disappeared from the 'annals of legal history'.²⁴ However, it was the first case to assert aboriginal artists' rights as copyright owners.

2.4 The Bulun Bulun Case: 1988

The *Bulun Bulun* case,²⁵ or rather, series of cases,²⁶ concerned thirteen aboriginal artists, including "dollar note" artist David Malangi, whose works had been reproduced

²²See the cases discussed *infra*, following text. Commentators locate these doubts in the analysis by the Working Party on Aboriginal Folklore, *supra* note 19: Hardie, *supra* note 1 at 39. Cf Ellinson, who attributes the doubts to a lack of understanding of the role of 'innovation and artistic interpretation' in aboriginal art: D.A. Ellinson, "Unauthorised Reproduction of Traditional Aboriginal Art" (1994) 17 U.N.S.W.L.J. 327 at 332-333. For a discussion of legal principles concerning the requirement of originality in copyright see C. Golvan, "Aboriginal Art and Copyright: the Case for Johnny Bulun Bulun" [1989] 10 E.I.P.R. 346 (hereinafter *Golvan on Bulun Bulun*) at 349-352.

²³ Federal Court, unreported, settled, 1985. Details of the case have been extracted from Johnson, *Copyrites*, *supra* note 2 at 15 and a casenote by N. Stevenson "Infringement of Copyright in Aboriginal Artworks" (1985) 17 A. L. Bulletin. No digest or other record has been located in searching.

²⁴ Counsel in the *Bulun Bulun* case, discussed below, appears to have been unaware of it: see *Golvan on Bulun Bulun*, *supra* note 22 at 347: "in 1989, *Bulun Bulun* took the apparently unprecedented step of bringing an action for infringement of copyright and breaches of the Trade Practices Act 1974"...

²⁵ *Bulun Bulun v. Nejlam* unreported, settled (Federal Ct. of Australia, Northern Territory Registry).

without authorisation on t-shirts.²⁷ The principle case is named for John Bulun Bulun, a bark painting artist from Garmedi outstation, near Maningrida, in central Arnhem Land.²⁸ At issue were two of his paintings, "*Magpie Geese and Waterlilies at the Waterhole*", 1980, and "*Sacred Waterholes Surrounded by Totemic Animals of the Artist's Clan*", 1981, both of which were in state-owned collections. The reproductions, which also included some minor design features taken from other artists, were unauthorised.²⁹ The swing tag on the t-shirts, headed "The Aboriginals", suggested anonymous, "generic" tribal authorship, without attribution:

*...a design originating from Central Arnhemland.... The aboriginal painted these designs on large pieces of bark often treated with a layer of brown or red ochre.*³⁰

John Bulun Bulun's affidavit described the harm caused to him by these unauthorised reproductions:

*...the reproduction has caused me great embarrassment and shame, and I strongly feel that I have been the victim of the theft of an important birthright.*³¹

Mr Bulun Bulun stated that he had not painted since he learned about the unauthorised reproductions. He further stated that he had considered never painting again if such unauthorised actions could not be stopped, despite the financial harm this would cause to

²⁶Golvan notes that there were related proceedings stemming from the original case brought by John Bulun Bulun: C. Golvan, "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 56 A.L.B. 5 (hereinafter *Golvan on Aboriginal Art*) at 5.

²⁷ For discussion of the case see *Golvan on Bulun Bulun*, *supra* note 22; *Golvan on Aboriginal Art*, *supra* note 26 at 5-6; McDonald, *supra* note 19 at 24-25; Johnson, *Copyrites*, *supra* note 2 at 17-18; Hardie, *supra* note 1 at 39; Puri, *supra* note 6 at 300.

²⁸*Golvan on Bulun Bulun*, *ibid.* at 347.

²⁹*Ibid.*

³⁰ Cited in *Golvan on Bulun Bulun*, *ibid.* at 347.

³¹ Quoted in Johnson, *Copyrites*, *supra* note 2 at 18.

his family. The case ultimately settled and the claimants extracted undertakings to stop manufacture and sale of the t-shirts. The action, for passing off, infringement of copyright and misleading trade practices, publicised³² the rights of aboriginal artists whose works were previously assumed to be too "traditional" or "generic" to qualify for copyright protection.³³ In the wake of this case, the Aboriginal Arts Management Association (A.A.M.A.) was set up.³⁴ A.A.M.A. is now N.I.A.A.A., the joint co-ordinator of the *Copyrites* exhibition.

2.5 The Ten Dollar Note Case: 1991

*Yumbulul v. Reserve Bank of Australia*³⁵ is the first reported case concerning "aboriginal copyright".³⁶ Again concerning the Reserve Bank of Australia's attempts to find aboriginal imagery for elevation into "official Australian culture", it neatly demonstrates the gradual paradigm shift in settler attitudes towards aboriginal cultural heritage in the intervening 25 years since the dollar note case. At this stage, aboriginal cultural heritage had reached equal status with settler art under copyright law. However,

³²Golvan (*Golvan on Aboriginal Art*, *supra* note 26 at 6) notes that: "The resolution of the cases received a good deal of public attention and I perceived there was much public support for the proposition that Aboriginal artists ought to be able to protect their designs from unauthorized reproduction." Golvan also notes that: "in early 1990, in addition to the above mentioned cases, there were a whole series of other claims made against people who had reproduced Aboriginal designs without permission, nearly all of which were resolved by the unauthorised producer making a payment of money which was then distributed to the artists concerned".

³³McDonald, *supra* note 19 at 25.

³⁴*Golvan on Aboriginal Art*, *supra* note 26 at 6; Johnson, *Copyrites*, *supra* note 2 at 28.

³⁵*Yumbulul v. Reserve Bank of Australia Ltd* (1991) 21 I.P.R 481 (Federal Ct. of Australia).

³⁶For discussions of the case, see Blakeney, *supra* note 6 at 442; *Golvan on Aboriginal Art*, *supra* note 26 at 6-7; McDonald, *supra* note 19 at 25-26; Hardie, *supra* note 1 at 40; Puri, *supra* note 6 at 301; D. Miller, "Collective Ownership of the Copyright in Spiritually-Sensitive Works: *Milpururru v. Indofurn Pty Ltd*" (1995) 6 A.I.P.J. 185 at 191-194; S. Gray, "Squatting In Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist" (1996) 14 Law In Context (Sp. Iss.) 29 at 40; T. Davies, *supra* note 6 at 4-5.

on one view it had also been assimilated. This is because, as the following discussion shows, copyright law obscures the communal rights behind the work of "celebrity" artists.

Mr Terry Yumbulul is an artist from the Warimiri and Galpu clans in north eastern Arnhem Land. In 1986 he created a 'Morning Star Pole', an important ceremonial pole throughout Arnhem Land. Mr Yumbulul had attained the right to create this Morning Star Pole, which carried certain sacred designs, through clan initiations. The designs indicated membership of these clans and were applied secretly in accordance with religious rules.³⁷ Manduway Yunupingu, giving evidence, stated that:

*The attainment of the right to make such a pole is a matter of great honour, and accordingly abuses of rights in relation to the careful protection of images on such poles is a subject of great sensitivity amongst people who believe in the Morning Star Ceremony and of the ceremonial Morning Star Pole.*³⁸

Mr Yumbulul created this particular pole, which contained, in addition to clan designs, a design based on ancestral stories, for sale to a museum for public display. French J accepted evidence that there was 'nothing inconsistent' with the traditions surrounding the pole in Mr Yumbulul's community and the making of a pole for public display, because meanings in the pole would not be understood by non-aboriginal people, and because aboriginal communities regarded education of non-aboriginal people as important.³⁹ However, he found, it was important for the communities to be informed of intended uses, and that they kept the right to control production of poles, and that in particular poles were not made by people who had not attained the right to do so:

³⁷ Yumbulul, *supra* note 35 at 482.

³⁸ *Ibid.*

³⁹ *Ibid.*

*I accept...that the maker of such poles for public display....has a cultural obligation to those clans to ensure that it is not used or reproduced in a way that offends against their perceptions of its significance.*⁴⁰

Unfortunately for Mr Yumbulul, he was not able to uphold that "cultural obligation" through the settler courts. In 1987, the Aboriginal Artists Agency approached him indicating that an important government agency, of undisclosed identity, was seeking to "mechanically reproduce" his Morning Star Pole. The exact nature of the events which occurred were contested. However, it transpired that Mr Yumbulul signed an exclusive licence agreement via the Agency, who then licensed the design to the Reserve Bank of Australia for use on a ten dollar note commemorating the first European settlement. After coming under heavy criticism from his community, Mr Yumbulul brought these proceedings against the agent and the bank to attempt to prevent further reproduction. Mr Yumbulul was ultimately unable to defeat the licence agreement on the basis of unconscionability or duress.

This time the Bank had a licensing agreement with the artist, thus satisfying the legal requirements of copyright. Unfortunately however, the use was not permitted under aboriginal law. One commentator argued that:

*...once again the Reserve Bank could not get it right, they had not consulted, asked proper permission or gained that permission to reproduce one of the most important ceremonial objects in Arnhem Land, that is the Morning Star Pole.*⁴¹

However, French J commented on:

*the difficulties that arise in the interaction of traditional Aboriginal culture and the Australian legal system relating to the protection of copyright and the commercial exploitation of artistic works by Aboriginal people.*⁴²

⁴⁰ *Ibid.*

⁴¹ Hardie, *supra* note 1 at 40.

The result was therefore negative for Mr Yumbulul and his community. However, Golvan commented that:

*While the action was unsuccessful for the Aboriginal artist in question, the proceeding may have the beneficial outcome of stimulating debate about appropriate protection for Aboriginal art in the context of addressing the inadequacies which exist in the law as it stands.*⁴³

Another positive outcome was French J's acceptance without comment that the Pole was an original artistic work despite its incorporation of ancient aboriginal designs, confirming that earlier assumptions of lack of originality in contemporary works incorporating communal designs were misplaced.⁴⁴

2.6 Unauthorised Reproductions of Urban Aboriginal Art

The first two cases brought by A.A.M.A. concerned urban aboriginal artists Sally Morgan and Bronwyn Bancroft.⁴⁵ Urban artists may use aboriginal styles or themes to express a contemporary vision of aboriginality. However, unless they use the designs of a particular community which are the subject of aboriginal laws, their works are in legal terms identical to that of other artists. Despite this however, the aboriginal "style" of their work appears to make it just as vulnerable to unauthorised reproductions. Sally Morgan's painting, which had been printed in an aboriginal art book, had been reproduced onto T-

⁴² Yumbulul, *supra* note 35 at 482.

⁴³ Golvan on Aboriginal Art, *supra* note 26 at 7.

⁴⁴ McDonald, *supra* note 19 at 26. See Golvan in Golvan on Bulun Bulun, *supra* note 22 at 349, who argues that as a result of the Bulun Bulun case, "no blanket view ought to be adopted in relation to the application of the concept of 'originality' to Aboriginal artworks". Cf Ellinson, *supra* note 22, who as noted above, *ibid.*, appears to assume that originality will rarely or never be an issue in this context.

⁴⁵ For discussion of the Morgan case see Johnson, *Copyrites*, *supra* note 2 at 28. The Bancroft case is discussed in Johnson, *Copyrites*, *ibid* at 31 and briefly in Puri, *supra* note 6 at 301.

shirts with the title of a painting by another artist, and sold in a Sydney supermarket. The case settled out of court with the handing over of screen prints by the infringers. Similarly, Bronwyn Bancroft, who works as a textile, jewellery and fashion designer, found that her designs had been reproduced from the same book and sold to a fabric retailer. Again, the case settled. The designer in this case had copied the print from an art book to obtain something with an "aboriginal flavour". These cases demonstrate that the image of aboriginal artists as anonymous, property-less tribesmen had carried over into the urban context.⁴⁶ The special "internal appropriation" issues concerning urban aboriginal artists who wish to use aboriginal imagery of other aboriginal communities is discussed in Chapter 4.

2.7 The Aboriginal Carpets Case: 1994

The most important aboriginal copyright case to date is *Milpurrruru v. Indofurn Pty Ltd*⁴⁷ The case for the first time attempts to recognise the communal interests behind the works of individual aboriginal artists, albeit in a limited way.⁴⁸ The case demonstrates the gradual shift in entrepreneurial attitudes towards the appropriation of aboriginal designs. By this time, the publicity surrounding *Bulun Bulun* and *Yumbulul* had confirmed that blatant reproduction of aboriginal designs without permission was risky.⁴⁹

⁴⁶Johnson, *Copyrites*, *ibid.* at 28.

⁴⁷*Milpurrruru v. Indofurn Pty Ltd* (1994) 54 F.C.R. 240; 130 A.L.R. 659; 30 I.P.R. 209; [1995] A.I.P.C. 39,051 (Federal Ct. of Australia) (hereinafter *Milpurrruru* cited to I.P.R.).

⁴⁸For a discussion of the case, see Johnson, *Copyrites*, *supra* note 2 at 39-40; Blakeney, *supra* note 6 at 442-445; McDonald, *supra* note 19 at 27-28; Puri, *supra* note 6 at 302-303; Miller, *supra* note 36 at 194-200. The carpets and their reproductions are shown in Johnson, *Copyrites* at 41-48.

⁴⁹Golvan (*Golvan on Aboriginal Art*, *supra* note 26 at 6) notes that unauthorised reproductions had largely disappeared from tourist shops: "It was made clear by the cases that such reproductions would be answered by copyright proceedings and the result was that people clearly did not want to invite the risk".

The case concerned the entrepreneurial efforts of Indofurn, a company which decided to branch into carpet importation. In 1992 one of the directors of Indofurn saw a catalogue of various aboriginal artists' designs offered for reproduction at a Vietnamese carpet factory.⁵⁰ These designs were those of George Milpururru and eight other aboriginal artists (by the time of trial some were deceased). When this director and his wife established that consumer interest existed in Australia for the carpets, they sought permission from the artists via A.A.M.A. The living artists who were eventually contacted by A.A.M.A (a task made difficult because of their remote locations) strenuously denied permission, indicating that use of the designs in carpets would be sacrilegious. However, by this time these directors had gone ahead and begun importing carpets which either exactly or substantially reproduced the designs of the artists. Receiving a negative response from A.A.M.A., they implied that A.A.M.A. was taking a paternalistic and domineering role influencing the artists to deny permission:

*...If you think a damages claim will produce more return than a continuing commercial relationship with your artists then so be it, but maybe you should read again the story of the goose that laid the golden eggs...*⁵¹

*...It is indeed a shame you or the artists you represent do not approve or like the medium of woollen rugs to present their work. Apart from royalties, it is a great way to promote aboriginal art and culture world wide.*⁵²

Indofurn continued limited sales of the carpets until the action was commenced by the applicants. In this litigation Indofurn was aggressive, denying that copyright in the works

⁵⁰ The production of aboriginal designs in nearby Asian countries appears to be well-established: see Johnson, "The Sarong Swindle" in Johnson, *Copyrites*, *supra* note 2 at 33-38.

⁵¹ Milpururru, *supra* note 47 at 221-222.

⁵² *Ibid.* at 222.

was held by the artists, a point which, as the Court noted in assessing damages, should not have been in contention.⁵³ In fact, von Doussa found that the paintings reproduced in differing form were sufficiently close to the originals to be found to be ‘substantial reproductions’ infringing the artists’ copyright.⁵⁴ In so finding von Doussa J took into account Indofurn’s ‘animus furandi’ in blatantly copying the designs.⁵⁵ This finding is likely to decrease the chances of entrepreneurs succeeding in avoiding infringement of aboriginal designs by modifying them slightly, apparently a common tactic in the tourist industry.⁵⁶

The Court heard evidence of the aboriginal laws surrounding the communal designs used in the paintings. However, in this case, evidence concerning aboriginal laws went to the issue of damages. The Court heard that under the aboriginal laws of these artists’ communities:

*...it is the responsibility of the traditional owners to take action to preserve the dreaming, and to punish those responsible for the breach. Notions of responsibility differ from those of the English common law. If permission has been given by the traditional owners to a particular artist to create a picture of the dreaming, and that artwork is later inappropriately used or reproduced by a third party, the artist is held responsible for the breach which has occurred, even if the artist had no control over, or knowledge of, what occurred.*⁵⁷

One artist, Banduk Marika, testified that if the unauthorised reproduction of her painting came to her family’s attention, she could be subject to punishments such as

⁵³*Ibid.* at 224. As noted earlier, *supra* note 43, *Yumbulul* helped to remove assumptions about lack of originality in contemporary aboriginal works.

⁵⁴ For a discussion of the requirement of substantial reproduction, and of its application to the Bulun Bulun reproductions, see *Golvan on Bulun Bulun*, *supra* note 22 at 351-352.

⁵⁵ *Milpururru*, *supra* note 47 at 228.

⁵⁶ See Johnson, *Copyrites*, *supra* note 2 at 51, discussing the “10 percent” modification rule rumoured to be used in the reproduction industry.

⁵⁷ *Milpururru*, *supra* note 47 at 214.

ostracism and prohibition from further painting.⁵⁸ von Doussa J also heard that previous punishments could have included death. Interesting, von Doussa took into account evidence that retribution in present day terms may now be apparently influenced by the result obtained in the settler courts.⁵⁹

The total damages award in the case was \$188,640. Of this, only \$1,500 per artwork reflected normal commercial damages. The remainder of the award reflected special damages through which the judge attempted to recognise the spiritual and communal aspects of the interests involved. He did this in three ways. The first was his agreement, at the request of the applicants, to grant "group" or aggregate damages which, although based on damages awarded to the individual artists, did not distinguish between them, except between those who were living and deceased.⁶⁰ This was done on the express request of the applicants, who indicated that this equal distribution was in accordance with aboriginal laws.⁶¹ von Doussa J noted that such a distribution might even entitle the trustees of the deceased artists to distribute their shares directly to traditional communal owners.⁶²

The second was his award of exemplary damages of \$70,000 for the personal harm suffered by the living artists. Each living artist received a total of \$15,000 each. This award took into account the "cultural environment" of the artists, some of whom,

⁵⁸*Ibid.* at 215.

⁵⁹*Ibid.* at 215, citing S. Gray, "Aboriginal Designs and Copyright" (1992) 9 Copyright Reporter 8 at 11.

⁶⁰*Milpurrruru*, *ibid.* at 247.

⁶¹ This apparently also occurred in the *Bulun Bulun* case: see *Golvan on Aboriginal Art*, *supra* note 26 at 5-6.

⁶² *Milpurrruru*, *supra* note 47 at 240.

including Ms Marika, feared serious retribution from their communities for allowing (albeit unintentionally) the unauthorised reproductions to be made.

Although not able to directly compensate the traditional owners, von Doussa J took into account the "anger and distress suffered by those around the copyright owner" as part of the artists' suffering.⁶³ Part of this award was also comprised of damages for the "flagrancy" of the respondents' actions, particularly as they had refused to stop selling carpets after permission was denied, and for the fact that they attached swing tags to the carpets stating that the artists were receiving royalties, thus implying their consent. Each of the deceased artists estates received \$5,000 reflecting this award for flagrancy.⁶⁴ It is clear that the judge attempted to reflect compensation for the harm suffered by the applicants as a result of breach of their traditional laws. However, like French J in *Yumbulul* he remarked on the inappropriateness of copyright laws to address the real issues in the case.⁶⁵ The case may show that aboriginal and settler laws concerning communal designs co-exist.⁶⁶ However, as one commentator noted after *Milpurrruru*, under settler laws:

At the end of the day the Copyright Act is the controlling text...Both Milpurrruru and Yumbulul disentitle representatives of the aboriginal group of which an artist

⁶³*Ibid.* at 244, citing *Williams v. Settle* [1960] 1 W.L.R. 1072 AT 1086-1087: cited in Blakeney, *supra* note 6 at 444.

⁶⁴ Although there is not doubt that the respondents' infringement of copyright was flagrant, Blakeney (*supra* note 6 at 444) appears to attribute von Doussa J's motivation for awarding damages for flagrancy primarily as an "alternative method" of compensating the deceased artists, who he held could not receive damages for personal harm suffered.

⁶⁵ Blakeney (*ibid.* at 443) argues that "*Milpurrruru* establishes the principle that where the unauthorised reproduction of such works involves a breach of copyright, customary laws on the subject may be taken into account in quantifying the damage which has been suffered". However, he goes on to argue that the way such laws will be reflected in damages awards "is not completely clear".

⁶⁶ Miller, *supra* note 36 at 194.

*is a member from either asserting communal ownership or from claiming in respect of communal harm.*⁶⁷

2.8 R&T Textiles: 1997

In new proceedings⁶⁸ commenced by John Bulun Bulun and George Milpurrruru, a new approach is being taken. Once again the problem is unauthorised infringements of the works of John Bulun Bulun. The defendants, R&T Textiles, have consented to judgment against them for breach of copyright. However, the case is still proceeding to trial on two novel issues:

1. *Whether the other traditional Aboriginal owners [represented in the action by George Milpurrruru] of the corpus of ritual knowledge from which the artistic work is derived are the equitable owners of the copyright subsisting in the artistic work; and*
2. *Whether an infringement of either the legal or equitable title to copyright in a case such as this constitutes a nuisance which has interfered with the applicant's traditional Aboriginal ownership or native title rights in Ganabingu country.*⁶⁹

This case demonstrates an attempt to address the context behind aboriginal art works in an innovative drawing together of streams of settler and aboriginal laws. Most interestingly, it uses an holistic aboriginal conception of communal designs as linked with custodianship of land, thus challenging the confined categories of settler law concerning culture. Submissions have recently been completed and the case is reserved for judgment.⁷⁰ The decision will be of great importance to the future direction of aboriginal use of the settler

⁶⁷ Blakeney, *supra* note 6 at 445.

⁶⁸ *Bulun Bulun v. R&T Textiles*, No DG3 of 1996 Darwin Registry, Federal Ct of Australia.

⁶⁹ M. Hardie, "Current Litigation in Native Title and Intellectual Property: *Bulun Bulun and Milpurrruru v R & T Textiles*" (1997) 90(3) A.L.B. 18 (hereinafter *Current Litigation*) at 18.

⁷⁰ Personal communication, Martin Hardie, 11 December 1997.

courts to protect communal designs. Because of its reliance on native title it is discussed in further detail in Chapter 5.

3. The Remaining Issues

As can be seen from the preceding discussion, aboriginal artists have now reached a position of formal equality within the settler legal system, by achieving protection of their art under copyright law. The requirement of originality is no longer an issue: the *Bulun Bulun* case established that aboriginal artists are regarded as equally creative and contemporary as their settler counterparts, and that aboriginal "art" is no longer regarded as frozen in an antiquated folkloric past. However, *Yumbulul* and *Milpurrrurru* demonstrate that the recognition of aboriginal "art" under copyright law also decontextualises it, obscuring the communal rights behind it. It was this issue that von Doussa J attempted to address, albeit within the constraints of copyright, in the *Milpurrrurru* case, by attempting to blend in consideration of aboriginal laws at the stage of the assessment of damages. *R&T Textiles* will seek to take this hybrid approach further by amalgamating native title, copyright and nuisance doctrines under settler law.

As foreshadowed in the Introduction, there are other related issues concerning aboriginal "art" which have not been canvassed in the cases. These issues include the protection of ancient rock art, which cannot satisfy the requirements of authorship and are beyond protection periods under copyright, and the protection of regional painting styles, such as dot painting, "crosshatching" and "farrk", and of representations of mythological figures, such as Mimi figures from the Kimberley. These aspects of aboriginal cultural

heritage may also be regulated under aboriginal laws, but are outside the scope of copyright unless incorporated into a contemporary work.⁷¹ Beyond this, many aboriginal peoples regard the commercial exploitation of aboriginal visual "themes" as forms of cultural appropriation or misrepresentation despite the fact that aboriginal laws may not specifically regulate them.⁷² An example is described by Golvan:

*Most tourist shops today are replete with examples of T-Shirt designs which may appear to be works of Aboriginal art but are in fact caricatures of Aboriginal art: namely the X-ray koala!*⁷³

The prevalence of this "pseudo-Aboriginalia" is confirmed by Johnson in survey work carried out by students in her sociology course, "Aboriginality", at Macquarie University.⁷⁴ Interestingly, Golvan links the development of these caricatures to the change in the legal environment caused by the aboriginal copyright cases. As direct copying of works becomes more risky, it seems, entrepreneurs have substituted caricatures and generic adaptations.⁷⁵

On a broader scale, these concerns are integrally linked to other issues of cultural appropriation and self-determination discussed in the previous Chapter. Their links to the

⁷¹ N.I.A.A.A. has indicated that use of these styles or figures is also considered inappropriate by aboriginal communities: N.I.A.A.A. policy statement, cited in Johnson, *Copyrites*, *supra* note 2 at 56.

⁷² See T. Janke, *Our Culture Our Future: Proposals for Recognition and Protection of Indigenous Cultural and Intellectual Property* (Discussion Paper prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies) (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997) (hereinafter *Our Culture*), McDonald, *supra* note 19.

⁷³ Golvan on *Aboriginal Art*, *supra* note 26 at 6.

⁷⁴ V. Johnson & Third Year Sociology Students, *The Copyright Issue*, (Sydney: Macquarie University, 1992). Johnson's students made visits to tourist shops in Sydney and then followed up with telephone queries regarding the origin and "authenticity" of souvenir items they purchased. In the course of doing this they obtained a "dot painting koala" in impressionist style, numerous "cut and paste" designs, and many examples of works which could not be attributed to production by any aboriginal individual or community.

⁷⁵ Golvan on *Aboriginal Art*, *supra* note 26 at 6.

issue of "reconciliation" in Australian political discourse is particularly clear. One commentator recently suggested that protection of aboriginal cultural heritage would be an achievable "consolation prize" in the face of current resistance by the settler Australian society to land claims.⁷⁶ However, on a more positive note, Golvan comments that the aboriginal copyright cases have shown a "*significant turn-around in thinking from notions of the law as an oppressor of black people.*"⁷⁷

4. Options for Reform

Reform proposals have centred on the issues of reproduction of communal designs raised by the aboriginal copyright cases. However, many have also canvassed the additional issues just noted. These proposals can be roughly grouped into three categories, each reflecting a different era in settler representations of aboriginality.⁷⁸ There are also proposals for non-legal solutions, which are briefly canvassed below.

4.1 Earlier Proposals: the Preservation of Folklore

The first group of proposals are for separate protection of aboriginal cultural heritage under settler-administered laws as "folklore". Such proposals include the 1981 Report of the Working Party on the Protection of Aboriginal Folklore,⁷⁹ established in

⁷⁶ "There's a lack of sympathy for land rights but here's a chance for a consolation prize.": Professor Michael Blakeney, speaking at the recent Reconciliation Convention: K. Lyall and D. Shanahan, "Call for Culture Copyright Laws" *The Australian* (28 May 1997).

⁷⁷ *Golvan on Aboriginal Art*, *supra* note 26 at 6.

⁷⁸ For a general discussion of these "eras" see Chapter 2.

⁷⁹ *Supra* note 19.

1975 in response to Wandjuk Marika's statement to the Australia Council.⁸⁰ This report, which considered protection of "Aboriginal folklore" including "traditions, observances, customs and beliefs, as expressed in Aboriginal music, dance, craft, sculpture, painting, theatre and literature",⁸¹ recommended (among other things) that a central agency be established to determine and approve appropriate non-aboriginal or outsider uses of aboriginal folklore. The Report contemplated that the agency would prohibit uses such as exposure of secret-sacred material, but could authorise other uses subject to royalty payments to communities of origin. The Report did not contemplate aboriginal communities of origin having any right of veto on uses, but did recommend that the agency be advised by an "Aboriginal Folklore Board". As noted above, the Working Party did not consider copyright, holding doubts about the originality of aboriginal works.⁸² A similar approach was taken by the Report of the Committee of Inquiry into Folklife in Australia,⁸³ which recommended the collection and documentation of "aboriginal craft and contemporary folklife" but did not appear to consider it as equivalent to contemporary settler production.⁸⁴

Today such proposals appear paternalistic, ghettoising aboriginal cultural heritage in a "folklore" box which denies it contemporary vitality.⁸⁵ In effect the "folkloric" label denotes aboriginal cultural heritage as separate and inferior:

⁸⁰ For a discussion of the Working Party Report see McDonald, *supra* note 19 at 30-31; S. Gray "Black Enough? Urban and non-traditional Aboriginal Art and proposed legislative protection for Aboriginal art" (1996) 7 Culture & Policy 29 (hereinafter "Gray, *Black Enough?*") at 36-39.

⁸¹ McDonald, *ibid.* at 30.

⁸² *Supra* note 22.

⁸³ Committee of Inquiry into Folklife in Australia, *Folklife: Our Living Heritage* (Canberra: Australian Government Printing Service, 1987) (hereinafter "*Committee of Inquiry*").

⁸⁴ For a discussion of this report see McDonald, *supra* note 19 at 33.

⁸⁵ See McDonald, *ibid.* at 31, citing Gray, *Black Enough?* *supra* note 80 at 39.

*...one tends to think of the word 'folklore' with some embarrassment. Generally, the word connotes cultural products and processes occupying a lowly position in some imagined hierarchical cultural pyramid.*⁸⁶

Accordingly, such proposals have largely lost currency today.⁸⁷

4.2 "Rights Plus" Approaches

The second group of proposals focus on what might be termed a 'rights plus'⁸⁸ approach to aboriginal cultural heritage, attempting to preserve the newly found equal status of aboriginal cultural heritage under copyright laws while extending such protection to recognise its additional 'special' aspects. They do this by attempting to extend the scope of existing general settler regimes. The main criticisms which may be levelled at them are that they tend to propose blanket solutions, which may not accommodate diversity among communities, and that merely amending existing regimes may not avoid the assimilatory and distorting effect of those regimes.⁸⁹

Unsurprisingly, proposals for reform of copyright laws has received a large share of attention from commentators. An early suggestion for the amendment of copyright law

⁸⁶ McDonald, *ibid.* at 10.

⁸⁷ The 1989 Arts and Crafts Industry Report and Golvan (*Golvan on Bulun Bulun*, *supra* note 22 at 347) recommended re-evaluating the Folklore Report, *supra* note 22. McDonald (*ibid* at 48-49) also notes that this report was commended at the 1982 WIPO meeting of government experts as a possible model at an international level. Cf Puri, *supra* note 6, who still appears to promote the folklore category. WIPO also still uses the folklore category.

⁸⁸ This terminology is based on the 'Hawthorne Report' in Canada, which used the term 'citizens plus' to promote government policies towards 'Indians' which would allow them to "*retain the special privileges of their status while enjoying full participation as provincial and federal citizens*": Indian Affairs and Northern Development, *A Survey of the Contemporary Indians of Canada*, by H.E. Hawthorn, ed., (Ottawa: Queens Printer, 1966) 2 volumes, at 1:7.

⁸⁹ See for example Miller, *supra* note 36 at 206 (cited in McDonald, *supra* note 19 at 63) arguing that Golvan's extension of the Heritage Act would face the same problems of distortion as proposals to amend the Copyright Act.

to accommodate aboriginal cultural heritage interests came in 1989 from counsel for John Bulun Bulun, Colin Golvan.⁹⁰ In the aftermath of the *Bulun Bulun* case, he proposed that:

*consideration be given to the introduction of a notion of collective ownership of copyright.*⁹¹

Golvan suggested that this collective ownership concept could be similar to the common law notion of collective ownership endorsed in *Foster v. Mountford*,⁹² where an injunction was granted to an aboriginal group to prevent disclosure of their tribal secrets.⁹³ Golvan developed this idea in more detail in the wake of the *Yumbulul* case, which directly raised the issue, by suggesting that collective ownership might be reflected through "the notion of equitable ownership of copyright."⁹⁴ If traditional owners of designs were to be recognised as equitable owners of copyright in those designs, he suggested, according to principles of equity they would be able to bring interlocutory injunctions in their own right without the necessity for joining the artist as legal copyright owner until further relief was sought.⁹⁵ However, as Golvan stated:

*it will be appreciated that there is a fundamental dichotomy of interests between the rights of ownership as they stand under Aboriginal law and the rights of ownership under western law.*⁹⁶

⁹⁰ *Golvan on Bulun Bulun*, *supra* note 22.

⁹¹ *Ibid.* at 347.

⁹² (1977) 14 A.L.R. 71.

⁹³ Golvan also noted the existence of collective copyright ownership provisions in some European copyright regimes: *Golvan on Bulun Bulun*, *supra* note 22 at 353.

⁹⁴ *Golvan on Aboriginal Art*, *supra* note 26 at 7.

⁹⁵ *Ibid.* at 7, citing *Sweet v. Shaw*, 8 L.J. Ch 216; *Bohn v. Bogue*, 10 Jur. 420; *Hodges v. Welsh* (1880) 2 Ir. Eq. Rep. 266; *Mawman v. Teggs*, 2 Russ. 385; *Sweet v. Cater*, 11 Sim. 572; *Ward, Lock & Co. v. Long* [1906] 2 Ch. 550; *Performing Rights Society Ltd v. London Theatre of Varieties Ltd* [1924] AC 1. Cf Blakeney, (*supra* note 6 at 443) who states that *Yumbulul* "established that aboriginal customary law on the right to reproduce works and the concept of communal ownership of works were not matters relevant to the validity of an assignment of the copyright in works by their creator".

⁹⁶ *Golvan on Aboriginal Art*, *supra* note 26 at 7.

In order for the two systems of law to be 'meshed', he suggested, it would be appropriate for traditional custodians to be joined along with artists in infringement proceedings.⁹⁷ This suggestion is now being tested in the *R&T Textiles* proceedings, discussed below. Other commentators suggested the extension of copyright by recognising moral rights,⁹⁸ by adapting 'Crown prerogative rights'⁹⁹ or implementing a 'domain public payant' scheme.¹⁰⁰ Proposals for reform of other general settler regimes include the extension of breach of confidence principles in *Foster v. Mountford* to protect the secret elements of

⁹⁷The *Rip-Offs* consultation paper (discussed below) referred to Golvan's suggestion and suggested that "copyright related" protection could include provisions addressing the collective ownership issue, as well "as an unlimited term of protection" and "no material form requirement." However, *Rip-Offs* acknowledged that there would be "practical difficulties" in implementing these changes. Such difficulties included the "proof of the existence and nature of the work" and identification of the membership of the group claiming ownership where a significant amount of time had elapsed after creation of the work. *Rip-Offs* also noted Australia's international obligations under the Berne Convention requiring that any protection offered to Australian nationals also be offered to the nationals of other Convention countries, whether or not similar protection is reciprocated in those countries: Attorney-General's Legal Practice, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islanders* (Canberra: Australian Government Printing Service, 1994) (hereinafter *Rip-Offs*) at 7-8.

⁹⁸ Blakeney, *supra* note 6 at 445, citing T. Alpin, "Aboriginal Art and Moral Rights Law" in Bur-ran-gur ang, *Women and the Law*, curated by A. Pederson, at 22-25. See also Hardie, *supra* note 1 at 40; Puri, *supra* note 6 at 332.

⁹⁹ These rights are preserved in section 8A of the Copyright Act. See Miller, *supra* note 36 at 205, discussed in McDonald, *supra* note 19 at 59. As Miller argued, the extension of Crown prerogative rights would have the advantage of unlimited duration. However, McDonald points out that such an extension may "extinguish any *Mabo* style rights which do survive".

¹⁰⁰ McDonald, *supra* note 19 at 61, citing the Australian Copyright Council's submission to The Committee of Inquiry into Folklife, *supra* note 83 at 264. McDonald takes a slightly more favourable view of domain public payant, noting that it has been implemented in a number of other countries: (*Committee of Inquiry*, *supra* note 83 at 265, cited in McDonald, *supra* note 19 at 61) and that it was considered for implementation in to "folklife" by the Committee of Inquiry into Folklife in Australia (*ibid*). Considering whether domain public payant could be applied to currently exploited aboriginal cultural heritage such as rock art and popular stylistic motifs, McDonald notes the advantage of money received going back to aboriginal communities. However, he point out, the disadvantage of domain public payant is that it would assume and consolidate "the dominance of copyright over Indigenous customary law": *supra* note 19 at 61. On this basis, McDonald argues for the rejection of domain public payant as an appropriate method for "giving Indigenous communities control over cultural materials."

communal designs;¹⁰¹ and the extension of blasphemy laws to protect designs with religious significance.¹⁰²

4.3 Non-Legal Responses

In contrast to proposals to reform copyright and other settler legal regimes, some commentators have referred to practical difficulties with litigation which particularly affect aboriginal people in remote communities, including "distance, language barriers, lack of financial resources and a reluctance to deal with the legal system".¹⁰³ Accordingly a number of commentators have recommended non-legislative solutions. One of these is the establishment of a trade mark or labelling system to help the public distinguish authentic aboriginal products from imitations.¹⁰⁴ Practical steps towards this have now been taken by N.I.A.A.A, which has produced a draft discussion paper on the basis of an appropriate "Label of Authentication" like that used in Canada on Inuit products.¹⁰⁵ Another is the establishment of a government funded "licensing and copyright information body" which could, among other things, develop appropriate forms of licence.¹⁰⁶ Others have

¹⁰¹S. Gray, "Aboriginal Designs and Copyright: Can the Common Law Expand to Meet Aboriginal Demands?" [1992] L. Institute J. 47 at 49, cited in K. Puri, "Protection of Cultural and Intellectual Property Rights of Indigenous Peoples" (1992) N.S.L.J. 1 (hereinafter *Indigenous Peoples*) at 23. However, Blakeney (*supra* note 6 at 442) argues that the public exposure of the designs means they have lost their quality of secrecy.

¹⁰² Miller, *supra* note 36 at 207. For criticism of this proposal, see McDonald, *supra* note 19 at 58. For suggestions regarding other settler laws see *Our Culture*, *supra* note 72 at 54-58.

¹⁰³L. Onus, "Copyright and Issues of Appropriation" (1990) 10:1&2 Artlink 38 at 38.

¹⁰⁴ See for example the Department of Aboriginal Affairs Review Committee, *The Aboriginal Arts and Crafts Industry*, (Canberra, Australian Government Printing Service, 1987) discussed in McDonald, *supra* note 19 at 64; *Golvan on Bulun Bulun*, *supra* note 22.

¹⁰⁵M. Annas, "The Label of Authenticity: A Certification Mark for Goods and Services of Indigenous Origin" (1997) 90 A.L.B. 4. For a discussion of this paper, see Chapter 4.

¹⁰⁶*Golvan on Bulun Bulun*, *supra* note 22 at 353-354. See also Hardie, *supra* note 1 at 40.

considered the benefits of education for both aboriginal communities and the public,¹⁰⁷ and of ethical guidelines concerning the use of aboriginal designs and imagery.¹⁰⁸

4.4 Resolving the Dilemma of Difference: The Move Towards Context

The third group of proposals favour a legal approach tailored specifically to aboriginal perspectives. They evidence a move, manifested in various degrees, to afford recognition of aboriginal peoples' right to cultural self-determination by emphasising aboriginal peoples' right to control their cultural heritage on their own terms. These approaches are characterised by a rejection of the "rights plus" approach on the basis of its assimilatory effect.

One subset of proposals concern reforms to existing special aboriginal legislation. Writing in 1992, Golvan¹⁰⁹ advanced the suggestion that the *Aboriginal and Torres Strait Islander Heritage Protection Act*¹¹⁰ could be amended to extend to "artistic works and designs with traditional significance".¹¹¹ The Act currently extends to culturally significant sites, with the exception of Victorian provisions extending to "Aboriginal folklore", which is defined as defined as "traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginals (including songs, rituals, ceremonies,

¹⁰⁷ McDonald, *supra* note 19; *Our Culture*, *supra* note 72, Johnson, *Copyrites*, *supra* note 2; Committee of Inquiry into Folklife, *supra* note 83; *Rip-Offs*, *supra* note 99. The Arts Law Centre has sent its director to aboriginal communities to conduct workshops on copyright in 1995: see Editorial, "Legal Reform to Stop the Indigenous Art Rip-Off" (March 1996) N.S.W. Law Soc. J. 12.

¹⁰⁸ McDonald, *ibid* at 66, citing the Committee of Inquiry's observation that ethical protocols are often the "first and only line of protection in respect to traditional material", and referring to the Committee Report at 257 and codes of conduct developed by various bodies such as the Council of Australian Museums Association. The N.I.A.A.A. guidelines are as just noted discussed in Chapter 4.

¹⁰⁹ Golvan on *Aboriginal Art*, *supra* note 26.

¹¹⁰ *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) (hereinafter "*Heritage Act*").

¹¹¹ *Ibid.* at 8.

dances, art, customs and spiritual beliefs) and that are of particular significance to Aboriginals in accordance with Aboriginal tradition".¹¹² It provides a scheme for 'local aboriginal communities', which are generally co-operatives and corporations with legal standing, to seek a Ministerial declaration to protect sites or folklore threatened by development. Evidence of a site's significance is provided by aboriginal people, but the final decision to protect is the Minister's, aided by the reports of "experts" such as anthropologists. Golvan suggests that an extension of the Victorian provisions concerning Aboriginal folklore could cover artistic works as well as communal designs not covered by copyright. He argues that these provisions should apply nationally, and that civil rights "akin to copyright rights" should be available to local aboriginal communities modelled on those defined in the Victorian provisions to prevent unauthorised uses of adaptations of works. Importantly, he says, these changes should exclude the implementation of any time limitation as one finds in copyright law, thus protecting rock art. This approach:

*would focus on the protection of claims of communal ownership in a way which is directly consistent with Aboriginal notions of ownership of rights and would be a step towards developing the regime of rights created by the Commonwealth to protect aboriginal culture and heritage, providing an important legislative recognition of the vital connection between land rights, sacred sites, protection of heritage and relics, and artistry. An understanding of this nexus is critical to a full appreciation of Aboriginal art.*¹¹³

However, McDonald argues that an overriding Ministerial discretion under the Act is unlikely to be acceptable to aboriginal peoples in this context.¹¹⁴ However, he suggested

¹¹²The provisions of the *Heritage Act* were discussed in Chapter 2.

¹¹³*Golvan on Aboriginal Art*, *supra* note 26 at 8.

¹¹⁴McDonald, *supra* note 18 at 62.

that this problem could be overcome by placing decisions in this area with an independent commission.

A related group of proposals has considered a *Mabo* style claim or amendments to the Native Title Act.¹¹⁵ These proposals have emphasised the connection between land and culture in many aboriginal communities, arguing (as in the *R&T Textiles* litigation) for an holistic approach to the conceptualisation of communal designs as part of land ownership.¹¹⁶ However, again McDonald argues that aboriginal peoples may find such an action unsatisfactory, given that the approach would be piecemeal and that it would require them to address the issue of extinguishment:

*Indigenous people may well find such analysis demeaning insofar as it involves picking over history and law to determine what might possibly have escaped the deadening hand of the eurocentric paramount power, looking at what has been extinguished and what survives.*¹¹⁷

The advantages and disadvantages of aboriginal rights litigation will be evaluated in light of the Canadian experience in Chapter 5.

Other proposals have stressed the need for aboriginal peoples themselves to be involved in finding solutions. The major recent government initiative responding to the aboriginal copyright cases is the consultative issues paper produced by the federal

¹¹⁵ See for example McDonald, *ibid* at 56-58; Blakeney, *supra* note 6 at 445; S. Wright, "Aboriginal Cultural Heritage in Australia" (1995) U.B.C. L. Rev. (Sp. Iss.) 45 at 46-48 *Indigenous Peoples*, *supra* note 101 at 22; D.H. Bennett, "Native Title and Intellectual Property" (1996) 10 Issues Papers 1 (Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islanders Studies); *Our Culture*, *supra* note 72 at 68-69.

¹¹⁶ Wright, *ibid.* at 47-48. McDonald (*ibid.* at 63) cites Brennan and Toohey JJ in *Mabo v. Queensland (No 2)* (1992) 175 C.L.R. 1 at 59 and 190 for the legal acceptance of the proposition that "dreaming stories and ceremonial links may be sufficient to ground a collective proprietary interest in land. The same evidence as is used to establish a land rights claim might then be used to establish sufficient nexus with cultural material within an extended [Act] or Native Title Act".

¹¹⁷ McDonald, *ibid.* at 58.

government, entitled *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander People*.¹¹⁸ Innovatively, *Rip-Offs* begins with a list of questions inviting comment.¹¹⁹ The questions appeared generally aimed at aboriginal peoples,¹²⁰ and more specifically, at aboriginal peoples living in traditional communities,¹²¹ although submissions from non-aboriginal people are welcomed. The consultation process was completed on October 31, 1997.¹²² Submissions are now being considered in order to "assist the development of options for reform". Finally, there is Davies' call, mentioned in Chapter 2, for innovative settler courts to recognise aboriginal "cultural sovereignty".¹²³ However, this proposal has not received any practical development and must, as argued in Chapter 2, address the continuing sovereignty of the Crown. It will be argued that aboriginal rights and self-government developments in Canada are two different ways of attempting to do this.

¹¹⁸*Rip-Offs*, *supra* note 99.

¹¹⁹ As McDonald, (*supra* note 19) noted, the consultative process in *Rip-Offs* appears to be aimed at avoiding a "top-down" solution.

¹²⁰For example, the questions generally asked what "you" think about uses of "your traditional arts and cultural expression". See Gray, *Squatting In Red Dust*, *supra* note 36; Gray, *Black Enough?* *supra* note 80.

¹²¹Gray, *ibid*, has raised concerns that issues concerning urban aboriginal artists may not be properly represented in the consultation process. For further discussion of urban aboriginal artists see Chapter 4.

¹²² Personal communication received from Ms Terri Janke, co-ordinator, submissions to *Stopping the Rip-Offs*, Michael Frankel & Co (ATSIC consultants) on 7 August 1997. Submissions were originally sought by 27 January 1995, with comments and ideas submitted to "be considered by a government working party" scheduled to report to the relevant federal ministers soon afterwards. The final goal of *Rip-Offs* was the introduction of legislation into Parliament, projected as occurring later in 1995. However, to date the process envisaged in *Rip-Offs* remains incomplete. In the meantime ATSIC has established a 12 person indigenous committee to, among other things organise community consultations and provide advice on the final report: McDonald, *supra* note 19 at 36.

¹²³Davies, *supra* note 6 at 21.

4.5 Concluding remarks

The proposals canvassed above await evaluation in the *Rip-Offs* consultation process. At this stage, no real solutions have been identified, and it can be expected that any solution will take a long time to develop. However, it may be expected that aboriginal peoples' submissions will assert the right to control the reproduction of communal designs in accordance with their right to self-determination. Given the diversity of the issues at hand and the failure of legislative proposals to date, it seems that blanket solutions are unlikely to be preferred. Rather, it seems, an incremental approach will be the practical result. The remainder of the thesis canvasses practical issues concerning the implementation of solutions which would adopt this approach. In particular, Chapter 4 discusses some broad issues which would need to be addressed in reform proposals. As Ellinson states, such issues should not be regarded as insurmountable obstacles, but rather "reckoned with and worked through".¹²⁴ The thesis goes on to examine the Canadian experience of aboriginal rights and self-government with this mandate in mind.

¹²⁴Ellinson, *supra* note 22 at 334.

Chapter 4

Some Theoretical Issues For Reform Proposals

...when migrant Australians talk about protection of 'Aboriginal' culture, we are incorporating our own imaginary vision of what 'Aboriginal' is.

Shelley Wright, 1996.¹

As discussed in Chapter 3, no one legal solution has yet emerged in response to the issues posed by the aboriginal copyright cases. Current initiatives include the attempt to expand native title and copyright in the *R&T Textiles* litigation;² N.I.A.A.A.'s development of a 'label of authenticity,'³ and the *Stopping the Rip-Offs* consultation process.⁴ However, as I argued at the end of Chapter 3, the diversity and complexity of the issues surrounding the copyright cases suggests that no one cure-all solution exists. Rather, it seems, the issues will be dealt with incrementally, depending on the kind of dispute at hand and the goals of the community or communities involved.

In Chapters 4 and 5 I will examine the Canadian experience of aboriginal rights and self-government as examples of incremental approaches that could potentially be adapted in this process. However, before doing so I will in this Chapter examine some issues

¹ S. Wright, "Intellectual Property and the 'Imaginary Aboriginal'" (hereinafter *The Imaginary Aboriginal*) in G. Bird, eds., G. Martin & J. Nielson, *Majah: Indigenous Peoples and the Law* (Federation Press: Sydney, 1996) 129 at 133.

² *Bulun Bulun v. R&T Textiles*, No DG3 of 1996 Darwin Registry, Federal Ct of Australia.

³ See M. Annas, "The Label of Authenticity: A Certification Trademark for Goods and Services of Indigenous Origin" (1997) 90 A.L.B. 4, discussed in Chapter 3.

⁴ Attorney-General's Legal Practice, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islanders* (Canberra: Australian Government Printing Service, 1994).

identified by commentators as issues that must generally be addressed as new initiatives are evaluated.

1. Issues for Resolution

Commentators have identified various issues in considering reforms. These include the question of how to conceptualise communal ownership of cultural heritage; the diversity of aboriginal communities; the position of urban aboriginal artists; the problems associated with submitting aboriginal cultures to the settler courts; and problems associated with legal definitions that freeze aboriginal cultures according to settler notions of “authenticity” or “aboriginality”. The Chapter will discuss theoretical developments in anthropology that inform some of these issues. This discussion will form the basis for evaluating the potential uses of aboriginal rights and self-government in Chapters 5 and 6.

Before commencing the examination of these issues, it is appropriate to address two preliminary issues that will form the basis of assumptions made in the analysis. The first of these is who should be involved in proposing reforms. Should non-aboriginal people join the debate, or does this infringe aboriginal peoples’ right to self-determination? Australian commentator Tony Davies argues that:

...it is up to Aboriginal people to define Aboriginal art, appropriation, and what the response to appropriation is. The role of non-Aboriginal Australia, and its legal system, is to allow this to happen. That is, to recognize the sovereignty of Aboriginal people, rather than to affirm the existing relationship of domination through imposition of an externally authorized solution.⁵

Davies’ essential point, that the *imposition* of solutions by outsiders should be avoided, finds now finds wide support. But arguably a distinction should be drawn between

⁵ T. Davies, “Aboriginal Cultural Property” (1996) 14 Law in Context (Sp. Iss.) 1 at 25.

aboriginal peoples' right to determine their own strategies, and the role of non-aboriginal people in debates about the effects of these strategies. The issues raised by the aboriginal copyright cases, and by cultural appropriation claims generally, have effects and will be contested beyond aboriginal communities. A vigorous debate amongst aboriginal and non-aboriginal people alike is therefore essential to the process of determining reforms. Such a vigorous debate is found surrounding the aboriginal copyright cases.

A second preliminary issue, foreshadowed in the Introduction, concerns the fundamental appropriateness of invoking settler laws in cultural appropriation debates. There are two main arguments that can be made against the use of settler law here. The first is that cultural appropriation is a complex and difficult set of issues with many "shades of grey". Settler law tends to impose "black and white" solutions. Accordingly, settler law is a "blunt instrument" for resolving cultural appropriation claims. The second is that the whole foundation of the settler legal system is colonialist and therefore, will always constitute "capitulation to assimilation"⁶ by aboriginal peoples who submit themselves to it. For example, Davies argues that solutions found within the settler system are "*a denial of the ability of Aboriginal people to confront non-Aboriginal society on terms established by Aboriginal people.*"⁷ As noted in Chapter 2, he calls on an "*innovative court*" to recognize "*the right of self-determination, at least in relation to art.*"⁸

⁶ A. Pask, "Cultural Appropriation and the Law: An Analysis of the Legal Regimes Concerning Culture" (1993) 8 I.P.J. 57 at 81, cited in the Introduction at 8.

⁷ Davies, *supra* note 5 at 24. Some aboriginal peoples, such as the Mohawk of north america, have denied any jurisdiction of settler courts. See for example F. Cassidy & R. Bish, *Indian Self-Government: Its Meaning and Practice* (Vancouver: Oolichan Books, 1989) at 34, and generally, Chapter 6.

⁸ Davies, *supra* note 5 at 21.

There is certainly validity to both of these arguments. However, the argument that law is a blunt instrument can be answered with the observation that, while cultural appropriation is notoriously fully of grey issues, some are less grey than others. In relatively clear cut cases such as the aboriginal copyright cases, law provides a powerful solution. Had aboriginal peoples not gone to court in these instances, these "wrongs" may have continued for a very long time. Similarly, the argument that settler laws are colonialist and ultimately compromising to aboriginal peoples' right of self-determination risks undervaluing the potential of litigation as a powerful tool for aboriginal peoples. As discussed below, aboriginal peoples must certainly contend with practical difficulties and doctrinal biases in using settler law to advance their claims. However, settler law has proven effective in advancing decolonisation in both Australia and Canada. Certainly, the gains made by aboriginal communities using the settler courts in the aboriginal copyright cases so far have been substantial. As discussed in Chapter 3, the publicity surrounding the cases has over the years produced significant changes in the behaviour of entrepreneurs wanting to exploit aboriginal designs. Sometimes the courts may move faster than governments, and vice versa, in a continuing dialogue:

*A common indigenous strategy has been litigation, an attempt to use one part of the settler system against other parts.*⁹

Ignoring the effects of settler law on political debate is clearly dangerous. There are also considerations of necessity. Aboriginal peoples may be forced to use settler courts to resolve cultural appropriation disputes where an "ethics of appropriation" has failed.¹⁰

⁹ D. Sanders, The Nisga'a Agreement, (Address to the American Anthropological Association Conference, 21 November 1996) [unpublished] at 3.

The thesis does not assume that settler law is or will always be an appropriate way to resolve particular debates or issues. Rather, the purpose of the thesis will be to examine how settler law might expand to accommodate aboriginal perspectives should aboriginal peoples choose to use it.

As noted above, commentators have identified a number of issues for consideration in the shaping of initiatives to address the aboriginal copyright debate. These issues are now discussed.

2. Conceptualising Group Ownership of Cultural Heritage

In Chapter 2 the private/universalist split of property ownership under settler legal regimes concerning culture was contrasted with aboriginal communal concepts of ownership, which are obscured by these regimes. As commentator Dean A. Ellinson states, the question that must be addressed in any initiative to protect communal rights in communal designs is that of how those communal rights are to be conceptualised:

*Group rights and responsibilities stand in stark contrast to the individualistic common law concept of property, of which copyright is only one example.*¹¹

The conceptualisation of group rights in communal aboriginal designs under Australian settler law is in its early stages. Golvan's suggestion¹² to extend the *Aboriginal and Torres Strait Islander Heritage Protection Act*¹³ to communal designs uses the existing concept

¹⁰See Chapter 2 for a discussion of the ethics of appropriation.

¹¹ D.A. Ellinson, "Unauthorised Reproduction of Aboriginal Art" (1994) 17 N.S.W.L.J. 327 at 336.

¹² C. Golvan, "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 56 A.L.B. 5 at at 8; discussed in Chapter 3.

¹³ *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) (hereinafter "*Heritage Act*").

of 'local aboriginal communities'. As noted in Chapter 2, these are co-operatives or corporations with standing in settler law.¹⁴ The *R&T Textiles* litigation uses a combination of native title doctrine and equitable ownership of copyright to conceptualise group ownership of pre-existing designs.¹⁵ The Canadian experience of aboriginal rights and self-government provide further models for the conceptualisation of these "group rights and responsibilities" towards cultural heritage.

2. Diversity in Aboriginal Communities

2.1 Homogenous treatment of aboriginal peoples

As Kline notes, the initial classification of north american aboriginal peoples as "Indian" illustrates the often homogenous classification of aboriginal peoples.¹⁶ She calls this failure to distinguish between aboriginal groups in the north american context the "ideology of homogenous indianness".¹⁷ In Australia, Nichol terms "aboriginality" a "white colonising, homogenising term".¹⁸ Wright elaborates further:

As in North and South America, the Indigenous Peoples did not think of themselves as a collectivity at the beginning of European colonisation, and there

¹⁴ This raises the question of whether, if a proposal of this kind was implemented, pan-aboriginal organisations could be listed in order to allow the larger aboriginal community they represent, including urban aboriginal groups, to move against the generic "rip-offs" or "pseudo-Aboriginalia" discussed in Chapter 3. This development was not canvassed by Golvan.

¹⁵ As discussed in Chapter 3, this development was partially foreshadowed in academic commentary. See for example Golvan *supra* note 12, regarding the expansion of equitable concepts of copyright; and Ellinson, *supra* note 11 at 336, noting that the decision in *Mabo v. State of Queensland [No 2]* (1992) 175 C.L.R. 1 already provides a test for the conceptualisation of group rights in land. For further discussion of this aspect of the *Mabo* test see Chapter 5.

¹⁶ M. Kline, "The Colour of Law: Ideological Representations of First Nations in Legal Discourse" (1994) 3 Social & Legal Studies 451 at 466.

¹⁷ Kline, *ibid.* at 466. See also D. Francis, *The Imaginary Indian: The Image of the Indian in Canadian Culture* (Arsenal Pulp Press: Vancouver, 1993) at 4, cited in *The Imaginary Aboriginal*, *supra* note 1 at 130.

¹⁸ F. Nichol, "The Art of Reconciliation: Art, Aboriginality and the State" (1993) 54(2) *Meanjin* 705 at 709.

*is considerable evidence to suggest that creating a consensus or collective identity is still extremely difficult because of this diversity.*¹⁹

For this reason, some commentators have cautioned against assuming that one solution will work across all communities, and have emphasised the need for solutions that recognise this diversity.²⁰ As will be shown in the following Chapters, aboriginal rights and self-government both provide avenues through which communities can advance their own agendas on cultural appropriation issues.

2.2 Internal Dissension

A related issue is internal dissension within communities on the appropriate use of communal designs. As Ellinson notes, there may be dissension between communal owners of pre-existing designs over appropriate commercial uses. The question may even arise as to whether a use was permitted in accordance with aboriginal law, or simply because the artist or communal owners were in desperate financial need.²¹

A consideration of internal self-government issues is beyond the scope of this thesis. However, it will be argued in Chapters 5 and 6 that the Canadian experience of aboriginal rights and self-government demonstrate that internal issues are not often likely to prevent aboriginal communities from forming an externally unified consensus on what

¹⁹ *The Imaginary Aboriginal*, *supra* note 1 at 133.

²⁰ See for example Ellinson, *supra* note 11 at 338-339; *The Imaginary Aboriginal*, *supra* note 1 at 131; Davies, *supra* note 5 at 19. The issue of diversity particularly affects urban aboriginal people, who may work outside "traditional" aboriginal artistic conventions. The special issues surrounding urban aboriginal artists' copyright are discussed further below.

²¹ Ellinson, *ibid.* at 338-339.

constitutes cultural appropriation.²² The special issues concerning urban aboriginal artists' rights to use traditional communal designs is considered below.

3. Problems with Aboriginal Use of Settler Courts

In order to bring cultural appropriation claims to the courts, aboriginal peoples must frame their understandings of culture within settler categories. This problem was discussed in relation to contrasting settler and aboriginal conceptions of law and culture in Chapter 2. The threat or institution of proceedings in the settler courts has been the major strategy used by Australian aboriginal peoples in combating unauthorised reproductions of their communal designs. A major component of this thesis is an evaluation of the avenue of aboriginal rights as a future direction which such proceedings might take. In order to evaluate this avenue of possible relief, this section examines inherent problems in aboriginal peoples' use of the settler courts.

3.1 Legal Process

A major criticism of settler litigation is the time and expense involved.²³ In addition, as Douglas Sanders observes in the Canadian context:

*The legalism in the assertion of claims carries with it the danger that the responses may be so technical, so legal, that their character detracts from the goals of fostering the enjoyment of cultural differences and local identity.*²⁴

²² Ellinson also raises what he terms the "non-unitary nature of Aboriginal 'property' ownership" as an issue to be worked through in any proposed reforms. By this he refers to the often complex and intersecting rights of control and ownership of traditional designs between different clans and groups in particular aboriginal communities. However, he points out that settler copyright interests are often similarly complicated and that copyright societies exist to simplify these issues: *ibid.* at 337.

²³ See L. Onus, "Copyright and Issues of Appropriation" (1990) 10: 1&2 Artlink 38 at 38.

²⁴ Sanders, *supra* note 9 at 3.

A graphic recent illustration of this problem is the Australian Prime Minister's insistence that native title is a purely legal issue.²⁵ Because of these difficulties some commentators in the Australian context have criticised the utility of using settler courts to solve communal designs disputes.²⁶

3.2 Settler Courts' Interpretive Monopoly

Use of settler courts also raises problems associated with the inherent biases of settler doctrine. These doctrines may in some cases remain ingrained with ideological representations of aboriginality of the colonial era. Issues surrounding settler representations of aboriginal cultures were foreshadowed briefly in Chapter 2. This Chapter analyses how anthropology, the dominant settler system of knowledge about aboriginal peoples, has attempted to correct its earlier biases by adopting new disciplinary tactics. This analysis will be used to demonstrate the persistent tendency for settler courts to misrepresent aboriginal cultures.

(a) A Brief History of (Post) Modern Anthropology

Post-modernist developments in anthropology have centred on methods of cross-cultural interpretation. Such methods have been at the heart of anthropology since its golden era in the early twentieth century at the time of consolidation of Western colonial expansion. However, as James Clifford wrote in his 1988 book 'The Predicament of

²⁵ M. Kingston, "Wik Not Moral Issue" *The Sydney Morning Herald* (12 December 1997) 2.

²⁶ See for example Australian Copyright Council, *Protecting Indigenous Intellectual Property* by I. McDonald (Redfern: Australian Copyright Council, 1997) at 58; Davies, *supra* note 5 at 17-18. In the Canadian context, see M. Jackson, "The Articulation of Native Rights in Canadian Law" (1984) 18 U.B.C. L. Rev. 255.

Culture",²⁷ the post-modernist era exploded the authority of anthropological interpretation of cultures. The post-modernist revision exposed anthropological claims to objectivity as subjective interpretations influenced by historical and social contingencies.²⁸ In particular, settler modes of thought about "other" cultures were heavily influenced by the relationship of power existing between coloniser and colonised. As Said argued in his 1978 book "Orientalism",²⁹ this relationship of power has influenced settler representations of aboriginal peoples in ways that implicitly legitimised the colonial project. The most obvious of these colonialist representations was the Darwinian or evolutionary model in which traditional or non-literate societies were positioned at a lesser stage of development than settler society, lacking positive "Western" attributes.³⁰ As some commentators have argued, this colonial model continues to underpin settler images of aboriginal peoples.³¹

As a result of such post-modernist critiques, the anthropologist's position as expert "interpreter" of aboriginal cultures came under fire. The privileging of settler over aboriginal forms of knowledge was attacked.³² The anthropologist's own activities in "the field" became part of the text, as "*neither the experience nor the interpretive activities of*

²⁷ J. Clifford, *The Predicament of Culture: Twentieth Century Art, Literature and Ethnography* (Cambridge: Harvard University Press: 1988).

²⁸ Clifford, *supra* note 27; A. Pearce, "Dropping Out of Sight: Social Anthropology Encounters Post-Modernism" (1990) 1 T.A.J.A. 1.

²⁹ E. Said, *Orientalism* (Cambridge: Harvard University Press, 1978).

³⁰ For a recent application of Said's "formula of Orientalism" to the production of knowledge about Australian aborigines, see M. Harris, "Scientific and Cultural Vandalism" (1996) 21 Alt. L.J. 1.

³¹ See generally Francis, *supra* note 17; M. Crosby, "Construction of the Imaginary Indian" in S. Douglas, ed., *Vancouver Anthology: The Institutional Politics of Art* (Vancouver: Talonbooks, 1991); *The Imaginary Aboriginal*, *supra* note 1; Mudrooroo, "White Forms, Aboriginal Content" in B. Ashcroft, G. Griffiths & H. Tiffin, eds., *The Post-Colonial Studies Reader* (London: Routledge, 1995) 228; T. Goldie, "The Representation of the Indigene" in Ashcroft et al, *ibid.*, 232; Nichol, *supra* note 18.

³² See for example J. Cruikshank, "Oral Traditions and Oral History: Reviewing Some Issues" (1994) LXXV Can. Hist. Rev. 3; T.M. Trinh, "Grandma's Story" in *Woman Native Other* (Bloomington: Indiana University Press, 1989) 119; Mudrooroo, *supra* note 31.

the scientific researcher can be considered innocent".³³ At the logical end of this deconstruction was a challenge to the competence of the anthropologist to represent another culture at all, as theorists asked:

*...can one ultimately escape procedures of dichotomies, restructurings, and textualizing in the making of interpretive statements about foreign cultures and traditions?*³⁴

This is Clifford's "*predicament of culture*", that is, the predicament of "*being in culture while looking at culture*".³⁵

Attempts have now been made to answer this predicament. Applied anthropology models use various techniques to make their analysis more transparent. These include the direct inclusion of multiple aboriginal "voices" in the text; the recording of personal narratives of both anthropologist and subject and collaborative authorship.³⁶ These models attempt to escape colonialist discourse by holding in view the "*specific contingencies of the exchange*".³⁷ Accordingly, says Clifford, these models have become a "toolkit" from which strategic choices about representation of the "other" can (and *must*) be made. Anthropology, like other disciplines, recognises that politics can never be removed from the representation of other cultures, but today, its theorists argue, they can be made more transparent, more reflexive and more situated in their application.

(b) Law's Interpretive Monopoly

³³Clifford, *supra* note 27 at 41.

³⁴*Ibid.* at 261.

³⁵*Ibid.* at 9.

³⁶For criticism of such postmodernist models, see Pearce, *supra* note 28.

³⁷Clifford, *supra* note 27 at 23.

As just discussed, anthropology has admitted its past complicity in the colonial project. More importantly, it has questioned and continues to question its own power to interpret through the "predicament of culture". The crisis of authority in anthropology has been echoed in other disciplines. However, Canadian commentator Mary Ellen Turpel, argues, this crisis has so far eluded law:

It is interesting to me that, in other disciplines, apart from law, cultural differences have been approached in a way which is contrary to current legal analyses. They have not been "interpreted" as gaps in one's knowledge of a discipline or discourse, waiting to be filled with conceptual bridges and extensions, but rather as irreconcilable or irreducible elements of human relations.³⁸

Turpel argues that settler courts retain the ultimate "interpretive monopoly" over aboriginal cultures, failing to recognize that "*Sensitivity to cultural difference is sensitivity to the limitation of the capacity to know*".³⁹ Turpel argues that settler courts' assertion of "cultural authority"⁴⁰ over aboriginal peoples makes them blind to the difficulties of representation addressed in other disciplines such as anthropology. Her implicit questioning of settler courts' authority over aboriginal peoples is similar to that of Davies, discussed at the beginning of this Chapter.⁴¹ Implicit in both their arguments is the point that, rather than being neutral or "objective" arbiters of disputes, settler courts operate within the "predicament of culture". Various commentators argue that ideological

³⁸M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989) Can. Human Rts. Y.B. 3 at 13.

³⁹ Turpel, *ibid.* at 25.

⁴⁰Turpel defines "cultural authority" as: "...the authority which one culture is seen to possess to create law and legal language to resolve disputes involving other cultures and the manner in which it explains (or fails to explain) and sustains its authority over different peoples."; *ibid.* at 4.

⁴¹ At its logical extreme, their arguments are a challenge to the sovereignty of settler courts. An exploration of these challenges is, as noted in the Introduction and Chapter 2, beyond the scope of this thesis.

representations of aboriginal peoples long abandoned in other disciplines continue to exist in settler legal doctrine.⁴² Aboriginal claimants must therefore consider that, when seeking relief in the settler courts, they are speaking from within a framework culturally biased towards settler interests.

A brief consideration of the term 'reconciliation' further illustrates this point. The term is of recent and fascinating currency in both Australian and Canadian legal and political language.⁴³ The term is used in these contexts to portray a relationship between culturally and politically distinct parts of society. It replaces the language of assimilation with an implicit acknowledgement of the wrongs of colonialism, setting the ground for negotiation between equal partners. However, the term clearly may be subject to manipulation. As an Australian commentator has pointed out, where the relationship of power is unequal, one side can impose its own vision of 'reconciliation' on the other.⁴⁴ A Canadian commentator notes cynically that reconciliation in this second sense means that:

... one side has all the power and the other side had better get reconciled to that.⁴⁵

⁴² See for example P. Fitzpatrick, *The Mythology of Modern Law* (London, Routledge, 1992); Kline, *supra* note 16 at 459, citing McEachern CJ's infamous comment in the *Delgamuukw* case that aboriginal claimants lacked the "badges of civilization" (Kline refers to McEachern CJ's comments as "anomalous", and there is an extensive Canadian literature criticising the decision); D. Sweeney, "Reflections from the Past: Conceptualisation of State, Citizen and Aboriginality in Australian Law" (Paper delivered at the Annual Conference of the Canadian Law and Society Association, Memorial University, Newfoundland, June 6-9, 1997) [unpublished]; Davies, *supra* note 5.

⁴³ In Australia, see generally the literature produced by the Council for Aboriginal Reconciliation. In Canada, The Royal Commission on Aboriginal Peoples in Canada recently suggested that reconciliation represented a "new relationship" between aboriginal peoples and Canada: "embracing the spirit and intent of the treaty relationship itself, a relationship of mutual trust and loyalty, as the framework for a vibrant and respectful relationship between peoples": Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services, 1996) vol. 2, pt 1, ch. 2 at 38.

⁴⁴ Nichol, *supra* note 18 at 714.

⁴⁵ J. Goddard, *Last Stand of the Lubicon Cree* (Vancouver: Douglas & McIntyre, 1991) at 34, cited in P.L.A.H. Chartrand, "Part XI: The Royal Commission on Aboriginal Peoples" in R. Goose, J.H. Youngblood et al, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference*

The difference between the two meanings can be expressed as the difference between reconciliation "with", connoting the favourable meaning, and reconciliation "to", connoting the negative meaning.⁴⁶ If someone is being reconciled "to" something there is no negotiation. In this sense "reconciliation", with its appearance of an equal negotiation relationship masking a relationship of power, becomes yet another colonial strategy employed by the state.⁴⁷ Accordingly, as one writer argues in the Australian context:

*...it is imperative that non-Aboriginal Australians resist the temptation to pre-empt aboriginal visions of how reconciliation with us might look. This would be to attempt to reconcile indigenous Australians to a non-Aboriginal picture of what reconciliation with entails.*⁴⁸

The problem is that, in approaching the settler courts with political problems aboriginal claimants are forced to accept reconciliation "to" their rights. As will be discussed in Chapter 5, in the *Vanderpeet* decision⁴⁹ the Supreme Court of Canada used the term "reconciliation" to read down the concept of aboriginal rights according to its own version of "aboriginality". It is this problem of "reconciliation to", it will be argued, which is the most serious problem for aboriginal peoples in using settler courts as a tactic to advance their cultural appropriation claims.⁵⁰

on Aboriginal Peoples and Justice (Saskatoon: Purich Publishing and the College of Law and Justice, University of Saskatchewan, 1994) 357 at 359.

⁴⁶ Nichol, *supra* note 18 at 714.

⁴⁷ Davies, *supra* note 5 at 21. For a recent example of this view by an aboriginal commentator, see I. Watson, "Reconciliation" in E. Johnston et al, *Indigenous Australians and the Law* (Sydney: Cavendish Publishing (Australia) 1997) 213.

⁴⁸ Nichol, *supra* note 18 at 714.

⁴⁹ *R v. Vanderpeet* (1996) 137 D.L.R. (4th) 289 (additional citations provided in the Introduction).

⁵⁰ This is an increasingly important issue as states such as Australia and Canada move to resolve aboriginal claims for decolonisation through the settler courts. As McLachlin J of the Supreme Court of Canada has commented extra-judicially, provisions such as section 35(1) of the Canadian Constitution

It will be argued in Chapter 6 that the recognition of self-government in Canada demonstrates a way aboriginal peoples can potentially escape the procedural difficulties and doctrinal biases of settler courts within areas over which they are able to assert jurisdiction.

4. Freezing Aboriginal Cultures

The general problem of cultural bias that may be encountered by aboriginal peoples using settler laws to resolve their cultural appropriation claims has been considered above. This section considers a particular aspect of this problem, namely that of the 'frozen' and essentialised representations of aboriginal cultures by settler society. Once again, I will discuss anthropological techniques for dealing with this problem to demonstrate the ideological nature of such representations in a legal setting.

4.1 The Issue: Commercial Adaptations

Ellinson asserts that:

*...from the traditional Aboriginal customary perspective, pre-existing designs which are reproduced and form the subject matter of traditional aboriginal art for the external market, are no less deserving of protection than pre-existing designs reproduced in ceremony.*⁵¹

As discussed in Chapter 3, many of the paintings the subject of the aboriginal copyright cases were produced entirely for outside commercial consumption. The aboriginal copyright cases are not an isolated example of this practice among aboriginal peoples.

represent an... "increasing tendency to transmute political and social questions to legal questions, thus placing the task of their reconciliation on the shoulders of the courts"... B. McLachlin, "The Role of the Court in the Post-Charter Era: Policy-Maker or Adjudicator?" (1990) 39 U.N.B.L.J.43 at 49 (emphasis added).

⁵¹Ellinson, *supra* note 11 at 331.

Aboriginal peoples have adapted cultural objects for sale since the beginnings of contact in both Canada and Australia. For example, in Australia some aboriginal communities transferred their body painting techniques to bark painting for the benefit of early collectors and missionaries.⁵² In Canada, a famous example is the Haida, who miniaturised their woodcarvings into argillite sculptures and learnt to inscribe their communal designs in scrimshaw in order to produce curios for trade with seafarers in the 19th century.⁵³ As discussed in Chapter 2, at various stages of government policy in both countries, aboriginal "arts and crafts" industries have received funding support, and today contribute strongly to the tourist industries of both countries. Aboriginal peoples have received benefits for "commodifying" their cultures. These benefits have included income,⁵⁴ education of the settler society,⁵⁵ and support for a contemporary revival of their cultures.⁵⁶ Aboriginal peoples may therefore face the argument that they cannot protest when others commercially exploit their cultures, because they themselves have already done so.⁵⁷ This argument implies that by commodifying aspects of aboriginal culture, they

⁵²Curator Margaret West, giving evidence in the Bulun Bulun case, noted that "*Bark painting tends to take its origins from body painting, and has been actively pursued in recent years arising from a growing interest in acquiring Aboriginal art among art collectors in Australia and around the world.*" (cited in C. Golvan, "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" [1989] E.I.P.R. 346 at 348)

⁵³T. Hill, "Indian Art in Canada: An Historical Perspective" in T. Hill & E. McLuhan, eds., *Norval Morrisseau and the Emergence of the Image Makers* (Ontario: Art Gallery of Ontario, Toronto).

⁵⁴ See for example Onus, *supra* note 23 at 38: "...many Aboriginal artists are anxious to increase their income and from time to time will produce an image specifically for reproductive purposes"..

⁵⁵ Elders in remote Australian aboriginal communities have often authorized the exposure of ancient Dreaming stories in paintings commissioned for museums or galleries in the hope of inspiring respect for aboriginal peoples among non-aboriginal Australians. This is a strong theme in the "copyright campaign", discussed in Chapter 3.

⁵⁶ For discussion of the cultural revival of Canadian and Australian aboriginal cultures, see Chapter 2.

⁵⁷ See for example G. Greer, "Selling Off the Dreaming" *The Sydney Morning Herald* (6 December 1997) 5s.

have assimilated them.⁵⁸ As Ellinson puts it in this context, if no limits are put on the kinds of designs which can be protected,

*...there could be a stage where the pre-existing designs being protected no longer have a distinctive traditional Aboriginal style or quality about them...*⁵⁹

There are certainly difficulties in drawing a line between settler and aboriginal art, as the discussion of urban artists below demonstrates. However, there are also dangers in attempting to define what is “authentic” about aboriginal cultures from an external perspective in order to draw such lines. These dangers are illustrated by developments in anthropological theory concerning the representation of cultures. Accordingly, the following discussion returns briefly to post-modernist anthropological theory in order to examine its rejection of its earlier search for the “pastoral”. It has now been revealed that a central component of this anthropological search was the construction of an artificial dichotomy between “traditional” and “post-contact” societies. It will be argued that the avoidance of this dichotomy is crucial in the consideration of reforms addressing protection of pre-existing aboriginal designs.

4.2 The Anthropological Experience of Representing Cultural Change

That change is inherent in social life is not news.

Edward M. Bruner, 1993.⁶⁰

⁵⁸ For a general discussion of this attitude towards aboriginal peoples, see Sweeney, *supra* note 42. For a discussion of decontextualisation of aboriginal art in settler discourse, see Chapter 2.

⁵⁹ Ellinson, *supra* note 11 at 340.

⁶⁰ E. Bruner, “Epilogue: Creative Persona and the Problem of Authenticity” in S. Lavie, K. Narayan, R. Rosaldo, eds., *Creativity/Anthropology* (Ithaca: Cornell University Press, 1993) 321.

Many anthropological writings have now been exposed as almost fictional in their efforts to ignore “contaminating” influences and reconstruct a static, pure tradition of the pristine past:

*Questionable acts of purification are involved in any attainment of a promised land, return to 'original' sources, or gathering up of a true tradition. Such claims to authenticity are in any event always subverted by the need to stage authenticity in opposition to external, often dominating alternatives.*⁶¹

These writers used a traditional/post-contact dichotomy in their interpretation of aboriginal cultures. In this dichotomy an opposition is set up between “traditional” and “Westernized” culture. On one side of this dichotomy is “traditional” societies, frozen since “time immemorial”, functioning according to perfectly symmetrical structures. On the other are post-contact societies, which are “contaminated” by settler influence. In this dichotomy post-contact societies were deemed to be rapidly and often fatally altered by the impact of sudden change, their previously functional structures breaking down. The anthropological search for the pastoral ignored post-contact societies in favour of a search for traditional “purity”. Obviously, this dichotomy was ideologically loaded. If “traditional” societies were scheduled for eventual destruction by the impact of “civilisation” in the colonial era, then it was imperative for scientists to “salvage” what remained. These “pure products”⁶² were construed as containing the real “essence” of aboriginal societies, and therefore of scientific and exotic interest to settlers. Meanwhile, the post-contact aboriginal society, being doomed by Western contamination, could be left

⁶¹Clifford, *supra* note 27 at 11-12.

⁶²Clifford, *ibid.* at 213.

to die out, or assimilated. In discourse about aboriginal peoples, this is what Kline terms, in the north american context, the 'ideology of static Indianness'.⁶³ Within this ideology aboriginal peoples:

*...are relegated to a timeless past without a dynamic, to a 'stage' of progression from which they are at best remotely redeemable and only if they are brought into History by the active principle embodied in the European.*⁶⁴

The apparent privileging of aboriginal traditions in this dichotomy is deceptive. This romanticism legitimised the colonial project. The process of colonisation, while viewed as "contaminating", is never problematised on its own terms, but viewed as inevitable and natural. In the end, it is the coloniser's culture that is privileged, because it is viewed as naturally superior, and that of the colonised that is devalued, because it is viewed as vanishing. The adaptations of post-contact aboriginal societies to settler influences are not viewed as creative or regenerative, but as corrupted. This ideology therefore:

*...occludes recognition by the settler society of the significance to the First Nations people of contemporary incarnations of traditional ways.*⁶⁵

Because of its ideological overtones, Clifford says, the settler search for cultural "authenticity" in aboriginal societies should now be viewed with suspicion.

Since the 1960s various theories, such as the 'interpretive' theory of Clifford Geertz, have deconstructed the idea that culture is played out according to fixed, ancient "rules" and suggested that cultural meaning is constantly reconstituted. Indeed, even the tendency to view cultural change in terms of "*special features of the context, such as*

⁶³Kline, *supra* note 16 at 455.

⁶⁴Kline, *ibid.* at 457, citing Fitzpatrick, *supra* note 42 at 110.

⁶⁵Kline, *ibid.* at 464.

historical forces, unsettled times, or even the proverbial raiders of the north"⁶⁶ is now viewed as problematic. Anthropology now rejects a theory of cultures as 'normally' dormant:

*It is as if the initial condition of man, or to borrow a term from computer terminology, the default setting, is one of no change, and every instance of change or innovation is an aberration from that comfortable initial state.*⁶⁷

To reject a view of culture as 'normally' dormant is not to deny that in some periods change is more rapid than in others. However, the point is that cultures, whether aboriginal or settler, never freeze. To search for 'real' aboriginal traditions in some pristine period of 'time immemorial' is to invent the past, or, as one writer terms it, to encounter the 'problem of authenticity'.⁶⁸ As a result of these post-colonialist critiques, anthropology has abandoned its attempts to reconstruct what was 'distinctive' about aboriginal culture in pre-contact times. Such attempts, it has been argued, tend to 'freeze' aboriginal cultures in fixed 'traditions'. This freezing advances colonialist ideology by denying aboriginal peoples a contemporary political identity.

Accordingly, anthropology's interpretation of aboriginal cultures now tends to focus on cultural interchange and creativity in the post-contact era rather than the discovery of pre-contact 'authenticity'.

4.2 The Legal Experience of Representing Cultural Change

How do these theoretical concerns translate into a legal setting? As noted above, in the aboriginal copyright cases most of the paintings had been produced for public

⁶⁶ Bruner, *supra* note 60 at 323.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

display or commercial sale to outsiders, and two cases feature "urban" aboriginal artists using aboriginal imagery but working outside any traditional community. This suggests that the boundaries between aboriginal communities and cultures and the settler society are not entirely clear, and that the construction of aboriginal "traditions" as fixed and unchanging is inadequate. When legal reforms are considered, therefore, it is clear that the issue is not merely to preserve aboriginal cultures in their ancient form, separate and "ghettoised". Rather, the issue in the debate is how the settler legal system may facilitate aboriginal peoples to adapt their cultures to changing conditions while maintaining their cultural integrity.⁶⁹ However, this is not easy. Commentators have argued that creating legal rights to preserve cultural difference is ...*"similar to building a house on a fault line: the base beneath the superstructure is constantly shifting"*⁷⁰ and that cultural difference is *"continually cutting across and frustrating efforts at legal definition"*.⁷¹ Accordingly, any attempt to impose certainty on culture for the purposes of determining a legal test will artificially freeze it. Because of this, Ellinson and others warn against imposing blanket legislation to preserve rights in pre-existing designs if such legislation does not accommodate changes in aboriginal laws.⁷² It is argued that the developments on aboriginal rights in Canada provide an interesting commentary on these issues. As will be argued in relation to the *Vanderpeet* test in the next Chapter, the use of a "frozen rights" analysis of aboriginal cultures by settlers tends to construct aboriginality as fixed and

⁶⁹For a general discussion of this issue see Pask, *supra* note 6.

⁷⁰J.D. Sacks, "Culture, Cash or Calories: Interpreting Alaska Native Subsistence Rights" (1995) 12 Alaska L. Rev. 247, referring to the theories of anthropologist Clifford Geertz, at 255.

⁷¹P. Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1992) 30 Alta. L. Rev. 164 at 178-179.

⁷²See for example Ellinson, *supra* note 11 at 339; Davies, *supra* note 5 at 17.

unchanging, thus limiting the potential for aboriginal peoples to obtain recognition of commercial aspects of their aboriginal rights.

4.3 Authenticity and the Dilemma of Difference

As noted above, "aboriginality", (or in the north american context, "Indianness") is historically a settler construct. In the post-colonial era, it is now:

a colonial field of power relations within which Aboriginal peoples struggle with the settler culture over the representation of things such as 'identity', 'history', 'land' and 'culture'.⁷³

A problem inherent in the representation of aboriginal cultures is essentialism, or attempts to define what is "authentic" about them. However, like aboriginality,

... 'authenticity' has as much to do with an inventive present as with a past, its objectification, preservation, or revival.⁷⁴

What happens when aboriginal peoples play into essentialist constructions of themselves?

As observed by Sanders:

In a modern state, cultural identities may fade, or they may be reinvented, adapted, even turned into a bourgeois resource...⁷⁵

In using cultural difference as a "tactic" aboriginal peoples seek space for the exercise of their cultural rights within liberal democratic principles.⁷⁶ However, as Wright observes,

⁷³Nichol, *supra* note 18 at 709. For further discussion of the political dimensions of "aboriginality" in Australia, see *The Imaginary Aboriginal*, *supra* note 1, Harris, *supra* note 30; W. Shapiro, "Introduction: Reconsidering Aboriginality" (1991) 2:2 T.A.J.A. (Sp. Iss.) 157; J. Archer, "Ambiguity in Political Ideology: Aboriginality as Nationalism" (1991) 2:2 T.A.J.A. (Sp. Iss.) 161; F. Lewins, "Theoretical and Political Implications of the Dynamic Approach to Aboriginality" (1991) 2:2 T.A.J.A. (Sp. Iss.) 171; C.L. Briggs, "The Politics of Discursive Authority in Research on the 'Invention of Tradition'" (1996) 11:4 Cultural Anthropology 435-469, discussing Hobsbaum and Ranger, *The Invention of Tradition* (New York: Cambridge University Press, 1983).

⁷⁴Clifford, *supra* note 27 at 222.

⁷⁵D. Sanders, *The Nisga'a Agreement* (Paper presented to the American Anthropological Association Conference, San Francisco, November 21, 1996) [unpublished] at 2.

such tactics presents aboriginal peoples with a "terrible dilemma", namely that of playing into settler constructions of the "imaginary aboriginal" in order to establish the necessary prestige to negotiate with the settler society.⁷⁷ This is once again the "dilemma of difference" discussed in Chapter 2.

This dilemma is illustrated in the context of the aboriginal art industry in Australia. "Authenticity" is often used as a selling point for aboriginal art in order to distinguish it from cheap "rip-offs".⁷⁸ Its value is shown in its command of higher prices in the tourist market.⁷⁹ However, recently the concept of "authenticity" has produced a controversial backlash. It began with a series of revelations that certain non-aboriginal people had used aboriginal alter-egos in painting and writing. The painter "Eddie Burrup" was revealed as Elizabeth Durack, a non-aboriginal woman from one of Australia's wealthiest pastoralist families, and "Wanda Koolmatrie", winner of an aboriginal writing award, was revealed as non-aboriginal taxi driver Leon Carmen.⁸⁰ Many aboriginal commentators denounced these people as "hoaxes" who pillaged aboriginal culture. However, soon the debate began

⁷⁶ See F. Lewins, *supra* note 73 at 173, arguing that Aborigines, like other ethnic minorities, manipulate "public ethnicity" for their own political ends".

⁷⁷ Wright, *supra* note 1 at 150.

⁷⁸ See for example a brochure now available in Australia Post Shops headed "Authentic Aboriginal Products". Featuring a picture of an aboriginal person in traditional feathers blowing into a didgeridoo, it contains a number of essentialised statements about aboriginal peoples. For example, "*Aborigines do not possess a written language, they are however a very visually communicating people*".

⁷⁹ See V. Johnson & Third Year Sociology Students, *The Copyright Issue* (Sydney: Macquarie University, 1992) for a discussion of this issue and of differing aboriginal and settler concepts of "authenticity".

⁸⁰ See D. Jopson, "Writing Wrongs" *The Sydney Morning Herald* (15 March 1997) 38; J. Freeman & D. Graham, "Nom de Brush Got Quite Out of Hand" *The Sydney Morning Herald* (8 March 1997) 5.

to turn inward. Some aboriginal people have accused others of mixed or urban ancestry, such as Sally Morgan, of not being really "aboriginal".⁸¹

Most recently, a controversy has erupted over allegations concerning a prominent aboriginal artist, Kathleen Petyarre, who won the \$18,000 1996 Telstra National Aboriginal and Torres Strait Islander Award for "*Storm in Atnangkere Country*". Her now estranged, non-aboriginal husband Ray Beamish alleges that he developed her distinctive "womens' sacred dreaming" style and was the main painter of the award-winning painting.⁸² Apart from Petyarre's entitlement to the prize, a number of broader questions are raised by this controversy. First, there is the continually thorny question of how aboriginal art is to be evaluated in settler aesthetic discourse. Is it the "objective" quality of the work, or its "authenticity" as the work of an aboriginal artist, which makes it valuable? Commentator Germaine Greer takes the latter view on the Petyarre debate:

*There would have been no shock-horror if the spurious ethnographic element, itself the egregious expression of paternalistic assumptions about Aborigines, had not been part of the grounds for the estimation of Petyarre's work.*⁸³

Second, there is the question of whether the settler concept of authorship is really applicable to aboriginal works. How are collaborative aboriginal practices which may

⁸¹ See for example, R. Guilliatt, "Black, White and Grey All Over" *The Sydney Morning Herald* (11 April 1997) 13; P.P. McGuiness, "Aborigines are the Losers in Hoaxes" *The Sydney Morning Herald* (15 March 1997) 40.

⁸² See S. McCulloch, "Revealed: Black Art Scandal" *The Weekend Australian* (15-16 November 1997) 1. Ms Petyarre has issued a denial through her lawyers.

⁸³ Greer, *supra* note 57 at 5s. The last part of this comment is perhaps unfair, as the scandal involves a real question of authorship of the work and the eligibility rules of the competition in which the award was given. Greer's article is an otherwise quite savage attack on the aboriginal arts industry alleging that the art boom is "bust" and that aboriginal art is now "eartless" because of its over-commercialisation. Her criticisms have been answered strongly by industry participants such as artist Queenie McKenzie, Ms Jodie Chester of Boomali Artists Co-operative and artist Greg Weatherby: see D. Jopson, "Black Artists Bristle at Greer Attack" *The Australian* (6 December 1997) 11.

involve the supervision of work by elders to be judged? Finally, who is to evaluate the genuineness of Dreamings? At the end of the day, Petyarre is forced to defend her work by reference to settler conceptions of authenticity.⁸⁴ On a wider scale, the Petyarre controversy exposes the entire aboriginal art industry to criticism for being too "commercial".⁸⁵ Even the use of canvasses and acrylics is again under question.⁸⁶ This is exactly what Stephen Gray discussed in his article "Squatting in Red Dust",⁸⁷ where he argued that settler representations of aboriginal artists tend to reify the "traditional" image of an artist "squatting in red dust" to do sand paintings, divorced from contemporary commercial realities.

The controversies just described demonstrate the dangers of using imposed tests of "authenticity" to judge what is worthy of protection in aboriginal culture. It is suggested that solutions that allow aboriginal peoples to control their own cultural representations without the need to play into settler constructions of authenticity are preferable. An example of aboriginal peoples' autonomous definitions of "authenticity" is to be found in survey results carried out as part of the development of N.I.A.A.A.'s label of authenticity.⁸⁸ These results indicate that many aboriginal people regard "authenticity" in cultural production as having to do with concepts such as knowledge of culture, belonging to country, respect and responsibility than with what is supposedly "traditional".⁸⁹ It is

⁸⁴ Cf Davies, *supra* note 5 at 22-23, arguing that settler laws define aboriginality by "an imposed standard of authenticity".

⁸⁵ Greer, *supra* note 57 at 5s.

⁸⁶ *Ibid.*

⁸⁷ S. Gray, "Squatting In Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist" (1996) 14 Law in Context 29.

⁸⁸ K. Wells, "Law Reform: The Development of an Authenticity Trade Mark for Indigenous Artists" (1996) 21 Alt. L.J. 19.

⁸⁹ See Annas, *supra* note 3 at 5.

suggested that the Canadian experience of self-government, discussed in Chapter 6, demonstrates ways in which these autonomous definitions of cultural integrity may be employed in legal structures advancing aboriginal cultural self-determination.

4.4 Urban Aboriginal Artists

There is a strong, almost racist perception that being Aboriginal and being urban are mutually exclusive.

Native Council of Canada, 1992.⁹⁰

As the work of urban artists Sally Morgan and Bronwyn Bancroft demonstrates, the spectrum of aboriginal art, and its contemporary marketability, is not limited to productions by remote communities. Urban aboriginal may even one day supersede “authentic” aboriginal art in popularity. As Gray argues,

*Urban aboriginal art is perceived by some members of the non-Aboriginal art world as even more ‘cutting edge’ than even traditional Aboriginal art. This is the product of a number of factors, including...an increasing distrust of, and a moving away from, the paternalistic and post-colonial elevation of the ‘authentic’ traditional aboriginal artist.*⁹¹

Aboriginal artist Lin Onus observes that urban aboriginal artists often invent their own styles and are aware of avoiding the use of designs that belong to communities. However, he acknowledges, this awareness may be the privilege of a “private few” who can afford to travel between bush and city and educate themselves:

If someone can’t make that journey, you’ve spawned another ‘stateless’ person....it can be stifling for younger artists who are very good. They want to

⁹⁰ Native Council of Canada, *Decision 1992: Background and Discussion Points for the First Peoples Forums* (Ottawa: Supply and Services, 1992).

⁹¹ S. Gray, “Black Enough? Urban and Non-Traditional Art and Proposed Legislative Protection for Aboriginal Art” (1996) 7 *Culture and Policy* 29 at 33.

*experiment, but are inhibited by the fact that they might unconsciously impinge on somebody's special thing, either another artist's work or a body of work. What is to be learnt is what's appropriate and what's not. Because people don't know they can't tell any limits. This applies to emerging artists 'down south', that is, anywhere from Rockhampton to Adelaide.*⁹²

How does urban aboriginal art fit into the aboriginal copyright debate? According to commentators such as Gray and Ellinson, the issue for reform proposals is whether urban aboriginal artists should have a different or higher claim to the use of pre-existing designs of other aboriginal communities than the settler society as a whole.⁹³ On one hand, it can be argued that the laws of a particular aboriginal community restricting right to designs should be upheld, to the exclusion of all others. On the other hand, excluding urban aboriginal people from this imagery may hinder the revival of cultural identity among urban communities.⁹⁴ In addition, Gray queries whether aboriginal law is now "*equipped to deal with disputes at opposite ends of the continent.*"⁹⁵ This question will be considered more closely in Chapter 5.

Implicit in Gray's analysis is the assumption that non-traditional aboriginal people may not *necessarily* be adequately protected by settler laws, or by the traditional focus of new directions in the aboriginal copyright cases such as *Milpururru* and *R&T Textiles*. Accordingly, his analysis problematises a simplistic division between "traditional" aboriginal peoples, with communal interests in designs, and "assimilated" urban aboriginal people. The balancing of urban artists' needs to access aboriginal imagery with the

⁹² Lin Onus, cited in A. Ward, "Blind Justice or Blinkered Vision?" (1993) *Meanjin* 52(4) 719 at 722-723.

⁹³ Ellinson, *supra* note 11 at 341; Gray, *supra* note 91 at 32.

⁹⁴ Gray, *ibid.* at 35.

⁹⁵ *Ibid.* at 36.

recognition of exclusive rights of ownership in traditional aboriginal communities is a difficult issue that, again, must perhaps be resolved within the larger aboriginal community itself.⁹⁶ This issue, like the others canvassed in this Chapter will be considered further in light of the Canadian experience in Chapters 5 and 6.

⁹⁶ Gray, *supra* note 91 at 32.

Chapter 5

Looking For Solutions in Canada **The Potential of Aboriginal Rights**

The Indians would like to retain their culture on Meares Island as well as in urban museums.

Seaton JA, British Columbia Court of Appeal, granting an interim injunction to prevent logging on Meares Island, British Columbia.¹

1. Introduction

This Chapter analyses how aboriginal rights claims could be used to resolve disputes over the unauthorised reproduction of communal aboriginal designs. After briefly outlining the development of aboriginal rights jurisprudence in both countries, the Chapter compares the Australian “native title” test in *Mabo v. Queensland [No. 2]*,² with the test for recognising aboriginal rights to cultural practices under section 35(1) of the Canadian Constitution 1982³ in *R v. Sparrow*⁴ and subsequently in *R v. Vanderpeet*.⁵ The Chapter then considers how both tests might apply to communal designs disputes. Finally, the Chapter examines three existing proceedings to explore possible directions for resolving such disputes. The first of these are the Australian proceedings, *Bulun Bulun v. R&T*

¹ Seaton JA, *MacMillan Bloedel Limited v. Mullin* [1985] 3 W.W.R. 577 (B.C.C.A.) (hereinafter the *Meares Island case*) at 588.

² *Mabo v. Queensland [No 2]* (1992) 175 C.L.R. 1; 63 A.L.J.R 84; 107 A.L.R. 1 (High Ct. of Australia) (hereinafter *Mabo* cited to C.L.R.)

³ *Constitution Act, 1982, being Schedule B to the Canada Act 1982* (U.K.) 1982, c.11.

⁴ [1990] 1 S.C.R. 1075; [1990] 4 W.W.R 410; 56 C.C.C. (3d) 263; 70 D.L.R. (4th) 385; 46 B.C.L.R. (2d) 1; (S.C.C.) (hereinafter *Sparrow* cited to W.W.R.).

⁵ [1996] 2 S.C.R. 507; [1996] 9 W.W.R. 1 (1996) 109 C.C.C. (3d) 1; 137 D.L.R. (4th) 289; 23 B.C.L.R. (3d) 1 (S.C.C.) (hereinafter *Vanderpeet* cited to W.W.R.).

Textiles,⁶ mentioned in Chapter 3. The other proceedings are British Columbia proceedings concerning a culturally significant ceremonial mask and a culturally significant name.

2. Overview

2.1 The Concept of Aboriginal Rights

Aboriginal rights are, as one Canadian commentator has noted, a form of “intersocietal law”,⁷ bridging the gap between settler and aboriginal laws. In Australia, aboriginal rights are generally referred to as “native title”.⁸ In this Chapter, the term “aboriginal rights” will be used generically to refer to Australian and Canadian settler courts’ recognition of “sui generis” interests, such as interests in land and natural resources, adhering to the benefit of particular aboriginal communities under the common law.⁹

There are broad parallels between the development of aboriginal rights in Australia and Canada. Until relatively recently, aboriginal laws, and rights flowing from those laws,

⁶*Bulun Bulun v. R&T Textiles*, No. DG3 of 1996 (Fed. Ct. of Australia, Darwin Registry) (hereinafter *R&T Textiles*).

⁷ B. Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar. Rev. 727 at 745. See also C. Bell, “Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate” (1992) 17 Amer. Ind. L. Rev. 457 at 502, referring to a “*blending of traditions*”.

⁸ This phrase is attributed to the majority judges in *Mabo*, *supra* note 2. However, as Barbara Hocking notes, the majority in fact used three different phrases: “native title” (Brennan J); “common law native title” (Deane and Gaudron JJ) and “traditional title” (Toohey J). In addition Dawson J, dissenting, referred to “traditional native title”: B. Hocking, “Aboriginal Law Does Now Run in Australia” in Law Book Company, *Essays On the Mabo Decision*, (Sydney: Law Book Company, 1993) 67 at 67, note 6.

⁹ In Australia, Priestley JA described native title as “*Aboriginal land rights and claims of right based on Aboriginal custom and tradition*”: see *Mason v. Tritton* (1994) 34 N.S.W.L.R. 572 (N.S.W. C.A.) (hereinafter *Tritton*) at 597, Gleeson CJ agreeing.

were generally¹⁰ assumed to be of no effect under settler law in both countries. There were two bases for this assumption. The first was that aboriginal laws had been extinguished by the assertion of British sovereignty. The second was the primitivist view, most famously espoused in the Privy Council decision in *In Re Southern Rhodesia*,¹¹ that there existed an “unbridgeable gulf”¹² between the concepts of property ownership recognised under common law and those recognised in the social systems of particularly “brutish” and “anarchic” aboriginal societies.¹³ However, in both countries this assumption has now

¹⁰ In both countries there was some recognition of aboriginal ownership of land and of aboriginal laws in the political and judicial spheres from an early date. In Australia, see H. Reynolds, “The *Mabo* Judgment in the Light of Imperial Land Policy” (1993) 16 U.N.S.W.L.J. 27; For an overview of modern legislative and political recognition of aboriginal rights, see in Australia, G. Neate, “Looking After Country: Legal Recognition of Traditional Rights to and Responsibilities for Land” (1993) 16 U.N.S.W.L.J. 161; D. Sweeney, “Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia” (1993) 16 N.S.W.L.J. 97 (hereinafter Sweeney, *Fishing Rights*); cf R. Bartlett, “*Mabo*: Another Triumph for the Common Law” in Law Book Company, *Essays on the Mabo Decision*, *supra* note 8, 58 at 64-65, arguing that native title had long been part of the common law of Australia as a result of Privy Council decisions such as *St Catherine’s Milling & Lumber Co v. The Queen* (1888) 14 A.C. 46. In Canada, see D. Sanders, “Pre-Existing Rights: The Aboriginal Peoples of Canada” in G.A. Beaudoin & E.P. Mendes, eds., *Charte Canadienne Des Droites et Libertés*, 3rd ed., (Montreal: Wilson & Lafleur Itée, 1996), 991 (hereinafter “Sanders, *Pre-Existing Rights*”).

¹¹ *In Re Southern Rhodesia* [1919] A.C. 211.

¹² Lord Sumner, speaking for the Privy Council, *supra* note 11 at 233-234.

¹³ The “unbridgeable gulf” thesis is based on a Hobbesian view of aboriginal societies. As discussed below, it held currency in Australian settler courts until 1971, when it was rejected by Blackburn J in *Milirrpum v. Nabalco* (1971) 17 F.L.R. 141; [1972-73] A.L.R. 65 (N.T. S.C.) (hereinafter *Milirrpum* cited to F.L.R.) Similarly, in Canada, at the time of the Supreme Court’s decision in *Calder v. British Columbia* [1973] S.C.R. 313, the federal government had assumed that aboriginal rights were too “vague” to be enforceable by settler laws: see Sanders, *Pre-Existing Rights*, *supra* note 10 at 998-999; 1008-1010. It appears some judges and political commentators still espouse Hobbesian conceptions: see for example, in Australia, M. Dodson, “Opinion: From ‘Lore’ to ‘Law’: Indigenous Rights and Australian Legal Systems” (1995) 20:1 Alt. L.J. 2. In Canada, the decision of McEachern CJ in *Delgamuukw* (1991) 79 D.L.R. 4th 185 (B.C.S.C.), is notorious as the “low water mark” of Hobbesian analysis. Cf Dickson C.J. in *Simon v. R.* [1985] 2 S.C.R. 387 at 390, criticising the remarks of Patterson J in *R. v. Syliboy* (1929) 1 D.L.R. 307 pertaining to aboriginal people as “uncivilized people or savages”: “Such language is no longer acceptable in Canadian law” (cited in D. Sweeney, “Reflections from the Past: Conceptualisation of State, Citizen and Aboriginality in Australian Law (Paper delivered at the Annual Conference of the Canadian Law and Society Association, Memorial University, Newfoundland, June 6-9, 1997) [unpublished] (hereinafter Sweeney, *Reconceptualisations*) at 29).

been overturned.¹⁴ Settler courts in Australia and Canada recognise aboriginal rights as “sui generis” interests¹⁵ under the common law on the basis of aboriginal peoples’ prior occupation. These findings have “made room” for recognising the distinct status and existing rights of aboriginal peoples, and at various stages pushed the process of decolonisation. However, in neither country have the settler courts challenged the fundamental tenet of Crown sovereignty through which colonialism, and their own authority, was legitimised. In order to “reconcile” prior aboriginal occupation of territories with Crown sovereignty, settler courts in both countries have used the concept of “extinguishment”. This concept holds that, while aboriginal rights can now be recognised under settler law, such rights nevertheless can (and always could) be taken away by the Crown.¹⁶ There is no requirement that the Crown obtain the consent of aboriginal peoples in order to extinguish their rights. Rather, it must merely evince its “*clear and plain intention*” to do so. In this way, the courts of both countries have legitimised the vast majority of existing Crown grants of aboriginal land and resources since settlement, leaving room for aboriginal negotiation with the Crown over those interests which might remain “unextinguished”. In Canada, the Supreme Court has attempted to impose duties

¹⁴ A “hangover” from the “unbridgeable gulf” view in Canadian law is the remaining technical requirement that aboriginal claimants *prove* that they live in “organised societies” as a precondition to recognition of aboriginal rights. Commentators Catherine Bell and Michael Asch argue for the rejection of this requirement on the basis that that anthropological theory has rejected the “evolutionary” theory and that there is no known society which was not “organised” enough not to recognise rights in land: C. Bell & M. Asch, “Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation” in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 38 at 56-73.

¹⁵ On the recognition of “sui generis” interests as aboriginal rights, see generally Sweeney, *Fishing and Hunting Rights*, *supra* note 10 at 112-114; M. Asch, *Home and Native Land*, (Toronto: Methuen, 1984), Chapter 4.

¹⁶ In Canada, since the introduction of section 35(1) into the Constitution, aboriginal rights can no longer be extinguished. However, as discussed below, they can still be regulated or infringed in accordance with a justificatory test.

of good faith and “justification” on the Crown’s decisions to extinguish aboriginal rights, through the finding of a general “fiduciary duty” owed by the Crown to aboriginal peoples.¹⁷ In Australia the possibility of a fiduciary duty owed “in abstracto” to aboriginal peoples remains unconfirmed.¹⁸

There are some broad differences between the Australian and Canadian framework of aboriginal rights. The first is the constitutional arrangements affecting aboriginal peoples. In both countries responsibility for aboriginal peoples is largely federal.¹⁹ However, only Canada has constitutional protection of aboriginal rights, under section 35(1) of the Constitution Act, 1982.²⁰ This section, which came into force on 17 April 1982, provides that:

*The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*²¹

In addition, Canada has the Charter of Rights and Freedoms,²² which came into force on the same day as section 35(1). The Charter gives constitutional protection against

¹⁷ See *R v. Guerin* [1984] 2 S.C.R. 335; 13 D.L.R. (4th); (S.C.C.) *Sparrow*, *supra* note 4.

¹⁸ *Thorpe v. Commonwealth (No 3)* (1997) 144 A.L.R. 677 (hereinafter *Thorpe*) per Kirby J at 688. As Kirby J observes, only Toohey J in *Mabo* has expressly supported it to date. For general comparative analyses of fiduciary duties towards aboriginal peoples, see C. Hughes, “The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada” (1993) 16 U.N.S.W.L.J. 70; F. Brennan, “*Mabo* and the Racial Discrimination Act: The Limits of Native Title and Fiduciary Duty Under Australia’s Sovereign Parliaments” in Law Book Company, *Essays on the Mabo Decision*, *supra* note 8, 86.

¹⁹ In Australia the federal government did not obtain power to legislate over aborigines until the passage of the *Constitutional Alteration (Aboriginals) Bill* 1967 by referendum on 27 May 1967. However, in the interim its assumption of jurisdiction over the Northern Territory in 1911 gave it substantial power in this region: see P. Hanks, “A National Aboriginal Policy?” (1993) 16 N.S.W.L.J. 45 at 46-47. In Canada section 91(xxiv) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3 provides for federal jurisdiction over “Indians, and lands reserved for the Indians”.

²⁰ *Supra* note 3. Section 35(1) is found in Part II, headed “Rights of the Aboriginal Peoples of Canada”.

²¹ For a discussion of the history of the section, see Sanders, *Pre-Existing Rights*, *supra* note 10; and Chapter 6.

governmental action to a range of individual rights and freedoms²³ "*subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*"²⁴ Significantly, section 25 provides that Charter rights and freedoms shall not derogate from the "*aboriginal, treaty or other rights of the aboriginal peoples.*"²⁵

The second significant difference in the development of aboriginal rights in Australian and Canadian settler courts is emphasis on land. In Australia the leading and foundational case, *Mabo*, is a "native title"²⁶ case, coming after a long campaign focused on land rights. Because of *Mabo*'s potentially enormous ramifications for land tenure in Australia, it is land which remains the current focus of legal and political debate. Accordingly, native title remains at this stage the primary vehicle for the interpretation of aboriginal rights. In Canada however, many leading cases deal with hunting and fishing

²² *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.*

²³ The rights and freedoms of individuals protected under the Charter include freedom of conscience and religion (section 2(a)); freedom of thought, belief, opinion and expression (section 2(b)); freedom of peaceful assembly (section 2(c)) and of association (section 2(d)); the right to life, liberty and security of the person (section 7); the right not to be arbitrarily detained or imprisoned (section 9); the right not to be subjected to cruel and unusual punishment (section 12); the right to the "equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" (section 15(1)).

²⁴ *Supra*, note 22, section 1.

²⁵ There is a growing literature on the effect of section 25 on aboriginal rights. See for example, B. Schwarz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Canada: The Institute for Research on Public Policy, 1986), chapter XXV; M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989) *Can. Human Rts. Y.B.* 3; J. Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics" (1994) 43 *U.N.B.L.J.* 19.

²⁶ In *Mabo*, Toohey J (*supra* note 2 at 178) commented that the concept of aboriginal land "title" is "artificial and capable of misleading" given its associations with common law conceptions of property which may not equate with aboriginal systems of land regulation. However, as noted above, *supra* note 8, it has been adopted in *Mabo* and subsequent cases to refer to the general concept of aboriginal rights pertaining to land in Australia.

rights,²⁷ and the Supreme Court has recently affirmed that aboriginal rights need not be an incident of title to land.²⁸ The current focus in Canadian settler courts is on the “distinctive cultures” of aboriginal peoples, and the integrality of specific practices, traditions and customs to those cultures.²⁹ It is those practices, traditions and customs which are the focus of protection as aboriginal rights.

3. The Australian Test

3.1 Background

In Australia, with one unimportant exception,³⁰ there were no treaties to acknowledge the pre-existing territorial rights of the aboriginal occupants on the establishment of the colonies. Prior to *Mabo* sovereignty over Australian territories was said to have been acquired on the basis of an extended version of the “terra nullius” doctrine of settlement. This extended doctrine held, on the basis of the “unbridgeable gulf” thesis, there were no pre-existing “settled inhabitants” or “settled law” in Australia when

²⁷See for example *R. v. White and Bob* (1965) 50 D.L.R. (2d) 613 (B.C.C.A., affirmed on appeal to the Supreme Court, (1965) 52 D.L.R. (2d) 481); *Hamlet of Baker Lake v. Minister for Indian Affairs and Northern Development* [1979] 1 F.C. 487; *R v. Taylor* (1982) 62 C.C.C. (2d) 227 (Ont. C.A.); *Simon v. R.* [1985] 2 S.C.R. 387; *R. v. Horseman* (1990) 1 S.C.R. 901; *Sparrow*, *supra* note 4; *Vanderpeet*, *supra* note 5. For an analysis of earlier cases, see Sanders, *Pre-existing Rights*, *supra* note 10 at 993-999.

²⁸*R v Adams* [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657 (hereinafter *Adams* cited to D.L.R.). For discussion of this case, see below, text accompanying notes 103-105.

²⁹*Vanderpeet*, *supra* note 5. Cf *Delgamuukw v. British Columbia* [1997] S.C.J. No. 108 (QL), the Supreme Court decision handed down on 11 December 1997. The decision is received too late for integration into this thesis. However, a summary obtained from Law/Net (internet:<http://www.qlsys.ca/lnet108.html>) indicates that the Supreme Court has substituted a test of continuous occupation since sovereignty in place of the *Vanderpeet* test in claims for aboriginal title. The *Vanderpeet* test may now be limited to rights in cultural practices.

³⁰There was apparently one private treaty between a private individual and aborigines near Melbourne. However, it was never recognised by the Crown: Sweeney, *Reconceptualisations*, *supra* note 13 at 2, citing H. Reynolds, *Fate of a Free People* (Melbourne, Penguin Books, 1995).

the British Crown asserted sovereignty in 1788.³¹ Accordingly, it was held, Australian territories were free for settlement as “desert uninhabited”.³² Settler courts held that the British acquisition of sovereignty included absolute beneficial ownership of all lands within the claimed territories,³³ and that the common law applied as if the laws³⁴ of the aboriginal occupants did not exist.³⁵ However, in 1992 these principles were finally overturned by a six-one majority³⁶ of the High Court in *Mabo*.³⁷ *Mabo* created for the first time in Australia a framework for the recognition of native title under the common law.³⁸ That

³¹ An explanation of the application of this extended “terra nullius” doctrine is found in the judgment of Brennan J, *supra* note 2 at 33-40.

³² See cases cited by Brennan J, *ibid.* at 36.

³³ See for example *Cooper v Stuart* (1889) 14 App. Cas at 291 per Lord Watson, discussed by Brennan J, *ibid.* at 38.

³⁴ In *Mabo*, the majority used the phrases “law and custom” (Brennan J) “system of rules” (Toohey J) and “the local native system” (per Brennan J, Toohey J, and Deane J and Gaudron J respectively). The interchangeability of these phrases is confirmed by Priestley JA in *Tritton*, *supra* note 10 at 598. In *Mabo* Brennan J at 18 asserted that “*Meriam society was regulated more by custom than by law*”. However, it is clear that he did not intend to imply that “customs” were too vague to ground native title interests. The phrase “aboriginal laws” is preferred in this thesis for its neutrality.

³⁵ See *Attorney-General (N.S.W.) v Brown* (1847) 1 Legge 312 at 316 per Stephen CJ; *Randwick Corporation v Rutledge* (1959) 102 C.L.R. 54 at 71 per Windeyer J; *New South Wales v. The Commonwealth* [1975] 135 C.L.R. 337 (the “*Seas and Submerged Lands Case*”) at 438-439 per Stephen J; discussed by Deane and Gaudron JJ, *ibid.* at 90-103.

³⁶ Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; Dawson J dissenting. The majority judgments are Brennan J (with whom Mason CJ and McHugh J agreed in a short judgment); Deane and Gaudron JJ; and Toohey J. As stated by Mason CJ and McHugh J (who on this point were authorised to speak on behalf of the entire Court), the main difference between the majority judgments is in the issue of compensation for extinguishment: see below, note 54 and accompanying text.

³⁷ *Supra* note 2. There is an extensive literature on the implications of *Mabo* for Australian law, largely focused on its effect on land titles. See for example, Law Book Company, *Essays on the Mabo Decision*, *supra* note 10; *Indigenous Peoples: Issues for the Nineties*: (1993) 16:1 N.S.W.L.J.; R.H. Bartlett, *Mabo Decision, With Commentary* (Sydney: Butterworths, 1993); P. Butt & R.D. Eagleson, *Mabo: What the High Court Said* (Sydney: Federation Press, 1993); S. Ratnapala & M. Stephenson, eds., *Mabo: A Judicial Revolution* (St Lucia, Queensland: University of Queensland Press, 1993).

³⁸ An earlier attempt to set up this framework was made in *Milirrpum v Nabalco*, *supra* note 13 with the argument for a doctrine of “communal native title” before Blackburn J of the Northern Territory Supreme Court. However, given the novelty of the argument and its lack of any precedent in Australian law, Blackburn J found himself unable to make such a juridical leap. However, on the evidence of the claimant’s “system of laws” before him, he did reject the “unbridgeable gulf” thesis (*ibid.* at 267).

framework has since been overlaid at the federal level with the *Native Title Act*, which sets up standards for dealing with native title rights and claims.³⁹

3.2 The Mabo decision

At issue in *Mabo* was the native title of the Meriam people. The Meriam people live in the Torres Strait off the coast of the state of Queensland on three islands which are together known as the Murray Islands. These islands were not claimed as part of Australian territories until their proclaimed annexation by the state of Queensland in 1879. In these proceedings the Meriam people asked for, among other things, a declaration that their title to the islands continued and had not been extinguished by the acquisition of sovereignty.

In the course of determining this claim, the Court was asked to consider general principles of land ownership of Australian territories under British Crown sovereignty,

³⁹*Native Title Act 1993* (Cth). The objects of the *Native Title Act* are set out in section 3. They are (a) "to provide for the recognition and protection of native title"; (b) "to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings"; (c) "to establish a mechanism for determining claims to native title; and (d) "to provide for, or permit, the validation of past acts invalidated because of the existence of native title". The general scheme of the Act has been analysed in *Re Waanyi (No 1)* (1994) 129 A.L.R. 100 (N.N.T.T.) per French J at 102-106; *North Ganalanju Aboriginal Corporation v. Queensland* (1995) 132 A.L.R. 565 (Fed. Ct. of Australia) per Lockhart J at 597-9; and *Western Australia v. Commonwealth* (1995) 183 C.L.R. 373 (High Ct. of Australia) at 453-9. Its features include provision that future extinguishment of native title can only occur in accordance with the Act, which includes a right of negotiation (see in particular section 26). However, "extinguishment" itself is not defined, leaving this to further common law elaboration such as occurred in *The Wik Peoples v. Queensland* (1996) 141 A.L.R. 129, discussed below. For further commentary on the Act and on state and territory legislation passed in response to the Act to attempt to validate past grants, see Butterworths, *Native Title* (looseleaf service) (Sydney: Butterworths, 1994); M. Stephenson, *Mabo: The Native Title Legislation* (St Lucia: University of Queensland Press, 1995); J.R. Forbes, *Issues in Australia In Native Title* (Sydney: Law Book Company, 1995); National Native Title Tribunal, *National Native Title Tribunal: A Guide* (Canberra: National Native Title Tribunal, 1994); Department of Prime Minister and Cabinet, *Native Title Act 1993: What Does It Mean and How Does it Work* (Canberra: Department of Prime Minister and Cabinet, 1994); P. Butt & R.D. Eagleson, *Mabo: What the High Court Said and What the Government Did* (Sydney: Federation Press, 1996), 2nd ed.; Aboriginal and Torres Strait Islander Commission, *A.T.S.I.C. Information Kit on Native Title* (Canberra: Office of Public Affairs, 1994); R. Bartlett, "The National Native Title Tribunal in Australia" [1996] 2 C.N.L.R. 1.

including the validity of the extended doctrine of terra nullius and the consequent theory of universal Crown ownership said to flow from it. The Court responded by drawing a distinction between the question of the legitimacy of the acquisition of sovereignty over Australian territories, and the question of the consequences of such acquisition under municipal law. The first question was, according to the Court, not justiciable in a municipal court.⁴⁰ However, the Court held, the second question was a legitimate function of its powers. The main issue, therefore, was whether the fundamental doctrines of municipal law held to apply in earlier cases should be overturned.

Using what some members of the Court acknowledged to be “emotive” arguments concerning Australia’s colonial history,⁴¹ the majority rejected the extended doctrine of terra nullius on the basis of its inappropriately primitivist “unbridgeable gulf” thesis.⁴² Favouring the “doctrine of continuity” theory espoused in later British cases such as *Amoju Tijani v. Secretary, Southern Nigeria*,⁴³ the majority held that the mere annexation and consequent assertion of sovereignty over the Murray Islands did not of itself procure to the Crown absolute beneficial title. Rather, the Crown acquired “radical” title subject to

⁴⁰This affirmed the Court’s previous stance in cases such as *Coe v. Commonwealth* (1979) 53 A.L.J.R. 403 at 408. This aspect of *Mabo* has subsequently been confirmed: see e.g. *Coe v. Commonwealth of Australia* (1993) 68 AL.J.R. 110 (High Ct. of Australia); *Walker v. New South Wales* (1994) 126 A.L.R. 321 (High Ct. of Australia) and, most recently, in *Thorpe v. Commonwealth (No 3)* (1997) 144 A.L.R. 677 (High Ct. of Australia), where Kirby J remarked (*ibid.* at 683) that “By seeking to invoke the jurisdiction of this court [the claimant] can only expect it to apply the law which governs it. For relief of a different kind, based on other law, he must go elsewhere.”.

⁴¹ See the judgment of Deane and Gaudron JJ, *supra* note 2, especially at 104-109.

⁴²The origin of this thesis is, as noted above, attributed to Lord Sumner in *In Re Southern Rhodesia*, *supra* note 12.

⁴³ [1921] 2 A.C. 399 (P.C).

the “burden” of the continuing rights of aboriginal peoples.⁴⁴ These continuing rights were known as “native title.”

The main elements of the *Mabo* test may be summarised as follows:⁴⁵

1. A native title interest must have existed immediately before the common law became the law of the colony in question.
2. The native interest “*must be a recognisable part of a system of rules*”⁴⁶ *observed by an identifiable group of people connected with a particular locality*”.⁴⁷
3. The claimant must show that his or her “biological descent” from the relevant group is traceable back to “just before the establishment of the common law”, and according to Brennan J,⁴⁸ that there is also “*mutual recognition of a particular person’s membership by that person and by the elders or other persons enjoying traditional authority among those people*”.⁴⁹

⁴⁴ *Supra* note 2 per Brennan J at 48-51; per Deane, Gaudron JJ at 81; per Toohey J at 183. As Brennan J notes, the distaste of at least one member of the Court for the “absolute beneficial ownership” theory was foreshadowed in 1985: see Deane J, *Gerhardy v. Brown* (1985) 159 C.L.R. 70 at 149, cited by Brennan J, *ibid.* at 42-43.

⁴⁵ Points 1-4 of this summary are based in part on the summary made by Priestley JA in *Tritton*, *supra* note 10 at 598, where he includes references to individual judgments in *Mabo* as authority for his propositions.

⁴⁶ As noted above, *supra* note 10, it may be assumed that the phrase “system of rules” is interchangeable with other phrases used in *Mabo* such as “law and custom”.

⁴⁷ Priestley JA, *supra* note 10 at 598, citing Brennan J, *supra* note 2 at 58, 70; Deane J and Gaudron J, *ibid.* at 86, 88, 108; Toohey J, *ibid.* at 186-187, 188.

⁴⁸ Priestley JA, *supra* note 10 at 598, citing Brennan J, *supra* note 2 at 70, only refers to the biological descent requirement, and argues that this requirement is “implicit” in the other majority judgments. He does not appear to regard the “mutual recognition” requirements as part of the test to establish native title. The requirement of biological descent has not generally been regarded as a huge evidentiary problem, and may in future be adduced largely by presumption after threshold evidentiary standards are met: see the approach taken by Kirby P in *Tritton*, *supra* note 10.

⁴⁹ *Mabo*, *supra* note 2 per Brennan J at 70.

4. The claimant must show that the descendants of the group have continued and are continuing to observe the system of rules at the time the claim is asserted.⁵⁰
5. Native title will be recognised as a communal title adhering in the group, even in the case of claimants whose system of land ownership is relatively individualistic.⁵¹
6. Native title is a "personal right" which can (in accordance with the Crown's status as sovereign) only be alienated to the Crown or in accordance with the laws of the relevant aboriginal group.⁵²

The ruling in *Mabo* means that the common law of Australia now recognises aboriginal legal systems as subordinate co-existing systems which may be enforced according to common law principles without challenging the sovereignty of the Crown. The decision achieves this by recognising aboriginal rights in land but reaffirming the Crown's power to extinguish native title without aboriginal consent. The majority held that native title could be extinguished by a Crown grant or other dealing that evinces a "*clear and plain intention*"⁵³ to deal inconsistently with the continued enjoyment of native title or its incidents. The majority differed on the issue of compensation for extinguishment. It

⁵⁰ Priestley JA, *supra* note 10 at 598. As discussed below, some statements by the majority ameliorate the strict requirement of continuity.

⁵¹ This parallels the approach taken by the Supreme Court of Canada in *Calder*, *supra* note 13, where the details of the aboriginal land holding system at issue were ignored.

⁵² Deane and Gaudron JJ, *supra* note 2 at 88; See also Brennan J, *ibid.* at 60, who seems to have taken the concept further: "*It follows that a right or interest possessed as a native title cannot be acquired from an indigenous person by one who, not being a member of the indigenous people, does not acknowledge their laws.*"

⁵³ Brennan J, *supra* note 2 at 60; Deane and Gaudron JJ, *ibid.* at 90; Toohey J, *ibid.* at 183. On the facts of *Mabo* itself, the majority held that the granting of leases for a sardine factory over two of the islands, the granting of a lease for the London Missionary Society over part of the third island, and the appropriation of lands for administrative buildings on the remainder of the third island had extinguished native title on those areas.

appears that only Deane and Gaudron JJ and Toohey J accepted a right to compensation for extinguishment in certain circumstances.⁵⁴

The particular types of Crown dealings that were “intended” to extinguish native title awaits, in the case of laws passed before *Mabo*, further judicial interpretation. There is also likely to be a long period of exploration of the incidents of native title. Finally, the question remains as to whether aboriginal laws not directly related to native title will be recognised. The few cases dealing with this issue are discussed further in Part 5.

4. The Canadian Test

4.1 Background

Canadian history evinces a quite different treatment of aboriginal peoples by the Crown in the early stages of settlement. After the initial assumption of sovereignty,⁵⁵ the Crown entered into local treaties in parts of Canada with various aboriginal peoples in order to facilitate peaceful relations and the settlement of lands. Broadly speaking, the fundamental premise of most of these treaties (according to their literal English translations) was the surrender of aboriginal title in exchange for Crown protection.⁵⁶

⁵⁴ As pointed out by Mason CJ and McHugh J, this left them in a minority on this point. Deane and Gaudron JJ suggest that “wrongful extinguishment” (ie extinguishment without clear and unambiguous words) may give rise to a right to compensation if pursued within limitation periods (*supra* note 2 at 111-112). Toohey J suggested that if no compensation is to be given, that must be clearly expressed. However, he seemed to contemplate the existence of a fiduciary relationship in some circumstances (*ibid.* at 203) which could impact on compensation issues.

⁵⁵ In contrast to Australian doctrine, the basis of the acquisition of sovereignty in Canada has never been clearly articulated.

⁵⁶ This protection usually entailed the continued right to maintain traditional lifestyles and the provision of some limited financial support and services. Subsequently there has been heated debate over whether the aboriginal parties would have understood the treaties to have surrendered their lands. See Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Supply and Services, 1996), vol. cite.

However, on the British side it was soon assumed that, although the aboriginal peoples had lost their lands, the treaties gave them no legal rights. It was not until the aboriginal political renaissance in the 1970s that the courts began to revitalise treaty rights.⁵⁷ Arguably, the developing jurisprudence surrounding treaty rights contributed to the emphasis on hunting and fishing rights, paving the way for *Vanderpeet*'s focus on cultural practices.

Another feature of Canadian aboriginal rights jurisprudence has been debate over the status of the Royal Proclamation of 1763 as a possible basis for positivist recognition of aboriginal rights. In the famous decision of *Calder v. British Columbia*⁵⁸ in 1973 the Crown argued that in areas not covered by the Proclamation, (which it argued included the largely unceded territory of British Columbia), no aboriginal rights survived. Until *Calder* the Canadian government assumed that aboriginal rights to such territories⁵⁹ had been extinguished by the introduction of the common law, or on the "unbridgeable gulf" thesis, that any surviving rights were too vague and general to be of legal consequence.⁶⁰ It was not until *Calder* that the possibility of surviving land title was unearthed, and not until 1990 that aboriginal rights were revitalised with the historic *Sparrow* decision on the interpretation of section 35(1) of the Constitution.

⁵⁷ See Sanders, *Pre-existing Rights*, *supra* note 10 at 1004-1008.

⁵⁸ *Supra* note 13. In this case, the Supreme Court split evenly on the question of whether aboriginal title to the territories of the Nisga'a of British Columbia had survived. One judge, Pidgeon J, decided solely on a procedural point: see Sanders, *Pre-Existing Rights*, *supra* note 10 at 1000.

⁵⁹ In addition to British Columbia, these areas included the Yukon, the Maritimes and parts of southern and northern Quebec.

⁶⁰ As noted in *Sparrow*, *supra* note 4 at 431, this view of aboriginal rights as unenforceable under settler law prevailed in 1969 in the Statement of the Government of Canada on Indian Policy (the "White Paper"). For a discussion of the political reaction to this paper and its part as a catalyst to the eventual assertion of section 35(1) into the Canadian Constitution, see Chapter 6.

4.2 The Sparrow Decision

In *Sparrow* the Supreme Court of Canada for the first time considered the meaning and effect of section 35(1) of the Constitution. The case concerned the Musqueam's right to fish for salmon in its traditional territories on the Fraser River in British Columbia, one of the largest and most economically significant salmon fisheries in the world. The dispute, according to the Supreme Court judgment,⁶¹ arose out of government net length limitations. As has been characteristic in the Canadian context, the case was a prosecution. The question was whether the net length restrictions were invalid for violating the Musqueam's aboriginal right to fish.

(a) General Interpretive Framework

In deciding this question the Court set out principles for the interpretation of constitutionally protected aboriginal and treaty rights under section 35(1). Key to these principles was the construction of section 35(1) as a "remedial" provision. The Court based this construction on the observation that section 35(1) was the culmination of a "long struggle" by aboriginal peoples in the political arena. The Court held that section 35(1) was to be interpreted generously, as representing a "just settlement" for the aboriginal peoples.⁶²

The elements of *Sparrow*'s framework for analysing section 35(1) are as follows:⁶³

1. Was the claimant acting pursuant to an aboriginal right?

⁶¹ Sanders (personal communication, April 1997) notes some "laundering" of the facts at the Supreme Court level: the trial judgment makes it clear that the case involved illegal selling of fish under a "sting" operation.

⁶² *Supra* note 4 at 433.

⁶³ These points paraphrase the summary by Lamer CJ in *Vanderpeet*, *supra* note 5 at 10-11.

2. If yes, has the right been extinguished?
3. If not, has the right has been infringed?
4. If yes, is the infringement justified?

The most radical aspect of the judgment is its interpretation of the word “existing” in section 35(1). The Court held that this word should not be interpreted to mean “existing as regulated in 1982” when the rights became constitutionally protected.⁶⁴ Rather, it said “existing” simply meant “unextinguished”.⁶⁵ The scope of the right, the Court held, could not be determined simply by reference to what had historically been permitted under the regulations. The Court did not elaborate on how aboriginal rights were to be defined, a point discussed further below. However, the Court did emphasise that courts should not attempt to apply common law concepts to the definition of aboriginal rights, and further emphasised that it was “crucial” to be sensitive to the “aboriginal perspective”.

Turning to the issue of extinguishment, the Court drew a distinction between mere “regulation” and extinguishment. Intention to extinguish must be “clear and plain”, the Court held, if aboriginal rights were to be held to have been extinguished prior to 1982 when they became constitutionally protected. In this case, the Court held that decades of heavy regulation under British Columbia fishing laws had not extinguished the Musqueam’s aboriginal fishing rights. After 1982, the Court held, aboriginal rights cannot be extinguished, as they are constitutionally protected under section 35(1). They can be

⁶⁴ This would, held the Court, lead to the incorporation of a “crazy patchwork of regulation” into the Constitution: *supra* note 4 at 421.

⁶⁵ *Supra* note 4 at 422.

regulated or infringed, but the Crown's power to do so is subject to its fiduciary duty towards aboriginal peoples.⁶⁶

If the right is not extinguished, the question becomes whether the right is infringed by regulations or other government action. The aboriginal claimant bears the burden of proving *prima facie* infringement. Infringement may be established by evidence that the regulation was "unreasonable"; that it imposed "undue hardship" or that it denied the preferred means of exercising the right. Once a *prima facie* infringement is made out, the Crown must justify the infringement, by showing a "valid legislative objective". In this case the Court held that conservation of the salmon stock was a valid legislative objective. If a valid legislative objective is shown, the Crown must then show that it has upheld its "honour" as a fiduciary in its dealings with the claimants. In determining this, the Court held, it would consider factors such as whether aboriginal peoples affected by the legislation had been consulted; whether compensation had been given in the case of an expropriation, and whether top priority had been given to the right after the objective, in this case conservation, had been met.⁶⁷

With these principles the Court heralded a new and vibrant era of aboriginal rights. Aboriginal rights were not extinguished by the assertion of sovereignty or even necessarily by heavy regulation under settler laws. However, the first question, which concerned how aboriginal rights protected under section 35(1) were to be *defined*, was left vague. As noted above, the Court had confirmed that aboriginal rights must be defined independently of reference to regulations and with reference to the "aboriginal perspective". However,

⁶⁶*Supra* note 4 at 434, citing *R v. Guerin*, *supra* note 17 and *R. v. Taylor*, *supra* note 27.

⁶⁷*Supra* note 4 at 436.

beyond this the judgment was unclear. In particular, the Court's approach, perhaps deliberately, left little guidance as to how far aboriginal practices could "adapt" from their pre-contact state before they would lose their protection as aboriginal rights in a modern context. The Musqueam argued that their right to fish should be defined as an absolute right to fish for any purpose, whether commercial or otherwise. Perhaps reflecting the political context of the case,⁶⁸ the Court avoided dealing with this "aboriginal perspective," holding that it was not necessary to fully define the right for the purposes of the case. Instead, it simply referred to the non-controversial "traditional" aspects of the Musqueam's right, namely the right to fish for "food and social and ceremonial purposes". The Court referred to anthropological evidence that these aspects had always been "integral to the distinctive culture"⁶⁹ of the Musqueam, words that would assume an unexpected importance in the *Vanderpeet* decision. Without further comment the Court sent the matter back for trial according to this new test.

(b) The Frozen Rights Issue

The Court refrained from determining whether the Musqueam's right included "modern" commercial aspects. However, the Court gave a hint as to the possible future determination of this issue with its statement that aboriginal rights must be interpreted "flexibly, to permit their evolution over time"⁷⁰ to avoid a "frozen rights" interpretation.

⁶⁸ The British Columbia salmon industry is extremely highly regulated and the subject of numerous competing commercial interests.

⁶⁹ "The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on social and ceremonial occasions. The Musqueam have always fished for reasons connected to their physical and cultural survival..." *supra* note 4 at 427-428.

⁷⁰ *Supra* note 4 at 423.

There are two propositions implicit in this statement. The first, which might conveniently be referred to as the "adaptation of methods" proposition, had been accepted in previous cases concerning treaty rights:⁷¹ aboriginal peoples are not limited in the exercise of their hunting and fishing rights to the use of "traditional" implements such as wooden spears, but may use modern methods such as steel fishing poles, guns and snowmobiles.⁷² The second proposition might be referred to as the "commercial adaptation" proposition: aboriginal rights, while based in pre-contact practices, may "adapt" to include commercial purposes such as the sale of fish for commerce. These propositions are escaping the "ideology of static Indianness" since abandoned in anthropological theory.⁷³ However such propositions, in particular the second, were controversial in a legal setting. Without the text of a treaty, it meant that there were potentially no limits, other than conservation, to the extent of section 35(1) rights that aboriginal peoples could assert in traditional resources.⁷⁴ This aspect of the judgment therefore had serious implications for competing interests in the contemporary fishing industry. Perhaps unsurprisingly, it was subsequently "read down" in *Vanderpeet*.

4.3 The *Vanderpeet* Trilogy

Vanderpeet was the leading case in a trilogy of aboriginal fishing cases released on 22 August 1996. The Crown prosecuted Dorothy Vanderpeet for selling 10 salmon,

⁷¹ See the cases cited *supra* note 27, most of which involved the use of guns or other "non-traditional" methods of hunting and fishing.

⁷² Cf Sweeney, *Fishing Rights*, *supra* note 10 at 115-116.

⁷³ See M. Kline, "The Colour of Law: Ideological Representations of First Nations in Legal Discourse" (1994) 3 *Social and Legal Studies* 451 at 455. For further discussion of developments in anthropological theory, see Chapter 4.

⁷⁴ In theory of course there could be internal limits set by aboriginal laws: Sweeney, *Fishing Rights*, *supra* note 10 at 113-114. Cf *Sparrow*, *supra* note 4, where as noted above the Musqueam asserted that their traditions gave them complete discretion over use of the fishery.

caught by her husband under his aboriginal food fishing license, to her neighbour. The Fisheries Act prohibited selling or bartering salmon caught under a food fishing licence. In her defence, Mrs Vanderpeet argued that, by virtue of her membership in the Sto:lo Nation, she had a constitutionally protected aboriginal right to sell and trade salmon in order to support a "moderate livelihood". This was a much more modest claim than the absolutist stance taken by the Musqueam in *Sparrow*, and was clearly less threatening to commercial fishing interests. Had the majority found an aboriginal right to sell salmon to support a "moderate livelihood", it would have reflected the Sto:lo's "aboriginal perspective" on the right. Instead, the majority,⁷⁵ led by Lamer CJ, added a gloss to the *Sparrow* framework which considerably reduced its "remedial" effects.

(a) A Gloss on *Sparrow*: The Test for Defining Aboriginal Rights

Lamer CJ observed that *Sparrow* had not set out the test for the *definition* of a constitutionally protected aboriginal right. Accordingly, he set out to do this, stating that a necessary step in doing so was to define the purposes of s. 35(1).⁷⁶ After a review of case law in Australia, Canada and the United States, Lamer CJ held that the basis of the recognition of aboriginal rights in these countries was prior aboriginal occupation. Section 35(1) was, he said, inserted in order to recognise this fact of prior occupation, but also to "reconcile" it with Crown sovereignty.⁷⁷

*The court must define aboriginal rights in a way which captures both the aboriginal and the rights in s. 35(1).*⁷⁸

⁷⁵ Lamer CJ, La Forest, Sopinka, Gonthier, Cory, Iacobucci, and Major JJ; L-Heureux-Dubé and Wilson JJ dissenting.

⁷⁶ *Vanderpeet*, *supra* note 5 at 17.

⁷⁷ *Ibid.* at 26.

⁷⁸ *Ibid.* at 17.

The recognition of prior occupation of aboriginal peoples required, according to Lamer CJ, an historical investigation centring on protection of the “crucial elements” of aboriginal peoples’ “pre-existing distinctive societies” prior to settlement.⁷⁹ It was the “distinctive” practices, customs or traditions which “made the aboriginal society what it was” prior to settlement, which should now be protected. Such distinctive elements of the society would not just be activities common to all societies, such as eating, or activities which were merely incidental to the society.⁸⁰ Referring to *Sparrow*’s requirement that the “aboriginal perspective” must be taken into account in defining the right, Lamer CJ introduced a gloss: because of the newly discovered aim of “reconciliation” in section 35(1), the aboriginal perspective must be framed “*in terms cognizable to the Canadian legal and constitutional structure*”.⁸¹ This meant, a perspective “*cognizable to the common law*”. The “common law” perspective, he held, must also be taken into account to recognise the “*intersocietal*” nature of aboriginal rights: “*True reconciliation will equally, place weight on each.*”⁸² This was achieved, he said, in the “integral to a distinctive culture” test, relying heavily on the literal words in part of the *Sparrow* judgment.⁸³

The “integral to a distinctive culture” test requires that an aboriginal group show that the particular practice or custom in issue was an “integral part of the distinctive

⁷⁹*Ibid.* at 27.

⁸⁰*Ibid.* at 31-33.

⁸¹*Ibid.* at 28.

⁸²*Ibid.* at 29.

⁸³*Sparrow*, *supra* note 4 at 427-428, cited above, note 69.

culture” of that group before contact with settlers. According to Lamer CJ, section 35(1) protects specific customs, practices or traditions which have continuity with customs, practices or traditions that are “integral to the distinctive culture” of the aboriginal society claiming the right. Customs, practices and traditions were defined by their “purposes”. Only those purposes that were “integral” (as opposed to incidental) to the particular aboriginal culture before contact could be protected. Those purposes which had *become* integral as a result of contact could not be protected. The “cut-off” date therefore was contact, not sovereignty.⁸⁴ However, Lamer CJ held, referring to *Sparrow*’s “frozen rights” principle, in showing continuity with past practices, a flexible approach could be taken. An aboriginal right would not be lost if the particular custom, practice or tradition had been interrupted for some time since contact. Lamer CJ also referred to *Sparrow*’s mandate to give a generous and liberal interpretation to aboriginal rights. Applying this to the evidentiary principles, Lamer CJ held a liberal construction should be given to the claimant’s evidence in order to ameliorate the heavy burden of proof associated with proving pre-contact practices.

Mrs Vanderpeet argued before the Supreme Court that the restrictive interpretation given by the majority in the British Columbia Court of Appeal below had converted her “right” into a “relic”. The Court of Appeal had upheld the trial judges’ findings that the trading of salmon was not sufficiently “integral” to Sto:lo society before contact to constitute an aboriginal right. This was because salmon trading was carried out on a “casual” or “opportunistic” basis, and not on a scale best characterised as

⁸⁴ Cf *Delgamuukw*, *supra* note 29. As noted earlier, this case was received too late for incorporation into this thesis.

“commercial”. Lamer CJ held that the trial judge erred in requiring the claimant to prove that “commercial” trading occurred in pre-contact times. This was, he said, to impose a Western requirement. However, he agreed with the trial judge’s conclusion. Applying the “integral to a distinctive culture” test Lamer CJ held that the Sto:lo’s salmon fishing for the purposes of trade (as opposed to fishing for food and social and ceremonial purposes), was not “integral” to their distinctive culture before contact, and therefore could not be protected as an aboriginal right. Mrs Vanderpeet’s sale was not protected as an aboriginal right, because such practices were not, according to the majority in *Vanderpeet*, “integral” to pre-contact Sto:lo culture. Mrs Vanderpeet’s conviction was therefore upheld.

(b) Comments

The *Vanderpeet* test uses the concept of aboriginality as a limit or modifier on the concept of aboriginal rights. It does so by determining what *was* integral to aboriginal cultures *before* contact, thus reaffirming settler society’s “*fixation....with capitalism...as the turning point between non-civilization and civilization*”.⁸⁵ As one of the minority judges argued, the majority test in *Vanderpeet* defines aboriginal rights as what is left when settler influence is taken away, forcing the claimant to engage in a search for a “pristine” and unchanging pre-contact society.⁸⁶ This is reminiscent of the anthropological search for the “pastoral” discussed in Chapter 4.⁸⁷

⁸⁵T. Isaac, “The Power of Constitutional Language: The Case Against Using ‘Aboriginal Peoples’ as a referent for First Nations” (1993) 19 Queens L.J. 415 at 436.

⁸⁶L-Heureux-Dubé J, *supra* note 4 at 46.

⁸⁷ For further comment critical of the decision, see J. Borrows, “The Trickster: Integral to a Distinctive Culture” (1997) 8:2 Constitutional Forum 27.

The ideological purpose behind the test is clear on the face of the judgment. That is, it allowed the majority to find a way to limit the "commercial adaptation" proposition in *Sparrow*, by restricting it to a connection with pre-contact "purposes". The *Vanderpeet* test therefore allows settler courts to determine limitations on aboriginal rights which are, as the minority judges remarked, more political than legal. By narrowing the analysis to specific practices and their "purposes" and then requiring the claimant to prove continuity with specific pre-contact activities, the majority test places a very high wall around the adaptation of those practices and their purposes in a commercial setting.

A similarly restricted analysis was applied in the second case in the trilogy, *R v. NTC Smokehouse*,⁸⁸ where a commercial right to sell salmon was also denied. However, as if to refute this argument, the Court on the same day handed down *R v Gladstone*.⁸⁹ In this case, the majority found that the Heiltsuk Nation of the Bella Bella region in north-western British Columbia had a constitutionally protected aboriginal right to sell herring roe on kelp to commercial buyers. In finding that the Heiltsuk had in pre-contact times traded herring roe "*on a scale best characterised as commercial*" the majority relied on anthropological evidence that, in pre-contact times, the Heiltsuk had traditionally harvested large amounts of herring roe on kelp for trading with other aboriginal peoples up and down the coast. The majority held that the trading had been sufficiently "integral to

⁸⁸ [1996] 9 W.W.R. 114. In this case the majority held that the Seschaht and Opetchesaht peoples' aboriginal right to fish for salmon did not extend to allow them to sell salmon to a "smokehouse" for commercial purposes. The majority rejected the argument that extensive exchange of salmon at potlatch ceremonies in pre-contact times could give rise to a right to sell salmon in modern times. However, the majority held, although potlatches themselves well might be "integral to the distinctive culture" of the claimants, the exchange of salmon on such occasions was merely incidental to potlatches. (*ibid.* at 127). In addition, as Sanders notes, potlatches were intra-tribal, and therefore may not be equivalent to trading with outsiders in a modern context: (personal communication, 17 July 1997).

⁸⁹ [1996] 9 W.W.R. 149.

the distinctive culture” of the Heiltsuk, and independent of settler influence, for it to qualify as an aboriginal right.⁹⁰

It is argued that, despite *Gladstone*, the *Vanderpeet* test places a very difficult task on aboriginal claimants who wish to assert that their aboriginal rights extend to commercial activities. At the least, the discrepancy in the results in *Vanderpeet* and *Gladstone* are difficult to explain and will make future results very difficult to predict.

5. Applying *Mabo* and *Vanderpeet* to Cultural Heritage Cases

How would the *Mabo* and *Vanderpeet* tests compare if applied to rights in intangible aboriginal cultural heritage, or in particular, to a case of infringement of communal aboriginal designs? So far, there are no decided cases in either jurisdiction. However, of the two, Canada provides the more fruitful source of analogies. One line of British Columbian cases, including the *Meares Island* case quoted from at the beginning of this Chapter, concerns the protection of culturally significant sites.⁹¹ Another, more recent decision upholds an aboriginal right to enter Crown land for the purpose of teaching cultural traditions to younger generations.⁹² Other cases have concerned rights to religious

⁹⁰ *Gladstone* is also interesting for its application of *Sparrow*'s justificatory scheme for limitation of aboriginal rights. Unlike a food fishing right, the Heiltsuk's "commercial" right had no natural internal limit. Accordingly, modification of the *Sparrow* test according constitutional priority to aboriginal rights was necessary. In redefining the test of justification for these circumstances, the Court espoused a number of vague principles aimed at achieving "something less than exclusivity but which nonetheless gives priority to the aboriginal right" (*ibid.* at 181).

⁹¹ *Meares Island* case, *supra* note 1; *Tlowitsis Mumtagila Band v. Macmillan Bloedel Industries Ltd* [1991] 4 W.W.R. 83 (B.C.C.A.); *Halfway Nation v. British Columbia (Ministry of Forests)* (June 24 1997, Vancouver Registry No A963993, (B.C.S.C.).

⁹² *R v. Côté* [1996] 138 D.L.R. (4th) 385 (S.C.C.).

practices which contravened settler laws.⁹³ The only case concerning more “intangible” rights in aboriginal cultural heritage is *Mohawk Band of Kahnawake v. Glenbow-Alberta Institute*⁹⁴ in which the Mohawk Band challenged the Glenbow Museum’s right to display Mohawk “False Face” masks associated with secret society ceremonies.⁹⁵ However, this case predates both *Sparrow* and *Vanderpeet* and was only brought to the stage of an interim interlocutory injunction application. There are currently two proceedings on foot in the British Columbia Supreme Court which deal with intangible rights in cultural heritage. There is also *R&T Textiles*, now in the close of submissions, which will seek to argue that communal aboriginal designs are an incident of native title. I will analyse these three sets of proceedings in Part 6. However, in this Part I will generally compare the *Mabo* and *Vanderpeet* tests is undertaken in order to hypothesise how they might apply to a communal aboriginal designs case argued on the basis of an aboriginal right independent of land.

5.1 Summary: Major Points of Difference Between *Mabo* and *Vanderpeet*

The major points of difference between *Mabo* and *Vanderpeet* are:

1. *Mabo* recognises native title and its incidents. *Vanderpeet* recognises as an aboriginal right any practice, custom or tradition which was “integral to the distinctive culture” of a particular aboriginal society before contact.

⁹³ See eg *R. v. Jack and Charlie* [1985] 2 S.C.R. 332 (S.C.C.); *Thomas v. Norris* [1992] 67 C.N.L.R. 139.

⁹⁴ [1988] 3 C.N.L.R. 70 (Alta. Ct. Q.B.)

⁹⁵ The case, which concerned the controversial “Spirit Sings” exhibition, was part of the widespread political protest about “institutionalised appropriation” of aboriginal cultural objects by museums discussed in Chapter 2.

2. *Mabo* protects native title and its incidents by reference to contemporary aboriginal laws and customs “based in traditions”. *Vanderpeet* bases its recognition of aboriginal rights on contemporary practices, customs and traditions which have continuity with pre-contact customs, practices and traditions. While laws and customs are relevant, the *Vanderpeet* also requires that they be “integral”.
3. *Mabo* uses the establishment of sovereignty as its touchstone. The relevant laws and customs must therefore date back to the time “just before the establishment of the common law.” *Vanderpeet* uses the influence of settlers on aboriginal cultures as its touchstone. The relevant practice, custom or tradition must therefore extend back to the time of contact.

If the Canadian experience of aboriginal rights is to be used as a guide to developments in aboriginal rights jurisprudence in Australia, these differences must be taken into account. Arguably, two questions arise here. The first is whether the *Mabo* test can or should extend beyond native title to encompass other aboriginal rights. Assuming it will, the second is whether the “integral to a distinctive culture” test should be adopted to make this extension. These questions are considered below.

(a) Does *Mabo* extend beyond native title?

As discussed above, *Mabo* grants recognition of native title on the basis of aboriginal laws. Aboriginal commentator Michael Dodson argues that a distinction between recognition of aboriginal laws as grounding native title, and aboriginal laws grounding other aboriginal rights, is “absurd”.⁹⁶ Another commentator asserts that “of

⁹⁶Dodson, *supra* note 13 at 2.

course” aboriginal rights under Australian law include rights beyond land.⁹⁷ However, the courts have not yet responded to these assertions. In *Tritton*, Kirby P found it unnecessary to consider whether fishing rights could exist independently of native title unnecessary to consider. Other cases refute the claim that particular aboriginal laws survived the introduction of the criminal law. These cases are discussed below under the heading “extinguishment”. For the purposes of hypothesising how *Mabo* and *Vanderpeet* would apply to a communal aboriginal designs case in the remaining parts of this Chapter, it will be assumed that this threshold question may be overcome, either on the basis that *Mabo* will extend beyond land, or by arguing that communal aboriginal designs are in fact an incident of native title (see the *R&T Textiles* proceedings discussed below).

(b) What are the Consequences of Extending *Mabo* Past Native Title?

If *Mabo* is assumed to extend beyond native title, what are the consequences? The issues raised in Chapter 4 should be taken into account. However, there are a number of more specific issues which arise in this context, some of which overlap with the broader issues discussed in Chapter 4. The following analysis will consider these more specific issues, as follows:

1. Territoriality: How can the settler legal system take account of the various regions and complex customary associations of aboriginal laws?⁹⁸ (This issue might be considered to be a sub-set of the issue of diversity considered in Chapter 4.)

⁹⁷ M. Mansell, “Native Title - A New Legal Shield” (1995) 20:1 Alt. L.J 32 at 34.

⁹⁸ R. McLaughlin, “Some Problems and Issues in the Recognition of Indigenous Customary Law” (1996) 82:3 A.L.B. 3 at 7.

2. Repugnancy: What if the aboriginal law provides “repugnant” sanctions, such as spearing, or offends human rights principles Australia is bound to afford all its citizens under its international obligations?⁹⁹
3. Which aboriginal laws have been extinguished?¹⁰⁰ (This issue might be considered as one of the the problems raised in relation to the use of settler courts).
4. How can “traditional” aboriginal laws be recognised in a dynamic rather than frozen form? ¹⁰¹(This is the same issue raised in Chapter 4 in relation to “freezing of cultures” and “authenticity”).
5. What will be the position of displaced or urban aboriginal persons?¹⁰²

(c) Should the “Integral To a Distinctive Culture” Test Be Adopted in Australia in Order to Extend *Mabo* Past Native Title?

A preliminary question is whether, if *Mabo* is extended past native title, the “integral to a distinctive culture” test should be adopted as the touchstone for proving aboriginal rights. It is argued that it should not. There are two reasons for this. The first is that the *Mabo* test already allows recognition of aboriginal rights (albeit currently restricted to rights in land) on the basis of evidence of aboriginal laws. There is, accordingly no need to adopt the *Vanderpeet* requirement of integrality. The second is

⁹⁹R. Sarre, “Aboriginal Customary Law” (Paper Presented to the 50th Annual Conference, Australasian Law Teachers’ Association: Cross Currents: Internationalism, National Identity & Law 1995) (internet: <http://www.austlii.com.au>); McLaughlin, *supra* note 99 at 7. McLaughlin’s concern that spiritually based aboriginal laws are incompatible with the “secular” settler legal system is refuted by Sarre’s argument that “sacred sites” legislation such as the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984) (Cth) “serves in no small measure to indicate that the law is capable of providing for the recognition of indigenous spiritual beliefs.” (Sarre, *ibid.* at 5).

¹⁰⁰ Sarre, *supra* note 99 at 1.

¹⁰¹ Sarre, *supra* note 99 at 7.

¹⁰²For a discussion of the issues surrounding urban aboriginal artists see Chapter 4.

that, as discussed above, the *Vanderpeet* test is more ideological than legal, requiring the court to engage in a subjective examination of what it considers to have been “integral” to the aboriginal culture before contact. For the reasons given in Chapter 4 this project is unsound. In the remainder of this Chapter it will be argued that the Canadian cases should be used by Australian courts to see how non-land based aboriginal rights can be recognised, but that the principles in these cases can be adopted without abandoning the recognition of aboriginal laws as the touchstone of aboriginal rights. It will be argued that courts should give a flexible interpretation of those laws, in order to recognise their application in modern conditions.

5.2 Territoriality

What is the territorial scope of aboriginal rights in communal aboriginal designs? If aboriginal rights to communal aboriginal designs are confined to the territories of the aboriginal group claiming the right, they will be of little use in combating unauthorised reproductions of designs sold in the national and international tourist markets.

On this point the Canadian case law provides some limited guidance. *R. v. Adams*,¹⁰³ a decision of the Canadian Supreme Court applying the *Vanderpeet* test, confirms that aboriginal rights are not necessarily incidents to land title.¹⁰⁴ However, the Court cautioned that aboriginal rights will usually be site specific, and not rights which can be exercised anywhere in the world.¹⁰⁵ It is accordingly unclear how a court would deal

¹⁰³*Supra* note 28 at 667.

¹⁰⁴The case concerned the prosecution of Mohawk person found fishing in the St Lawrence River. In finding an aboriginal right to fish despite the absence of land title, the Court specifically recognised that some aboriginal peoples were nomadic and that therefore aboriginal rights need not “necessarily” be specific incidents of aboriginal land title established by proven continuous occupation: *ibid*.

¹⁰⁵*Supra* note 28 at 668.

with a claim by an aboriginal community that related to intangible interests such as rights in communal designs. The Court in *Adams* clearly did not have such a question in mind but its answer would depend on the facts of each case, the issue at hand, the aboriginal perspective on the scope of the right and considerations of what remedies might be appropriate.

A related question here is whether aboriginal rights in intangible interests such as communal aboriginal designs are exclusive. In many Canadian aboriginal communities, for example, there are complex inter-group kinship connections and laws concerning the use of cultural heritage in names, stories and symbols. The cases discussed in Chapter 3 indicate that similarly complex arrangements exist among Australian aboriginal communities in relation to communal aboriginal designs. How does this affect the proof of an aboriginal right? Arguably, the same answer applies. The court should receive evidence of applicable laws and define the aboriginal right by reference to them.¹⁰⁶

5.3 Extinguishment

Have intellectual property regimes such as copyright extinguished aboriginal rights in communal aboriginal designs? This depends on the answer to the wider question of whether, assuming that *Mabo* does extend beyond native title:

*...traditional laws on subjects such as family relationships, title to goods, community justice mechanisms, inheritance and criminal law survive[d] colonisation?*¹⁰⁷

¹⁰⁶ See Sweeney, *Fishing Rights*, *supra* note 10 at 113-114, who makes this argument in relation to fishing rights.

¹⁰⁷ Sarre, *supra* note 99 at 7.

As noted above, in both Australia and Canada a “*clear and plain intention*” is required before extinguishment can occur. However, beyond this it is difficult to predict which settler laws have extinguished aboriginal laws regulating cultural heritage. In Australia the recent High Court decision in *The Wik Peoples v. Queensland*¹⁰⁸ which applied *Mabo* to the question of whether Crown grants of “pastoral leases” extinguished native title or its incidents.¹⁰⁹ The somewhat inconclusive result suggests that courts will not issue judgments delineating the effect of broad categories of settler laws on broad categories of aboriginal laws.¹¹⁰

In the context of fishing rights, Kirby P in the *Tritton* case recognised that fishing regulations had not extinguished an alleged aboriginal right to fish for abalone, thus following the Canadian cases such as *Sparrow*. A broader statement was made by Mason CJ in *Walker v. New South Wales*,¹¹¹ which concerned an aboriginal defendant’s allegation that aboriginal laws, and not settler criminal laws, applied to him. Mason CJ emphatically rejected this proposition, holding that there was “no analogy” between *Mabo* and laws of “universal application” such as the criminal laws:

¹⁰⁸(1996) 141 A.L.R. 129 (hereinafter “*Wik*”).

¹⁰⁹The majority, Toohey, Gaudron, Gummow and Kirby JJ (Brennan CJ, with whom Dawson and McHugh JJ agreed, dissenting) broadly held that pastoral leases are a legal creation unique to the circumstances of Australia, and therefore cannot be judged in the abstract to be equivalent to a “lease” as known by the common law inherited from England. For commentary on the decision, see for example, Butterworths, *Native Title*, *supra* note 39 at 3,095.10; Hiley, ed., *The Wik Case: Issues and Implications* (Sydney: Butterworths, 1997).

¹¹⁰ The majority held that the question of the effect of a particular pastoral lease on native title depended on both the terms of the enabling legislation under which the lease was granted, and on the terms of the lease itself. Accordingly, the majority opted for a case by case interpretation of the effect of pastoral leases on native title. As discussed below, this would make it difficult to predict which aboriginal laws affecting cultural heritage might now be extinguished.

¹¹¹(1994) 126 A.L.R. 321 (High Ct. of Australia).

*...It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions being applied to different persons for the same conduct offends that basic principle.*¹¹²

Mason CJ's stance appears based on a concern that all citizens be treated equally in relation to fundamental issues of liberal democratic rights and freedoms. To similar effect is Brennan J's obiter statements in *Mabo* that "customs" will not be recognised where they are inconsistent with the common law,¹¹³ and Toohey J's remark that there may be a society where "*a traditional system was so violent or otherwise repressive of human rights so as to make adoption by the common law impossible*".¹¹⁴ This view is supported in Canada by *Thomas v. Norris*,¹¹⁵ a case concerning "spirit dancing", where the judge tended toward the view that any aboriginal right to perform aboriginal religious ceremonies involving forced imprisonment or assault would have been extinguished by the introduction of settler laws.

On this basis it would seem that, to the extent that aboriginal laws concerning communal aboriginal designs apply "violent" or other unusual punishments for breach, they would be extinguished by the criminal law, thus indirectly addressing the issue of repugnancy. However beyond this it is unclear whether *Walker* means that aboriginal laws concerning cultural heritage have been extinguished. Arguably, there is a much clearer "analogy" between *Mabo* and aboriginal laws concerning the regulation of communal

¹¹² Mason CJ added that the presumption of extinguishment applied with "*added force under the criminal law, which is inherently universal in its operation, and whose aims would otherwise be frustrated*": *ibid.* at 323.

¹¹³ Brennan J, *supra* note 2 at 59, 64.

¹¹⁴ Toohey J, *supra* note 2 at 192, footnote 29.

¹¹⁵ *Supra* note 93.

aboriginal designs (which may be linked with custodianship of land) than between *Mabo* and the criminal law.¹¹⁶ As Sarre remarks, *Walker*¹¹⁷

*...is not authority...for the proposition that no case will recognise customary law. The position is simply that recognition must, of legal necessity, be piecemeal and limited.*¹¹⁸

5.4 The Frozen Rights Issue

As discussed in Chapter 4, many aboriginal artists, including those involved in the aboriginal copyright cases, do not “squat in red dust”¹¹⁹ making sand paintings. Although using pre-existing communal designs, these artists produce paintings for “non-traditional” purposes, and use “non-traditional” materials such as canvas and acrylic paints. This is true of many aboriginal communities producing cultural heritage objects in both Australia and Canada. The question that arises in the present context is whether aboriginal rights may protect an aboriginal group’s exclusive right to produce these designs or objects for commercial applications.

¹¹⁶ For other cases denying the validity of aboriginal laws see Sarre, *id* note 99 at 2, citing *R v. Wedge* [1976] 1 N.S.W.L.R. 355 (N.S.W.S.C.); (criminal law) *R. v. Neddy Monkey* [1861] V.L.R. 40; (marriage); *R v. Cobby* (1883) 4 N.S.W.L.R. 355 (marriage). Cf *Walden v. Hensler* (1987) 163 C.L.R. 561 at 565 (a hunting prosecution, where Brennan J noted that an aboriginal law defence might have been argued on the basis of traditional aboriginal resource use of the relevant territories, but was not); *R v. Williams* (1976) 14 S.A.S.R. 1 (S.A. S.C.) (suspended sentence given on the basis that the defendant would be punished under aboriginal laws. The defendant was speared through the leg in accordance with punishment determined by the elders and as Sarre notes (*ibid.* at 4) “[n]ot coincidentally”, soon after this the Australian Law Reform Commission was commissioned to examine whether aboriginal laws should be applied to some or all aboriginal peoples.

¹¹⁷ Sarre, *ibid.* at 5.

¹¹⁸ It is unfortunate that Mason CJ’s statement, which is of potential importance in clarifying the *Mabo* judgment, was made on an interlocutory application before a single judge: K. Pringle, “One Law for All?” (1995) 20 Alt. L.J. 39 at 41.

¹¹⁹ The term comes from Gray’s analysis of the aboriginal copyright cases in S. Gray, “Squatting in Red Dust: Non-Aboriginal Law’s Construction of the ‘Traditional’ Aboriginal Artist” (1996) 14:2 Law in Context 29.

Under *Mabo*, aboriginal laws will not be considered to have been abandoned merely because they have “evolved” after the establishment of sovereign rule. As Toohey J remarked:

*modification of traditional society in itself does not mean that traditional title no longer exists...An indigenous society cannot, as it were, surrender its rights by modifying its way of life.*¹²⁰

Given that *Mabo* does not require aboriginal laws or aboriginal modes of life to remain exactly the same over time, it should not matter that settler techniques or materials are used in the application of communal aboriginal designs. Accordingly, it is argued that *Mabo* would allow “adaptation of methods” in the same way as the Canadian decisions on hunting and fishing rights do.

Mabo also contains some positive indications regarding the “commercial adaptations” issue. Brennan J observed that rights to native title may be based in aboriginal laws “as currently observed”,¹²¹ so long as the “*general nature of the connexion between the indigenous people and the land remains.*”¹²² As Sweeney notes,¹²³ Deane and Gaudron JJ held a similar view, stating that the law (or “custom”) is not “frozen” at the moment of Crown sovereignty, provided the relationship of the group with the land remains,¹²⁴ and Toohey J stated that “*modification of traditional society in itself does not mean traditional title no longer exists...An indigenous society cannot, as it were,*

¹²⁰Toohey J, *supra* note 2 at 192.

¹²¹Brennan J, *ibid.* at 61.

¹²²*Ibid.* at 70.

¹²³ These quotations are set out in full in Sweeney, *Fishing Rights*, *supra* note 10 at 114-115 in his analysis of hunting, fishing and gathering rights.

¹²⁴ Deane and Gaudron JJ, *supra* note 2 at 110.

surrender its rights by modifying its way of life."¹²⁵ These statements suggest that aboriginal laws concerning the reproduction of communal aboriginal designs could be recognised in a commercial context. However, under the present law such rights must be capable of being characterised as incidents of native title.

In Canada, just where the line can now be drawn around aboriginal rights and their "commercial adaptation" after *Vanderpeet* remains unclear, even in relation to fishing cases. It is accordingly difficult to predict how it would be applied to rights in aboriginal cultural heritage. Would *Vanderpeet* enforce aboriginal rights in communal designs painted for sale to outsiders, assuming aboriginal laws permitted it? As discussed above, the *Vanderpeet* test looks at the "purposes" of an aboriginal practice or tradition and requires that that "purpose" was integral to the distinctive culture of the aboriginal group asserting the right before contact. On a narrow reading of *Vanderpeet*, communal aboriginal designs would not be protected as aboriginal rights if they were produced for commercial purposes unless some kind of evidence of pre-contact trade or exchange is produced.¹²⁶ If this is not possible, reproduction of commercially produced paintings incorporating these designs would therefore be left to regulation under existing settler regimes such as copyright. However, there is, at best, a weak analogy between a situation concerning an aboriginal fishery, on the one hand, and a situation concerning communal aboriginal designs, on the other. In fishing cases, the issue is regulation of competing interests in a finite resource. In *Vanderpeet* the Court attempted to resolve this issue by

¹²⁵ Toohey J, *ibid.* at 192.

¹²⁶ It may be that there was some kind of "trade" or exchange between groups (intra or inter tribal) which allowed outsiders to use designs, for example as body paintings in ceremonies to which they were invited. This would depend on evidence of aboriginal laws in the particular society claiming the right.

finding limits to aboriginal rights by reference to the pre-contact purposes for which fishing was carried out.¹²⁷ In communal designs disputes there is no such consideration, and there should be no need to interpret such aboriginal rights in an artificially restrictive manner. The pre-contact focus of *Vanderpeet* has already been distinguished in subsequent Canadian cases.¹²⁸ Arguably, it should also be qualified in its application to intangible rights in cultural heritage.

For these reasons, to the extent that the “integral to a distinctive culture” test has the effect of restricting aboriginal rights in communal aboriginal designs in non-commercial uses, it should not be followed in Australia.

5.5 Urban Aboriginal Artists

As discussed in Chapter 4, there are many aboriginal artists who are working outside community traditions or structures. May a person who has lost touch with the traditions of his or her community now paint the communal aboriginal designs of that community? Is he or she precluded from the benefit of an aboriginal right in the communal aboriginal designs of the community? Can he or she in fact be excluded from painting those designs? The answers, it seems, depend on whether that person can claim membership of the relevant community. Under *Mabo*, a person wishing to claim the benefit of aboriginal rights must be a member of the community who adheres to traditional laws and customs. As stated by Brennan J, membership is determined by biological

¹²⁷ Note that this is a reading of the purposes behind the majority decision in *Vanderpeet*. On the face of the majority decision however, it was “aboriginality” which restricted aboriginal rights, and not considerations of competition over a resource.

¹²⁸ See the latest decision, *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108 (QL).

descent, self-identity and “*recognition by community leaders*”.¹²⁹ Accordingly, if an urban aboriginal person wishes to paint designs from his or her original community, the community leaders will be the gatekeeper of that right because of their power to refuse recognition of that person as a community member. In Canada a similar situation applies. Under the Canadian test, in order to take the benefit of an aboriginal right a claimant must prove membership of an “organised society” of aboriginal people existing since pre-contact times.¹³⁰ Membership of aboriginal groups in Canada is determined according to the band system under the Indian Act. Therefore bands, although artificially created under the Act, have been used as the relevant party for the purposes of aboriginal rights litigation. Band membership is controlled by band councils. This means that the power to regulate communal aboriginal designs under both tests would be even more strongly controlled by particular members of aboriginal communities.

A related question arises in the context of communities which have lost touch with their own traditions under assimilation policy. In *Mabo*, Brennan J suggested that:

*A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.*¹³¹

Further, he states, that once traditions are “*washed away by the tide of history*”,¹³² they are lost. If such an analysis is applied to aboriginal cultural heritage, it seems aboriginal communities who have lost touch with their traditions will not be able to assert aboriginal

¹²⁹ Brennan J, *supra* note 2 at 64.

¹³⁰ This requirement derives from the judgment of Judson J in *Calder*, *supra* note 13.

¹³¹ *Supra* note 2 at 60. Cf Deane and Gaudron JJ, who suggest that it may still be possible to assert native title where indigenous people are still occupying the land, regardless of whether they have ceased to live by their traditions: *ibid.* at 110.

¹³² *Ibid.*

rights in such traditions after reviving their cultures. However, it could be argued that in the context of rights in intangible cultural interests, which do not compete with settler interests in the way that aboriginal land claims do, this test might be given a more generous interpretation.¹³³

The test under Canadian law is more lenient. *Sparrow's* principles for the interpretation of aboriginal rights under section 35(1) include the generous and liberal interpretation of the evidence, with doubts being resolved in favour of the aboriginal claimants. In *Vanderpeet*, Lamer CJ adopted Brennan J's statement that once "*washed away by the tide of history*" aboriginal rights are lost. However, he added, an interruption "*for some reason*" would not extinguish rights.¹³⁴ It could be argued that such a interruption could be the disruption of aboriginal cultures under particularly virulent assimilation policies, thus restoring section 35(1)'s "remedial" purpose under *Sparrow*, and advancing the social justice policies underlying the *Mabo* decision. This statement may not be inconsistent with that of Brennan J. However, it is argued that to the extent that it qualifies Brennan J's statement, it should be expressly accepted in Australian cases. Otherwise, it is likely that the pool of aboriginal people able to take advantage of these developments will be small.

¹³³ Cf M. Gregory, "Absent Owners" (1995) 20:1 Alt L.J. 20 for similar policy arguments in relation to the aboriginal owners of land who have been excluded from their lands..

¹³⁴ Lamer CJ, *Vanderpeet*, *supra* note 5 at 31.

6. Some Recent Proceedings Concerning Cultural Heritage

Some recent proceedings in both Australia and Canada give further guidance on how future aboriginal cultural heritage claims might be framed under the *Mabo* and *Vanderpeet* tests. As all of the proceedings are still alive, it would be inappropriate to evaluate their merits. However, they will be used to explore the method in which some of the issues discussed above might be argued in future cases concerning communal aboriginal designs.

6.1 Australia - R&T Textiles

*Bulun Bulun v. R&T Textiles*¹³⁵ are proceedings in the Federal Court of Australia now in the final submission stage.¹³⁶ These proceedings will “*explore the nature and incidents of native title*”¹³⁷ by asserting that “*rights in paintings and rights in land are inextricably woven*”.¹³⁸ The case involves previous litigants John Bulun Bulun and George Milpururru, who are both members of the Ganalbingu people of Arnhem Land in the Northern Territory.¹³⁹ The subject of the case is John Bulun Bulun’s 1978 painting, “*Magpie Geese and Waterlilies at the Waterhole*”, which was reproduced by the defendants, R&T Textiles, on fabric imported into Australia without his permission.

¹³⁵ *Supra* note 6.

¹³⁶ Personal communication, M. Hardie, 11 December 1997.

¹³⁷ M. Hardie, “Current Litigation in Native Title and Intellectual Property: *Bulun Bulun* and *Milpururru v R & T Textiles*” (1997) 90(3) A.L.B. 18 at 18.

¹³⁸ *Ibid.*

¹³⁹ It will be recalled from Chapter 3 that John Bulun Bulun was the principal litigant in the seminal *Bulun Bulun v. Nejlam* (1992) (unreported, settled, Federal Ct. of Australia, Darwin Registry) and that George Milpururru was the principal litigant in the most recent aboriginal copyright case, *Milpururru v. Indofurn* (1995) 30 I.P.R. 209 (Federal Ct. of Australia).

(a) The Proceedings

The defendants consented to judgment for breach of copyright.¹⁴⁰ However, the case is proceeding on two novel heads:¹⁴¹

1. *Whether the other traditional Aboriginal owners [represented in the action by George Milpurrruru] of the corpus of ritual knowledge from which the artistic work is derived are the equitable owners of the copyright subsisting in the artistic work; and*

2. *Whether an infringement of either the legal or equitable title to copyright in a case such as this constitutes a nuisance which has interfered with the applicant's traditional Aboriginal ownership or native title rights in Ganalbingu country.*

In these proceedings, therefore, the artist (Mr Bulun Bulun) and the communal owners of the designs incorporated in Mr Bulun Bulun's paintings (represented by Mr Milpurrruru) are cooperating in this attempt to extend the law. Under the first head, the claimants are attempting to expand the notion of equitable ownership of copyright¹⁴² to include the communal owners of the "*corpus of ritual knowledge (madayin) of the Ganalbingu people*" associated with Ganalbingu traditional territories (Djilibinyamurr). The claimants allege that the madayin is embodied in the Bulun Bulun painting,¹⁴³ that Mr Bulun Bulun's right to paint this subject matter is controlled by the traditional owners under aboriginal law, and that such rights are an incident of Mr Bulun Bulun's and the traditional owners' native title.¹⁴⁴ By reason of these matters, the claimants allege:

¹⁴⁰ Hardie, *supra* note 137.

¹⁴¹ *Ibid.*

¹⁴² It will be recalled from Chapter 3 that this course was argued by barrister Colin Golvan in his article "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 56 A.L.B. 5. Mr Golvan is appearing as counsel for the applicants in *R&T Textiles*.

¹⁴³ Amended Statement of Claim, *supra* note 6, paragraph 4.

¹⁴⁴ *Ibid.*, paragraphs 8-11.

*...on the reduction to material form of a part of the ritual knowledge of the Ganalbingu people associated with Djilibinyamurr by the creation of the artistic work, [Mr Bulun Bulun] held the copyright subsisting in the artistic work as a fiduciary, and/or alternatively on trust, for [Mr Milpururru] and the people he represents.*¹⁴⁵

The claimants allege that the defendants have infringed the copyright of the communal owners (represented by Mr Milpururru) as well as that of the artist, Mr Bulun Bulun. On this basis, damages for copyright are claimed under section 115(2) of the Copyright Act on behalf of Mr Bulun Bulun as well as the communal owners. Such damages include a claim for damages for the *"anger, distress, personal suffering, humiliation, offence and embarrassment"* caused to Mr Bulun Bulun and the traditional owners,¹⁴⁶ and additional damages under section 115(a) of the Copyright Act for factors such as *"the cultural and customary significance of the artworks in question and the cultural environment including the traditions, customs and law of the Ganalbingu people;"*¹⁴⁷ *"the blasphemous nature of the unauthorised reproduction"*¹⁴⁸ and ... *"the serious view taken by the Parliament of the Commonwealth of the misuse of Aboriginal cultural heritage."*¹⁴⁹ The claim for additional damages also alleges that *"the infringements are contrary to rights and freedoms sought to be protected under International Law in particular the International Covenant on Civil and Political Rights and is a significant issue both under domestic and International Law."*¹⁵⁰

¹⁴⁵*Ibid*, paragraph 12.

¹⁴⁶*Ibid*, paragraph 17(d).

¹⁴⁷*Ibid*, paragraph 17(f)(v).

¹⁴⁸*Ibid*, paragraph 17(f)(viii).

¹⁴⁹*Ibid*, paragraph 17(f)(ix).

¹⁵⁰*Ibid*, paragraph 17(f)(x).

In relation to the second head, the claimants allege that, in addition to the copyright remedies they claim, they are entitled to damages for nuisance on the basis that the defendant's actions have interfered with their enjoyment of their traditional ownership of Ganabingu country including Djilinyamurr.¹⁵¹

(b) Commentary

These proceedings attempt to advance the position reached in *Milpurrrurru* by introducing aboriginal legal concepts into a framework of copyright law. As observed in Chapter 3, one of the most obvious flaws in the *Milpurrrurru* result was the inability of the court to go behind Mr Milpurrrurru's rights as individual copyright owner in order to compensate his community for breach of the designs in his paintings. Mr Milpurrrurru is now attempting to stand before the court as the representative of his community in order to allow recognition of the communal elements of Mr Bulun Bulun's designs. The claimants invoke the *Mabo* doctrine by emphasising the connection of the designs to native title. The court's attitude to these claims is as yet unknown. But interesting questions concerning the intersection of copyright and native title are raised. For example, if the communal aboriginal designs in Mr Bulun Bulun's painting, embodying the madayin, are found to be an incident of native title under settler law, would a painting incorporating those designs be prohibited from reproduction in perpetuity? Would reproduction for any "fair dealing" be permitted?

The pleadings are also interesting for their treatment of the territoriality issue raised above. By asserting that the unauthorised reproductions constitute a nuisance

¹⁵¹ *Ibid*, paragraph 16(b)(iii).

associated with the claimant's native title, the pleadings demonstrate the connection of the infringement of the designs with the enjoyment of native title.

Finally, it will be recalled that in the *Milpurrruru* case, there was evidence that traditional sanctions such as spearing and ostracism might apply. These proceedings avoid the obvious problems of repugnancy that enforcing these remedies would raise (if in any case they were still enforced), by adopting settler remedies. Accordingly, the proceedings seek to use evidence of aboriginal laws only to establish the designs as an incident of native title, and not as relevant to remedies. These pleadings allay concerns that traditional remedies for breach of aboriginal laws may be incompatible with modern liberal democratic standards. There is no need to enforce these remedies under the settler laws. As noted at the beginning of this Chapter, aboriginal rights are a form of "intersocietal law". They do not involve the wholesale transplant of aboriginal laws into the common law. Although the court may use an aboriginal law as the basis of an aboriginal right, it need not use aboriginal laws as the basis of remedies for infringement of that right. The remedies to be applied are in the court's discretion. Accordingly, remedies for infringement of aboriginal rights need not be (and arguably, cannot be) restricted to those recognised under aboriginal laws.¹⁵²

¹⁵² This does not mean that a traditional aboriginal remedy cannot be sanctioned by the settler court in its discretion. Sarre, (*supra* note 99 at 5) discussing a recent unreported case (the "Denis Walker" case) where "payback", an aboriginal sanction, was ordered by a judge against an aboriginal defendant convicted of manslaughter, argues that: *"There is quite a difference...between acknowledging traditional practices and granting customary law a status equal to that of the common law applying generally. The Denis Walker case does not prevent a sentence of pay-back where, in all the circumstances, the judge determines that such an outcome serves the administration of justice. It does, however, prevent pay-back from being resurrected as a right, enshrined in some customary code, in the same fashion that native title was recognised in the Mabo case."*

6.2 Canada - The *Echo Mask* and *Queneesh* Proceedings

There are two recently commenced proceedings in British Columbia concerning aboriginal cultural heritage. The first concerns the alienation of culturally significant objects; and the second concerns the use of a culturally significant name. With the possibilities opened up by *Mabo* it might be expected that such issues may one day be litigated in Australia. In the following section, the two recent proceedings are used as case studies to examine some of the issues that might arise if a *Mabo* or *Vanderpeet* type analysis is applied to aboriginal rights in communal aboriginal designs.

(a) The *Echo Mask* case

The long and controversial history of north-west coast collecting has been referred to in Chapter 2. The latest episode in this history is the subject of the well publicised litigation¹⁵³ in *Nuxalk Nation v Roloff*,¹⁵⁴ or the "Echo Mask" case. It concerns the Nuxalk Nation, formerly well known to anthropologists and collectors as the "Bella Coola Indians".

(i) Background

The Nuxalk live in the valleys and inlets near Bella Coola on the north-west coast of British Columbia. The richness of their material and spiritual culture has long been the

¹⁵³The proceedings were the subject of newspaper publicity, in which it was noted that a team of academics from the University of Victoria assisted the Nuxalk in preparing their case. See for example, J. McDowall, "A Symbolic Victory: Natives Go to Court to Scuttle the Sale of a Mask" *British Columbia Report* (August 26, 1996) 39.

¹⁵⁴(British Columbia Supreme Court, Victoria Registry, no 2676 of 1996) (hereinafter the "*Echo Mask case*").

subject of intense settler fascination.¹⁵⁵ Since the golden age of collecting on the north-west coast,¹⁵⁶ Nuxalk masks, often distinguished by the use of "Bella Coola blue" paint, have been highly valued. Because of the significance of the masks to Nuxalk traditions, Nuxalk leaders have consistently sought to prevent their loss to the community through trade. However, this has perhaps only increased their value for generations of entrepreneurs and collectors who have attempted to obtain them. A consistent feature of the history of Nuxalk-settler contact to the present day has been attempts by settlers to secretly negotiate for the sale of masks with individual Nuxalk. Over time Nuxalk leaders have responded in various ways to attempt to prevent these unauthorised sales. In earlier periods, the punishment against an individual Nuxalk who secretly sold an important mask could include a death curse.¹⁵⁷ In the 1970s, as the Nuxalk joined the widespread revival

¹⁵⁵ In 1885 nine Nuxalk were "exhibited" in Europe by the Norwegian Jacobsen brothers who, as noted below, undertook studies of Nuxalk culture. It was this exhibition which fascinated anthropologist Franz Boaz and inspired him to begin his lifelong study of pacific north-west coast aboriginal culture. In 1895 Jacobsen published "The Sissauch Dance", describing several sacred ceremonial dances (a translation into English was made by the British Columbia Language Project in 1977, and is annexed to the affidavit of Grant Edwards dated 24 June 1996 and filed in the *Echo Mask case*, *supra* note 154 on the same day (hereinafter *Edwards affidavit*). In 1898 Boaz published his famous work "The Mythology of the Bella Coola Indians" (being volume 1, Part 1 of *The Jesup North Pacific Expedition* (New York: American Museum of Natural History, 1898). In 1948 T.F. McIlwraith published the comprehensive "The Bella Coola Indians". (Toronto: University of Toronto Press, 1948). Since then various anthropologists and researchers have continued to live and work for various periods among the Nuxalk: see Edwards affidavit, paragraphs 10-12..

¹⁵⁶ Edwards puts this period between 1871 - 1925 in respect of the Nuxalk: G. Edwards, "Bella Coola Masks", *The Thunderbird* (3 April 1979) 5.

¹⁵⁷ An instance of this is described by Phillip Jacobsen in 1895, in *The Sissauch Dance*, *supra* note 155. As noted above, *ibid.*, he and his brother had studied Nuxalk culture and for this purpose had undertaken many visits. However, his visits had a dual purpose. At nights he met secretly with individual Nuxalk to obtain masks and other ceremonial objects for export to Europe: ... "I have always bought indian artifacts during the night, that is to say, such objects which are connected with the holy dances. To this end I have often gone through back doors and windows, and as I have said, always after it got dark"... After one night when he was caught carrying masks out of a chief's house, he reported the following consequences for the chief: (*ibid.* at 11)... "a meeting was quietly called right away, and here it was unanimously decided that he was to die at the end of the year. An indian "medicine man" was paid to kill he who had committed the enormous crime of selling his Sissauch masks to a stranger." Jacobsen reports that the chief did in fact die within a year in accordance with the medicine man's spells.

of aboriginal culture, strategies to avoid loss of the masks to outside collectors included making copies of masks for sale¹⁵⁸ and locking originals in the local police station.¹⁵⁹ The Nuxalk leaders' latest strategy is to seek relief in the settler courts.

(ii) The Proceedings

On 21 June 1996 the Nuxalk Nation commenced proceedings against dealer Mr Howard Roloff and his company seeking to overturn his purchase of an important "Echo Mask" from an individual Nuxalk. According to the Nuxalk Statement of Claim filed in these proceedings, Echo is a "*mythical influential figure of the Nuxalk Nation, a supernatural being, resident on earth, who from time immemorial formed an important part of the Nuxalk Nation's distinctive culture.*"¹⁶⁰ Echo is honoured by the Nuxalk by the carving of "Echo Masks" for use in ceremonial performances. Usually according to tradition, such masks would be burnt after they were publicly "danced" in these ceremonial performances in order to keep them secret from the uninitiated. However, the

¹⁵⁸ Nuxalk leader Margaret Siwallace was recorded as urging Nuxalk to: *...copy the masks that are in their possession, in an attempt to try to prevent them from selling the originals to visiting tourists and collectors, thus losing them forever*: reported in M.A. Stott, *Bella Coola Ceremony and Art* (National Museum of Man, Mercury Series 1975), cited in G. Edwards, "Bella Coola Masks", *supra* note 156 at 5.

¹⁵⁹ In 1979, a local newspaper reported that: *An elusive Victoria-based artefact buyer slipped into Bella Coola on the March 3 weekend without contacting Bella Coola Band Council or the Bella Coola Museum Association [BCMA]...Museum association's suspicions were raised because most band counsellors are away herring fishing.* According to the report, the dealer had offered up to \$24,000 to individual Nuxalk for certain items. Nuxalk leaders responded by putting the masks in the local police station for safekeeping. When individual Nuxalk requested return of artifacts they had deposited with the museum as "original owners", the museum, who had established co-operative links with the Nuxalk leaders, arranged for the artifacts to be taken to the local jail for safekeeping until a band meeting could be convened: "Priceless Heritage", *The Thunderbird* (13 March 1979); *Edwards affidavit, supra* note 155 at 3. After consulting with these leaders the police returned the masks to them "as the communal property of the Nuxalk Nation", with the exception of one mask, which was returned to an individual. That mask was reputedly later sold: *Edwards affidavit, ibid.* at 5.

¹⁶⁰ See Nuxalk Statement of Claim dated 21 June 1996 and filed in the *Echo Mask* case on 21 June 1996 (hereinafter "*Nuxalk Statement of Claim*"), paragraph 6.

particular "Echo Mask" the subject of this litigation has survived along with other masks in order to be passed down through successive generations of Nuxalk. Thought to have been originally carved in 1860 on commission for then Chief Potlass, the Mask has distinctive interchangeable mouthpieces which are attached by the dancer in order to convey different aspects of Echo. Until shortly before its sale the Echo Mask was used in contemporary Nuxalk ceremonies.

According to the Nuxalk Statement of Claim, Mr Roloff "*purportedly paid \$30,000 (Cnd.) for the Echo Mask*" and intended to "*sell it to a purchaser in the United States for \$250,000. (U.S.).*"¹⁶¹ In order to do so, he was required to apply for an export permit under the *Cultural Property Import and Export Act*, discussed in Chapter 2. As a result of this application the mask was assessed as being of "national significance". Although a temporary ban on export was granted under the Act in order to give public institutions an opportunity to bid, this ban could not be extended indefinitely. Accordingly, the Nuxalk Nation intervened, seeking return of the Mask on the basis of, among other grounds,¹⁶² an aboriginal right to its ownership as cultural property pursuant to the "Echo Custom". The Statement of Claim described the Echo Custom as follows:

8. *It is and was at all material times a custom, tradition or practice of the Nuxalk Nation that certain physical objects including certain masks with cultural, spiritual or historic significance must, perhaps with limited exceptions, remain with or kept by the Nuxalk Nation or families or individual members thereof. This custom, tradition or practice formed an integral part of the Nuxalk Nation's distinctive culture.*

¹⁶¹Nuxalk Statement of Claim, *ibid*, paragraph 12. Given that Mr Roloff never filed a defence, this allegation has not been the subject of any pleading in reply.

¹⁶² The other grounds relate to section 91 of the Indian Act; the Band by-laws and the Band Business Licence: Nuxalk Statement of Claim, *ibid*, paragraphs 13 and 14.

9. *The Echo Mask together with its accompanying songs, dances, stories, hereditary titles and other privileges, is one such physical object and as such the custom, practice or tradition of the Nuxalk Nation is that the Echo Mask could not be sold otherwise transferred or given away to someone not a member of the Nuxalk Nation (the "Echo Mask Custom").*

10. *The Echo Mask Custom is integral to the distinctive culture of the Nuxalk Nation.*

The Statement of Claim further alleged that the Echo Mask Custom has never been extinguished and that it is now recognised and affirmed under section 35(1) of the Constitution.¹⁶³ The Statement of Claim alleged that the Echo Mask was sold in contravention of the Echo Mask Custom. It sought, among other relief, a declaration that *"the Echo Mask cannot be sold, transferred or given away to someone who is not a member of the Nuxalk Nation."*¹⁶⁴

Mr Roloff's attitudes towards the continuing trade in Nuxalk masks clearly differs from that of the Nuxalk. According to a newspaper interview, he asserts that many have been sold to collectors in an "important trading tradition":

*I am the last member of that important trading tradition. I simply bought an object. I did not buy the rights or prerogatives associated with it. So the tradition of dancing and singing the Echo legend hasn't died. As the Kwakwakawakw noblewoman Gloria Cranmer-Webster of the Umista Centre once said: 'Objects were unimportant. What mattered was the idea behind them. They represented the right to own that thing, and that right remains even if the object decays or is otherwise lost.'*¹⁶⁵

¹⁶³ Nuxalk Statement of Claim, *ibid.*, paragraph 11.

¹⁶⁴ Nuxalk Statement of Claim, *ibid.*, paragraph 16(a). The other relief sought in paragraph 16 was an order restoring possession of the Mask to the Nuxalk, an "order permanently enjoining the Defendants from selling, transferring, exporting or in any other manner dealing with the Echo Mask" and special costs.

¹⁶⁵ J. McDowall, *supra* note 153 at 37.

However, soon after the filing of the Statement of Claim he consented¹⁶⁶ to an order temporary halting the sale in order to allow the Nuxalk an opportunity to purchase the Mask, which was in safekeeping at the Royal British Columbia Museum.¹⁶⁷ During this period of negotiations the Nuxalk applied for classification under the Act as a Category B public institution, in order to allow them to qualify for federal funding to assist purchase of the Mask. Recently, the federal government approved the Nuxalk's application and granted them funding.¹⁶⁸ This is the first time an aboriginal community has been granted this status under the Act and is of ground-breaking significance in aboriginal peoples' attempts to repatriate cultural objects to their communities.¹⁶⁹ The Mask is now to be returned to the Nuxalk community where it will be housed permanently.¹⁷⁰

(iii) Commentary

As Mr Roloff did not file a defence pending the outcome of negotiations, it is not known whether he would have alleged that the Echo Custom has been extinguished, or that the Nuxalk individual otherwise had a valid basis to sell the Mask to him. However, it is nevertheless instructive to see how, in the Nuxalk Statement of Claim, aboriginal laws

¹⁶⁶ It should be stressed here that Mr Roloff does not appear to have contravened any existing settler laws. Assuming that the individual who sold him the Mask has the right to sell it, he was well within his rights to proceed with sale to his US buyer, subject to the outcome of the Nuxalk's claim had it proceeded.

¹⁶⁷ A week after the commencement of proceedings, a consent order was issued by a judge in chambers. Under these orders the Echo Mask was delivered to the Royal British Columbia Museum for safekeeping pending resolution of the proceedings. The consent order prohibited the defendants from further dealing with title in the Mask and allowed the Nuxalk Nation to remove the Mask for potlatch ceremonies on the posting of a security bond. Although the Nuxalk Nation was entitled to remove the Mask for two potlatch ceremonies in 1996 and two in 1997 for a period of 5 days at a time it did not do so: personal communication, Irene Faulkner, Legal Representative of the Nuxalk Nation, 25 June 1997.

¹⁶⁸ Personal Communication, Irene Faulkner, 29 October 1997.

¹⁶⁹ See the discussion of this legislation in Chapter 2.

¹⁷⁰ Personal communication, Irene Faulkner, 29 October 1997.

pertaining to aboriginal cultural heritage might be argued to found aboriginal rights independently of native title. In the Nuxalk Statement of Claim and through supporting affidavits, it is the "Echo Custom", which is argued to be the basis of an aboriginal right. This is similar to the kind of pleading which might be used to argue a communal aboriginal designs case under the *Mabo* test. Communal aboriginal designs could also be shown to be subject to various "customs", or laws. These laws could form the basis of rights preventing non-community members from using the designs.

The Nuxalk Statement of Claim further alleged that the Echo Custom has been "integral" to the Nuxalk's "distinctive culture" since "time immemorial". However, arguably, it would not be necessary for the "integral to a distinctive culture" requirement to be imported into Australian law. The claimants could simply allege, in accordance with *Mabo*, that the relevant law had been part of their aboriginal laws since just before the establishment of the common law.

The *Echo Mask* proceedings are also, like the Bulun Bulun proceedings, interesting from the point of view of remedies. As noted earlier, a previous traditional sanction for the alienation of a mask in Nuxalk society could include a death curse. However, the Nuxalk Statement of Claim did not seek relief by reference to Nuxalk laws. Instead, it sought a declaration invalidating Mr Roloff's attempted purchase. This approach again confirms that evidence of aboriginal laws may be used to found aboriginal rights in settler courts without running into the problems of repugnancy that enforcement of traditional sanctions might bring. The next proceedings, *Queneesh Studios*, illustrates how aboriginal rights in cultural heritage might be asserted in a commercial context.

(b) Queneesh Studios Inc v. Queneesh Developments Ltd

*Queneesh Studios Inc v Queneesh Developments Ltd*¹⁷¹ concerns a dispute between the Comox Indian Band¹⁷² on Vancouver Island, and well known aboriginal artist Mr Richard Krentz.¹⁷³ The dispute concerns the right to use the name or term *Queneesh*, which represents the flood legend of the Comox Indian Band.¹⁷⁴

(i) Background

The people of the Comox Band are descended from the Comox and Puntledge peoples, known as the Comox-Puntledge First Nation, on Vancouver Island.¹⁷⁵ The Queneesh flood legend relates to the Comox glacier found in Comox traditional territories. In the legend the glacier is a white whale, known as Queneesh, who saved the Comox people from a great flood.¹⁷⁶ The current dispute arose out of the Comox Indian Band's decision to expand the activities of its corporate vehicle, Queneesh Developments Pty Ltd ("Developments"), into the area of art sales. Developments was incorporated in 1976 as

¹⁷¹ Proceedings no 4019, Courtenay Registry (B.C. S.C.). An interim judgment is reported at (1996) C.P.R. (3d) 452.

¹⁷² The counterclaim filed by Queneesh Developments Inc, the Comox Band's corporate vehicle, on 24 May 1996 (hereinafter "Counterclaim") states that "The Comox Indian Band is the successor to the Comox-Puntledge First Nation. The members of the Comox Band are the descendants of the members of the Comox-Puntledge First Nation, which has existed and continues to exist as an organized and self-governing social group bonded together by common language, customs, laws, economy, spiritual beliefs and culture, since long before the establishment of British sovereignty on Vancouver Island": paragraph 4.

¹⁷³ Queneesh Studios Inc. filed a Writ of Summons and Statement of Claim. on 11 March 1996. The Statement of Claim, paragraph 4 alleges that "*Mr Krentz is an internationally recognized Coast Salish artist and a member of the Sechelt Indian Band*".

¹⁷⁴ Counterclaim, *supra* note 172, paragraph 6.

¹⁷⁵ *Ibid.* paragraph 4. McMillan refers to the Puntledge as "Pentlatch" and states that they were amalgamated with the Comox after being almost wiped out. He notes that both the Comox and "Pentlatch" were part of the Coast Salish linguistic group: A.D. McMillan, *Native Peoples and Cultures of Canada*, 2nd ed. (Vancouver: Douglas & McIntyre, 1995) at 216-217.

¹⁷⁶ Personal communication, Liz McLeod, immediate past Band Manager, 2 August 1997.

an “umbrella organisation for the development of economic opportunities by the Comox Indian Band.”¹⁷⁷ In October 1995,¹⁷⁸ the Band through Developments opened an art gallery selling aboriginal prints, masks, jewellery and other items next to its Band office under the names “Queneesh Gallery” and “Queneesh Giftshop”. The Band commissioned a signature design for the gallery. The design, which is shown on business cards of the gallery and also sold as a framed print, incorporates a representation of *Queneesh*.¹⁷⁹ The Counterclaim alleges that “the significance of the term *Queneesh* as associated with the Comox Indian Band has been asserted publicly by the Comox Indian Band since time immemorial”,¹⁸⁰ and that since Developments’ incorporation, Developments and the Band:¹⁸¹

...have publicly advertised the term Queneesh widely, frequently referencing the flood legend of the Comox Indian Band in the advertisements, in order to promote both cultural identity and commercial opportunities.

Mr Krentz has marketed and sold his art work under the name “Queneesh Studios” for some years in Canada, the United States and Europe.¹⁸² He advertises his products widely, including as a mail order service over the internet.¹⁸³ His work, which includes jewellery, carving and prints, has achieved a high profile.¹⁸⁴ In January 1995, Mr Krentz

¹⁷⁷ Counterclaim, *supra* note 172, paragraphs 1, 2.

¹⁷⁸ According to the Statement of Claim, *supra* note 173, paragraph 6.

¹⁷⁹ Personal visit, Queneesh Gift Shop, 26 July 1997.

¹⁸⁰ Counterclaim, *supra* note 172, paragraph 7.

¹⁸¹ *Ibid.* paragraph 9.

¹⁸² According to the Statement of Claim, *supra* note 173, paragraph 6.

¹⁸³ See Internet: <http://www.swifty.com/queneesh/products.html> (site visited 1 October 1997). Paragraph 5 of the Statement of Claim alleges that “the name *Queneesh Studios* has been widely advertised through the media to the trade and the general public worldwide”.

¹⁸⁴ Statement of Claim, paragraph 6. Mr Krentz designed the “Eagle of Unity” artwork for the British Columbia Ministry of Aboriginal Affairs: see Internet: <http://www.tbc.gov.bc.ca/aaf/eagle.htm> (site visited 1 October 1997) and the “Spirit of Nations” Commemorative Medallion for the 1994 Commonwealth Games, among other projects: see <http://www.swifty.com/queneesh/bio.html> (site visited 1 October 1997).

incorporated Queneesh Studios Incorporated ("Studios"), of which he became the sole director, president and secretary.¹⁸⁵ According to the Studios internet site as at 1 October 1997, Studios is named "in remembrance of Queneesh the White Whale, who saved the Comox and Puntledge people from the Great Flood"...¹⁸⁶

(ii) The proceedings

Soon after the Comox Band's gallery opened, Mr Krentz commenced (through Studios) passing off proceedings against Developments. Mr Krentz's side of the proceedings is based purely on passing off principles. He claims that he is entitled to the exclusive use of the name *Queneesh* in relation to aboriginal art sales because he has built up a trading reputation in the name before the entry of the Comox Band into that market. Studios alleges that Development's acts and conduct is "*calculated to mislead and confuse the trade and the general public into the belief that 'Queneesh Gallery' and/or 'Queneesh Gift Shop' sells the same Native art work as [Studios] does and into buying 'Queneesh Gallery' or 'Queneesh Gift Shop's' Native art work as and for [Studio's]*

¹⁸⁵ Statement of Claim, *supra* note 173, paragraph 3.

¹⁸⁶ <http://www.swift.com/queneesh/about.html> (site visited 1 October 1997). The Studios logo is the "Spirit of Friendship" image depicting a stylised snowflake design: <http://www.swift.com/queneesh/mission.html> (site visited 1 October 1997). The "Spirit of Friendship" image does not appear to be associated with the Queneesh legend.

Native art work. Studios seeks, among other remedies,¹⁸⁷ an injunction to restrain Developments from using the name “Queneesh” in association with aboriginal art sales.¹⁸⁸

Developments has counterclaimed with the allegation that the name *Queneesh* is the subject of an exclusive aboriginal right which it uses by permission of the Comox Indian Band.¹⁸⁹ Developments alleges that the Queneesh flood legend has been “integral to the distinctive culture of the Comox Indian Band” since “time immemorial”,¹⁹⁰ and that the Band created the “unique spelling” of the name.¹⁹¹ The counterclaim alleges that Studios has passed off the term *Queneesh* by using it within the Band’s traditional territories, by adopting its “unique spelling”, and by making reference to the Comox flood legend in its advertising.¹⁹² Developments alleges that Studios’ activities have damaged its commercial reputation. It seeks an injunction restraining Studios from using the term,

¹⁸⁷ The Writ of Summons filed by Studios seeks an injunction to “restrain *Queneesh Developments* (by its servants or agents or otherwise) from using the name ‘*Queneesh Gallery*’, ‘*Queneesh Gift Shop*’ or any other similar variation of ‘*Queneesh*’ that may mislead or be confused with *Queneesh Studios Incorporated* in the minds of the public”; as well as damages, the option of an account of profits, a delivery up order for destruction of all materials containing the aforementioned words; proof that *Queneesh Developments* has ceased advertising under those names, and “special damages”: Writ of Summons, *supra* note 173, paragraphs (a)-(f).

¹⁸⁸ Statement of Claim, *supra* note 173, paragraph 14.

¹⁸⁹ The Comox Indian Band originally filed a Notice of Motion seeking to be joined as a defendant in the proceedings. The basis of its application was its assertion of an exclusive aboriginal right in the name “*Queneesh*”: Supporting Affidavit of Wendy R. Holland sworn 25 April 1996, filed on 26 April 1996 by *Queneesh Developments Pty Ltd* (hereinafter “*Holland Affidavit*”); paragraph 4. However, this application was refused on the basis that aboriginal rights were unconnected with the issue of passing off. Even if there was some connection, the Master held: ...the proof of aboriginal rights as a matter of experience has proved peculiarly lengthy and difficult in the past. The plaintiff should not have its litigation tied up in the claim by the Comox Band to an aboriginal right... Judgment at 5-6, citing *Attorney-General of Canada v Aluminium Company of Canada* (1987) 10 B.C.L.R. (2d) 371 at 379, 381.

¹⁹⁰ Counterclaim, *supra* note 172, paragraph 6.

¹⁹¹ *Ibid.* paragraph 10. Liz McLeod, *supra* note 176 states that term *Queneesh*, which is the Coast Salish term for “whale” would be spelt linguistically as “kwenis”.

¹⁹² Counterclaim, *supra* note 172, paragraphs 16-19.

damages and an account of profits.¹⁹³ Studios has since denied that Developments or the Band has any proprietary interest in the name *Queneesh*. As yet no trial date has been set.

(iii) Commentary

Like the *Echo Mask* proceedings, the *Queneesh* proceedings provides an interesting example of how aboriginal cultural heritage claims may be framed in aboriginal rights litigation. Like the Nuxalk in the *Echo Mask* proceedings, the Comox Indian Band (through Developments) seek conventional settler remedies for infringement of its aboriginal right, in this case remedies associated with passing off. The case therefore demonstrates how claims for aboriginal rights in intangible aspects of cultural heritage might be framed in a commercial setting. The Comox pleadings are also interesting for their treatment of the “territorial” issue. The Comox have alleged that Studios passed off the name *Queneesh* by operating in Comox traditional territories. Passing off is an example of a settler regime which uses injunctions flexibly to addresss the special facts of each case. Injunctions against the use of names can be limited geographically, or limited to particular uses or contexts. Presumably the court in these proceedings would, if the case succeeds, refer to these principles in awarding an injunction to protect the Comox Indian Band’s aboriginal right in the name *Queneesh*. Arguably, a similarly flexible approach should be taken to the protection of aboriginal rights in communal aboriginal designs in Australia.

¹⁹³ *Ibid.* paragraph 21.

7. Conclusion

The Canadian experience is fruitful as a source of examples of aboriginal rights litigation concerning cultural heritage, and shows how Australian law could escape the land title connection in *Mabo*. The “integral to a distinctive culture” test is unfortunate, and arguably, unnecessary if the *Mabo* test centring on aboriginal laws is used to found aboriginal rights. In particular, its confinement of aboriginal rights to largely non-commercial practices is, it is argued, unsuitable for application to communal aboriginal designs cases and should be distinguished when this question is considered in Australia. However, there are other indications in the Canadian experience of how aboriginal rights claims might be framed under an extended *Mabo* doctrine. In particular, the recently commenced British Columbian proceedings discussed in Part 6 demonstrate the flexible approach which might be taken towards the kinds of remedies which might be used to protect communal aboriginal designs in an Australian setting.

On a broader scale, it can be argued that aboriginal peoples right to self-determination over their cultural heritage is only imperfectly advanced with aboriginal rights litigation. As stated in *Vanderpeet*, aboriginal rights are predominantly about the “reconciliation” of aboriginal and settler (or “common law”) perspectives. Accordingly, the disadvantages and advantages of using legal “rights” to advance political claims against the majority are particularly evident. In aboriginal rights disputes it is the settler society and its laws which determine the outcome of the dispute, and, as evidenced by *Vanderpeet*, such outcomes may be very influenced by ideological majoritarian views of what is worth protecting in aboriginal cultures. In particular, in aboriginal rights litigation

it is clear that “variant” and displaced communities, and urban aboriginal peoples, are at the periphery. It is the “authentic” traditions of largely undisrupted societies which are protected, and not aboriginal peoples’ own vision of their place in contemporary Canadian society. Finally, it seems clear from the analysis in both *Mabo* and *Vanderpeet* that Australian and Canadian aboriginal rights jurisprudence, being concerned with evidence of traditional laws and customs of specific aboriginal communities, does not provide answers to issues general issues of cultural appropriation, such the appropriation of generic aboriginal imagery discussed in Chapter 2.

However, despite these problems, it is argued that aboriginal rights are a potentially powerful tool for aboriginal peoples in their negotiations with the settler society and should therefore not be underestimated. Aboriginal people are free to choose aboriginal rights litigation as a strategy to advance their right to self-determination. To do so is to risk an unfavourable result. However, if the result is favourable, aboriginal rights provide a settler-mandated enforceable right against non-members of aboriginal communities, thus bridging the gap between aboriginal and settler laws. If Australian courts are willing to follow the Canadian lead towards the recognition of aboriginal rights in cultural heritage while bearing in mind its potential pitfalls, it is possible that in future they will be able to refer directly to aboriginal laws in order to address the unauthorised reproduction of communal aboriginal designs.

Chapter 6

Looking For Solutions in Canada The Potential of Self-Government

...the parties acknowledge the entitlement of the Simgigat and Sigidimhaanak (hereditary chiefs and matriarchs) to tell their Adaawak (oral histories) relating to their Ango'oskw (family hunting, fishing and gathering territories) in accordance with the Ayuuk (Nisga'a traditional laws and practices)...

Preamble, Nisga'a Treaty Negotiation Agreement-In-Principle, 1996.¹

1. Introduction

As noted in Chapter 2, many Fourth World aboriginal peoples have asserted the right to self-determination. However, in the majority of cases this has not involved challenges to state sovereignty. Instead, aboriginal peoples have generally sought to "negotiate into" state structures through forms of "internal decolonisation" which recognise their distinct status and their power to determine their own internal affairs. "Self-government" is one such kind of internal self-determination. Although difficult to define at a specific level, self-government is, as one commentator put it, a "*subordinate form of sovereignty within overall [state] sovereignty*".² This Chapter examines how aboriginal peoples in Australia might use self-government policy to address communal designs disputes and other cultural appropriation issues. The Chapter takes as its model

¹ Government of Canada, the Province of British Columbia and the Nisga'a Tribal Council; *Nisga'a Treaty Negotiation Agreement-In-Principle*, (Ottawa: Queens Printer, 1996) (hereinafter *Nisga'a AIP*).

²G. Nettheim, "International Law and Sovereignty" in C. Fletcher, ed., *Aboriginal Self-Determination in Australia* (Report Series, Australian Institute of Aboriginal and Torres Strait Islander Studies) (Canberra: Aboriginal Studies Press, 1994) 71 at 72.

the Canadian experience of self-government, focusing on the Nisga'a Treaty Negotiation Agreement-In-Principle³ ("*Nisga'a AIP*") signed between the Nisga'a Tribal Council, The Province of British Columbia and the Federal Government in February 1996. The Nisga'a AIP contains the most comprehensive regime for protection of aboriginal cultural heritage of any self-government agreement in Canada. Of particular interest are the provisions for Nisga'a law-making power over the accreditation and reproduction of "cultural symbols".

Self-government has not yet been proposed as a solution to the communal designs disputes or other cultural appropriation issues of concern to Australian aborigines. This is not surprising given the piecemeal nature of self-government arrangements in Australia to date. However, as discussed in Chapter 3, more recent reform proposals support aboriginal peoples' right of cultural self-determination. The Canadian experience of self-government provides valuable insights into the potential of self-government initiatives to address these issues. In order to draw from the Canadian experience, the Chapter takes a broad perspective. It commences with a brief review of Australian and Canadian developments. It then evaluates the Nisga'a AIP for its potential to resolve communal designs disputes and to deal with the issues raised in Chapter 4. In particular, it considers the advantage of escaping the problems associated with litigation in settler courts against the difficulties posed by jurisdictional limits in Canadian self-government policy.

³ *Supra* note 1 (hereinafter "*Nisga'a AIP*").

2. Australian Self-Government Policy

"Self-government" or "self-determination"⁴ has been part of government policy in Australia since the official abandonment of assimilation policy in the 1970s Whitlam government era.⁵ Although land rights has been the focus of aboriginal efforts, self-government is of growing importance to the process of "reconciliation". As Professor Daes said in her Canberra speech in 1993:

*There is no reconciliation without self-determination....Australia will never be reconciled with Aboriginal and Torres Strait Islander peoples until they are genuinely free to choose their own destiny, whatever that may be.*⁶

The major initiative in self-government policy to date is the establishment of the Aboriginal and Torres Strait Islander Commission ("A.T.S.I.C."),⁷ a federally funded body comprised primarily of elected aboriginal representatives. A.T.S.I.C. has primary

⁴ It appears that in Australia the terms are used interchangeably: see the literature review, *infra* note 5. The term "self-government" will be preferred here for consistency with the Canadian terminology.

⁵B. Wells & J. Doyle, "Reconciliation and the Constitution" in Johnson et al, *Indigenous Australians and the Law* (Sydney: Cavendish Publishing (Australia), 1997) 183 at 183. For discussions of self-government developments in Australia, see generally, B.W. Morse, *Aboriginal Self-Government in Australia and Canada* (Kingston: Institute of Intergovernmental Relations, 1984); H.C. Coombes, *Aboriginal Autonomy: Issues and Strategies* (Cambridge: Cambridge University Press, 1994); C. Fletcher, ed., *Aboriginal Self-Determination in Australia*, *supra* note 2; N. Dyck, ed., *Indigenous Peoples and the Nation-State: Fourth World Politics in Canada, Australia and Norway* (Social and Economic Papers No.14) (St Johns, Newfoundland: St Johns Institute of Social and Economic Research, 1985) (hereinafter "Dyck, *Indigenous Peoples*"); F. Brennan, "Self-Determination: The Limits of Allowing Aboriginal Communities to be a Law Unto Themselves" (1993) 16 U.N.S.W.L.J. 245; House of Representatives Standing Committee On Aboriginal Affairs, *Our Futures Our Selves: Aboriginal and Torres Strait Islander Community Control, Management and Resources* (Canberra: Australian Government Printing Service, 1990); Royal Commission into Deaths in Custody, *Royal Commission into Deaths in Custody - Final Report* (Canberra: Australian Government Printing Service, 1991), Chapters 20 and 27 (hereinafter *Royal Commission Final Report*); Queensland, Legislation Review Committee, *Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland - Final Report* (Brisbane, Queensland Government Printer, 1991) (hereinafter "*Queensland Inquiry*").

⁶ Professor Daes, Chairperson of the United Nations Working Group on Indigenous Populations, *The Position of Indigenous People in National Constitutions* (speech to the Canberra conference, 4-5 June 1993) (Canberra, Australian Government Printing Service, 1993) at 62, cited in Wells & Doyle, *supra* note 5 at 183.

⁷ A.T.S.I.C. is established under the *Aboriginal and Torres Strait Islander Act* 1989 (Cth).

responsibility for funding service delivery to aboriginal communities and for advising the government on aboriginal issues. In 1991 the *Royal Commission into Aboriginal Deaths in Custody*⁸ strongly recommended that "self-determination" (a concept the Commission found difficult to define) be pursued to address the issues underpinning the serious rate of deaths in custody of aboriginal people. In response, the Commonwealth argued that it was already fulfilling its commitment to aboriginal self-determination through A.T.S.I.C.⁹ However, debate exists in the aboriginal community as to whether A.T.S.I.C. is truly an "aboriginal" body or does advance aboriginal self-government. In the opinion of lawyer Irene Watson, a member of the Tanganekald Peoples:

...it is a lie to suggest we have any real degree of self-determination through governmental bodies such as [A.T.S.I.C.].¹⁰

She attacks A.T.S.I.C. on the basis that its election system does not reflect aboriginal methods of decision-making by consensus, that it continues to impose artificial administrative divisions over traditional aboriginal political boundaries, and that its closeness and accountability to government makes it liable to conflicts of interest.¹¹

At state level there are various arrangements for aboriginal powers of consultation and decision-making under land claims and community services legislation. Some more

⁸*Royal Commission Final Report*, *supra* note 5.

⁹Brennan, *supra* note 5 at 254. The federal government has also taken this position at the international level, at the 1992 session of the United Nations Working Party On Indigenous Populations: see G. Nettheim, "The Consent of the Natives: *Mabo* and Indigenous Political Rights" in Law Book Company, *Essays On the Mabo Decision* (Sydney, Law Book Company, 1993) 103 (hereinafter "Nettheim, *Consent of the Natives*") at 114.

¹⁰I. Watson, "Reconciliation" in E. Johnson et al, *Indigenous Australians and the Law*, *supra* note 5, 213 at 222. For a sample of other opinions on A.T.S.I.C., see G. Nettheim, *Consent of the Natives*, *supra* note 9 at 114, who refers to submissions of Aboriginal non-government organisations at the 1992 session of the United Nations Working Party on Indigenous Populations; Wells & Doyle, *supra* note 5 at 184.

¹¹Watson, *ibid.* at 254-255.

isolated communities have assumed local government powers.¹² There are also land councils with trustee's powers to hold land on behalf of aboriginal communities.

There have been attempts to raise the issue of self-government or self-determination at the national level. The "Makaratta" aboriginal statement of 1981 sought the development of self-government "in each respective tribal territory".¹³ Most significantly, on 12 June 1988 the Hawke Government and aboriginal leaders signed the "Baranga Statement", under which the federal government undertook that it was "committed to work for a negotiated Treaty with aboriginal people".¹⁴ However this treaty, which might have served as a starting point for national talks on self-government, was shelved in favour of the less controversial Council for Aboriginal Reconciliation in 1991,¹⁵ whose functions are restricted to "convening meetings and providing Reports to the Federal Government".¹⁶ In the meantime, there have been reports from sources such as the House of Representatives Standing Committee on Aboriginal Affairs in 1990,¹⁷ the Royal Commission in 1991,¹⁸ and the Queensland Legislative Review Committee,¹⁹ also in

¹²On arrangements in relation to land management, see for example, *Aboriginal Land Act* 1991 (Qld); *Torres Strait Islander Land Act* 1991 (Qld); *Aboriginal Land Rights Act* 1983 (N.S.W.), and the Plan of Management for Uluru National Park prepared under the *National Parks and Wildlife Conservation Act* 1975 (Cth), discussed in G. Neate, "Looking After Country: Legal Recognition of Traditional Rights To and Responsibilities For Land" (1993) 16 U.N.S.W.L.J. 161. On arrangements for communities in north Queensland, see for example the *Community Services (Aborigines) Act* 1984 (Qld) and the *Community Services (Torres Strait) Act* 1984 (Qld), discussed in Nettheim, *The Consent of the Natives*, *supra* note 9 at 114-115.

¹³ Morse, *supra* note 5 at 80-81.

¹⁴ Baranga Statement, paragraph 1: see Wells & Doyle, *supra* note 5 at 183.

¹⁵Nettheim, *Consent of the Natives*, *supra* note 9 at 116, noting that the Council for Aboriginal Reconciliation, set up under the *Council for Aboriginal Reconciliation Act* 1991 (Cth) was substituted when the treaty proposal failed to gain broad political support.

¹⁶ Watson, *supra* note 10 at 213.

¹⁷*Supra* note 5, discussed in Nettheim, *Consent of the Natives*, *supra* note 9 at 114-115; Brennan, *supra* note 5 at 254-255.

¹⁸ *Royal Commission Final Report*, *supra* note 5, discussed in Nettheim, *Consent of the Natives*, *supra* note 9 at 114-115; Brennan, *supra* note 5 at 254-255.

1991, all of which recommended enhancing aboriginal control of service delivery and policy design and, in the case of the Legislative Review Committee, allowing aboriginal communities in Queensland to adopt their own constitution and assume responsibility for a range of government functions.²⁰ However, none of these reports have resulted in far-reaching changes. At this stage, it appears that a uniform national policy on the implementation of comprehensive self-government agreements is unlikely in the near future. Rather, it seems that self-government initiatives will continue to develop slowly on a region-by-region basis. This reflects the diversity and traditional independence of aboriginal communities. As commentator H.C. Coombes observes:

*...an informal federation of autonomous groups for specific shared purposes, accompanied by a reservation of the independence of the individual groups forming the federation, seems to be a characteristic of aboriginal thought.*²¹

As noted in the introduction above, to date self-government has not been advanced as a proposal for resolving communal designs disputes or other cultural appropriation issues. However, this is not to say that self-government in some form could not be used. An example of the "incremental" approach just noted is found in the Central Land Council's 1992 Policy regarding sacred objects. The Central Land Council is a Commonwealth statutory authority under the *Aboriginal Land Rights (Northern Territory) Act* 1976. Its members are senior traditional land owners and elders of central Australian communities. The Policy does not have the force of law. However, it represents a common statement on behalf of a number of communities which could form the basis for

¹⁹ *Queensland Inquiry*, *supra* note 5, discussed in Nettheim, *Consent of the Natives*, *supra* note 9 at 114-115.

²⁰ This was to be implemented under new legislation proposed in the Report. See further Nettheim, *ibid.*

²¹ H.C. Coombes, *supra* note 5 at 176.

implementation by government. The Policy asserts, among other things, that Aboriginal custodians are the rightful owners of secret and sacred objects, and that trade in such objects is offensive. The Policy calls on the government and A.T.S.I.C. to uphold these principles.²²

There is also Golvan's suggestion (discussed in Chapter 3) that the *Aboriginal and Torres Strait Islander Heritage Protection Act*²³ could be extended to give "local aboriginal communities" some form of "civil rights" over communal aboriginal designs. As already discussed, the concept of "local aboriginal communities" is already in operation under the Victorian provisions of the Act. Although the Act does not provide for "self-government" in a strict sense via these local aboriginal communities, they suggest a model by which communities could move towards self-government over communal aboriginal designs by constituting themselves as "local aboriginal communities" and seeking powers to enforce rights in communal designs.

3. Canadian Self-Government Policy

3.1 Local Factors

Three important local facts have influenced the development of self-government policy in Canada,²⁴ making it diverge sharply from the situation found in Australia. The

²²Cited in T. Janke, *Our Culture, Our Future: Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property* (Sydney: Australian Institute for Aboriginal and Torres Strait Islander Studies, 1997) 88, citing A. Clements, "The Central Land Council Policy on Sacred Objects" (1996) 28 C.O.M.A. Bull. 9.

²³ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

²⁴For discussions of self-government in Canada see for example J. Rick Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart, 1986), Part Four "Indian Self-Government"; L.L. Bear, M. Boldt & J.A. Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984); M. Boldt and J.A. Long, eds., *The*

first is the question of Quebec secession, which has traditionally been linked to the question of aboriginal political status.²⁵ This linkage led to the term "self-government" being preferred by settler governments over concepts such as "self-determination" and "sovereignty" in relation to aboriginal peoples.²⁶ The avowed disassociation of self-government policy from questions of secession is strongly present in the 1995 federal policy:

*The inherent right of self-government does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states. On the contrary, implementation of self-government should enhance the participation of Aboriginal peoples in the Canadian federation, and ensure that Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society.*²⁷

The 1995 federal policy forms the foundation of today's federal treaty negotiations and is discussed further below.

Quest for Justice: Aboriginal Peoples and Aboriginal Rights (Toronto, University of Buffalo Press, 1985), D. C. Hawkes, *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989); F. Cassidy & R. Bish, *Indian Government: Its Meaning In Practice* (Lantzville: Oolichan Books, 1989); F. Cassidy, ed., *Aboriginal Self-Determination* (Lantzville: Oolichan Books, 1991); Part 5, "Aboriginal Rights and Indian Government"; J. Hylton, *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon, Purich Publishing, 1994); D. Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada", in *Charte Canadienne Des Droits et Libertes*, G.A. Beaudoin & E.P. Mendes, eds, 3rd ed., (Montreal: Wilson & Lafleur Itee, 1996), Chapter 18 (hereinafter "Sanders, *Pre-Existing Rights*"); P. Hogg and M.E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 Can. Bar. Rev. 187 (hereinafter "Hogg & Turpel"); J. Borrows "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291; P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382 (hereinafter "Macklem, *Borders*").

²⁵ See D. Sanders, "The Indian Lobby and the Canadian Constitution, 1978-1982" in Dyck, *Indigenous Peoples*, *supra* note 5, 151 (hereinafter "Sanders, *Indian Lobby*") at 157.

²⁶ Sanders, *ibid.* at 154, notes that in 1980 Prime Minister Trudeau had acknowledged the concept of "internal native self-government" but refused to accept terms such as "self-determination" or "autonomy". See also Macklem, "Borders", *supra* note 24 at 387, note 2.

²⁷ Government of Canada, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: DIAND, 1995) (hereinafter "Federal Policy") at 4.

The second is that self-government has been seen as a natural evolution of existing reserve communities. While Australia has largely abandoned its reserve system, in Canada the reserve system survived relatively intact under the administration of band councils overseen by what is now the Department of Indian Affairs and Northern Development. Accordingly, the central model of self-government remains to this day the aboriginal reserve community occupying an exclusive territorial land base.²⁸ The transition contemplated in most cases is from administration of reserves under the Indian Act²⁹ to self-government of those reserves.

Thirdly, because of the existence of early settlement treaties in most parts of Canada, aboriginal peoples have argued that an original "nation to nation" relationship existed with the Crown. Aboriginal peoples' assertion that the Crown recognised their "nation" status on settlement is a significant element of their contemporary claims for recognition as distinct self-governing political entities under self-government. It is also the basis for their assertion that the right to self-government is "inherent", and not delegated by the Crown as sovereign.³⁰

3.2 Modern Historical Developments

²⁸ Examples of this model appear in major policy initiatives and reform proposals beginning (at least) with the Hawthorn Report (Indian Affairs and Northern Development, *A Survey of the Contemporary Indians of Canada*, ed. H.B. Hawthorn (Ottawa: Queens Printer, 1966), then the 1983 Penner Report (Special Committee on Indian Self-Government, *Report of the Special Committee on Indian Self-Government*, (Ottawa: Supply and Services Canada, 1983) (hereinafter "*Penner Report*"); the Trudeau government's abortive "Indian Self-Government Act" bill of 1984 and now the 1995 federal policy itself. Only the Royal Commission on Aboriginal Peoples has made a serious attempt to include urban aboriginal peoples, Metis and other "variant" aboriginal communities in models of self-government: see Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996), 5 volumes (hereinafter "*RCAP Report*"), vol. 4, ch. 7 "Urban Perspectives".

²⁹ *Indian Act* 1985 R.S.C. I-5 (hereinafter "*Indian Act*").

³⁰ For a discussion of these aboriginal perspectives, see the collection of extracts from a conference organised by the Assembly of First Nations and the University of Toronto in F. Cassidy, *Aboriginal Self-Determination*, *supra* note 24; and the collections edited by Boldt & Long, *ibid.*

A brief outline of the modern development of Canadian self-government policy begins with the Trudeau government's introduction of the assimilationist "White Paper" in 1969.³¹ This policy sought to remove all legal recognition of cultural difference in the form of "Indian status" and to abolish the reserve system. The event is significant for the ensuing outcry by aboriginal groups which soon led to the final laying to rest of assimilation policy in Canada.³² Following on from this was the Supreme Court's decision in *Calder v. British Columbia*³³ in 1973. In this case the Nisga'a of British Columbia argued that their aboriginal land title, never ceded by treaty, had survived unextinguished. The decision suggested for the first time that surviving aboriginal title might be recognised by the courts. The potential impact of this decision brought about a sea-change in aboriginal-government relations. Soon afterwards, questions of unextinguished aboriginal title held up a major development project in northern Quebec, and in the years to come forced the negotiation of settlements in many frontier development areas "north of 60".³⁴ There were subsequently some ad hoc developments towards self-government arrangements for certain aboriginal groups.³⁵

The next significant event came in 1982, when aboriginal groups managed to secure the inclusion into the Constitution of section 35(1) "recognizing and affirming" the

³¹Government of Canada, *Statement of the Government of Canada on Indian Policy*, (Ottawa: Queens Printer, 1969).

³² See H. Cardinal, *The Rebirth of Canada's Indians* (Edmonton: Hurtig Publishers, 1977) at 107. On this period generally, see S.M. Weaver, *Making Canadian Indian Policy - The Hidden Agenda 1968-1979* (Toronto: University of Toronto Press, 1981).

³³ *Calder v British Columbia* [1973] S.C.R.313.

³⁴In 1973 the Canadian government announced a policy of land claims negotiation in major non-treaty areas: see further Sanders, *Pre-Existing Rights*, *supra* note 24 at 1002.

³⁵See for example the Cree Naskapi Act of 1984 (R.S.C. c.C-18) and the Sechelt Self Government Act of 1986 (B.C.S c. C-27). See further Sanders, *Pre-Existing Rights*, *supra* note 24 at 1018.

“existing treaty and aboriginal rights of the aboriginal peoples of Canada”.³⁶ The potential for section 35(1) to include a right of self-government was not known then. Accordingly, after section 35(1) was introduced further talks were scheduled on the issue of an express constitutional recognition of aboriginal self-government. Through a series of “First Ministers Conferences” in the following few years no express constitutional wording could be agreed on. However, during this period a ground-swell of general consensus on self-government developed among political leaders. An important factor in this development was the release of the “Penner Report”,³⁷ recommending express constitutional recognition of a right of self-government for “Indians”.³⁸ A further important step in the recognition of self-government was the Supreme Court’s landmark decision in *R v. Sparrow*.³⁹ The decision had latent implications for recognition of a right of self-government under section 35(1).⁴⁰ As with *Calder*, the potential impact of the decision stimulated government negotiation of a new relationship with aboriginal peoples.

The final catalyst towards the recognition of self-government was the proposal agreed on in the “Charlottetown Accord” referendum proposal in 1991. The proposal,

³⁶*Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.) 1982, c.11, section 35(1).*

³⁷*Supra*, note 29.

³⁸The terminology of “Indians” reflected the wording of section 91(24) of the Constitution, which gives the Canadian government power over “Indians, and Lands Reserved for the Indians”. The term “Indian” has since 1876 been defined in the *Indian Act*, and has excluded many aboriginal persons from its scope over the course of its legislative history. For an overview of the development of legislation concerning “Indians” see Indian Registration and Band Lists Directorate, *Identification and Registration of Indian and Inuit Peoples*; paper prepared for the Royal Commission on Aboriginal Peoples (Ottawa: DIAND, 1993) For critiques of this restrictive interpretation of section 91(24) and its effects see for example, Hawthorn Report, *supra* note 29 at 1:249-253; RCAP Report, *supra* note 29 at 539-540.

³⁹[1990] 1 S.C.R. 1075. Further citations were provided in Chapter 5.

⁴⁰As Sanders observes, the implication was that if the Musqueam right to fish had not been extinguished by decades of heavy regulation under fisheries laws, then it was arguable that an aboriginal right to self-government also survived intensive government regulation, and could be recognised under section 35(1) without the need for further constitutional amendments: D. Sanders, *Indian Self-Government* (Paper Prepared for Self-Government Course, Faculty of Law, University of British Columbia, September 1996) [unpublished] (hereinafter “Sanders, *Indian Self-Government*”) at 2.

agreed to by settler and aboriginal leaders,⁴¹ was ultimately defeated but introduced a general mission statement avoiding the pitfalls of detail. Notably, the proposal contained a statement endorsing the authority of aboriginal peoples to “*safeguard and develop their languages, cultures, economies, identities, institutions and traditions*”.⁴² With this defeat went the chance of entrenchment of an express right of self-government.

In the meantime, negotiations had continued on the “north of 60” agreements, some of which now include cultural heritage provisions. These provisions generally relate to the management of culturally significant sites, the ownership of objects and human remains found on traditional lands and the repatriation of some museum held cultural objects.⁴³ However, they have not tended to make any significant advance on the legal environment concerning aboriginal cultural heritage claims under existing settler regimes.⁴⁴ For example, under repatriation arrangements, objects which are deemed by museums to be of “unique” or “national” significance may be retained in museum collections, regardless of their significance to the aboriginal communities from which they originated. Others may be recalled at the museum’s discretion if needed for a special exhibit or research project. Similarly, in respect of culturally significant sites, aboriginal communities are given only consultation rights over development. And these arrangements have

⁴¹ For a discussion of the Accord, see Hogg & Turpel, *supra* note 24 at 193.

⁴² Cited in Hogg & Turpel, *supra* note 24 at 193.

⁴³ See for example, Agreement between the Inuit of the Nunuvut Settlement Area and Her Majesty the Queen in Right of Canada, (Ottawa: DIAND, 1993) chapters 33 and 34; *Gwich'in Comprehensive Land Claim Agreement*, Appendix C “Yukon Transboundary Agreement” (Ottawa, DIAND, 1992), chapter 9 (North West Territories); *Implementation Plan for the Sahtu Denes and Metis Comprehensive Land Claim Agreement* (Ottawa: DIAND, 1993), (North West Territories) 157-169; *First Nation of Nacho Nyak Dan Final Agreement*, (Ottawa: DIAND, 1993) (an example implementing the *Yukon Umbrella Agreement* which covers a number of similar agreements), chapter 13.

⁴⁴ For a discussion of these regimes see Chapter 2.

included no provisions with respect to intangible aboriginal cultural heritage, leaving existing intellectual and cultural property regimes in force.⁴⁵

An outcome of the constitutional talks was the forming of political consensus on a national self-government policy. The Chretien government came to power in 1993 with a commitment to recognition of the inherent right.⁴⁶ The importance of these prior developments is acknowledged in the introduction to the 1995 federal policy enacted to carry out this commitment:

*For more than a decade there have been serious efforts, on the part of governments and Aboriginal representatives, to amend the Canadian Constitution to include explicit recognition of the inherent right of Aboriginal self-government. Although these efforts were ultimately unsuccessful in achieving a constitutional amendment, they did succeed in building a broad measure of consensus for aboriginal self-government.*⁴⁷

Finally, there have been more recent judicial developments on recognition of self-government under section 35(1) in the Supreme Court of Canada's decisions in *R v. Pamajewon*⁴⁸ and *Delgamuukw v. British Columbia*.⁴⁹ As Australia does not have a similar constitutional provision or case law suggesting the possibility of such a right, they will be dealt with only briefly. The former decision saw the Court dealing for the first time, albeit indirectly, with the recognition of an inherent right of self-government under section 35(1) of the Constitution. The case concerned the issue of whether on-reserve gambling was protected as an aboriginal right. The Court, led once again by Lamer CJ, held that the

⁴⁵ *Supra*, note 43.

⁴⁶ *Federal Policy*, *supra* note 27 at 1, referring to the "Liberal Red Book", *Creating Opportunity: The Liberal Plan for Canada*. See further Hogg & Turpel, *supra* note 24 at 189, note 4.

⁴⁷ *Federal Policy*, *supra* note 27 at 3.

⁴⁸ [1996] 2 S.C.R. 821; 137 D.L.R. (4th) 204.

⁴⁹ *Delgamuukw v. British Columbia* [1997] S.C.J. No. 108 (QL).

question at issue was whether “high stakes gambling” was “integral to the distinctive culture” of the aboriginal group before contact. Applying the narrow *Vanderpeet* test, it found that such a right did not exist, and that if a right of self-government were implied under section 35(1), it did not include a right of self-government. Given the outmoded “traditional/post-contact” dichotomy inherent in the *Vanderpeet* test, it seemed that *Pamajewon* had essentially eliminated the “forward-looking” elements of the legal definition of self-government in Canada.⁵⁰ However, this position must now be re-evaluated in light of the *Delgamuukw* decision. The decision, which was received too late for incorporation into this thesis, appears to apply a test of continuous occupation and use of land rather than the “integral to a distinctive culture” used in relation to cultural practices.

3.3 The 1995 Federal Policy

(a) Structure

The 1995 federal policy is obviously influenced by the history of disputes over the exact meaning of self-government.⁵¹ Accordingly, it represents an attempt to push forward by using the already existing section 35(1) of the Constitution. The policy utilises section 35(1) in two ways. First, it acknowledges the Canadian government’s recognition of an “inherent right” of self-government as within the aboriginal rights recognised and affirmed under section 35(1):

⁵⁰Sanders, *Indian Self-Government*, *supra* note 40 at 12. This is the result of restrictively interpreting *Sparrow* to limit self-government powers to matters which were integral to or connected with traditional practices or land use: Sanders, *Pre-Existing Rights*, *supra* note 24 at 1022.

⁵¹The introduction to the policy states that the policy represents the Canadian government’s development of “an approach to implementation that focuses on reaching practical and workable agreements on how self-government will be exercised, rather than trying to define it in abstract terms.”

*Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.*⁵²

After setting out this general acknowledgment, the policy takes a "flexible" approach. It does not concede that any particular powers of self-government exist under the "inherent" right, favouring instead a tailor-made approach via negotiation with individual communities:

*...under the federal approach, the central objective of negotiations will be to reach agreements on self-government as opposed to legal definitions of the inherent right.*⁵³

The policy states that self-government agreements will be enshrined as modern "treaties" under section 35(1). This approach seems geared at avoiding abstract "sticking points" which could lead to litigation:

*The Government acknowledges that the inherent right of self-government may be enforceable through the courts and that there are different views about the nature, scope and content of the inherent right. However, litigation over the inherent right would be lengthy, costly and would tend to foster conflict. In any case, the courts are likely to provide general guidance to the parties involved, leaving it to them to work out detailed arrangements...for these reasons, the Government is convinced that litigation should be a last resort*⁵⁴...

However, there is a twist. Having left the "inherent right" to be defined by negotiation, the policy goes on to set out the subjects of power on which the Canadian government is, or is not, "prepared to negotiate". There are three groups of subjects. The first consist of core powers which are:

⁵² Federal Policy, *supra* note 27 at 4.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

*internal to the group, integral to its distinctive Aboriginal culture, and essential to its operation as a government or institution.*⁵⁵

The policy provides that these core internal powers may generally be made the subject of sole Aboriginal jurisdiction and authority under self government agreements. The second group of powers are those which:

*may go beyond matters that are integral to Aboriginal culture or that are strictly internal to an Aboriginal group...In these areas, laws and regulations tend to have impacts that go beyond individual communities.*⁵⁶

Primary power over these areas is, according to the policy, to remain with the federal (or provincial) government. However, it provides, there would be scope for negotiation of joint arrangements in some areas. Finally, the third category of subject matters includes those on which:

*there are no compelling reasons for Aboriginal governments or institutions to exercise law-making authority. These subject matters cannot be characterized as either integral to Aboriginal cultures, or internal to Aboriginal groups.*⁵⁷

This category includes subject matters of "national interest". Negotiation of self-government powers is not available on this category. The distribution within these categories of subject matters relevant to aboriginal cultural heritage claims is discussed below.

The separation of these categories demonstrates that the 1995 federal policy is designed to ensure federal government control over the implementation of self-

⁵⁵*Ibid.* at 5.

⁵⁶*Ibid.* at 6.

⁵⁷ *Ibid.*

government and the scope of powers available. This is further demonstrated in the general statement that:

*the inherent right will not lead to the automatic exclusion of federal and provincial laws...Prior to the conclusion of self-government agreements, federal and provincial laws would continue to apply to the extent that they do currently.*⁵⁸

This statement suggests an orderly approach to the implementation of self-government, allowing settler laws to continue to apply until treaties are negotiated. A further assertion of external control over the "inherent right" is the policy's assertion that the Charter of Rights and Freedoms⁵⁹ must apply to all negotiated agreements.⁶⁰ The implications of the 1995 federal policy for the resolution of aboriginal cultural heritage claims is discussed further below.

3.4 Cultural heritage provisions

As noted above the 1995 federal policy includes three categories of subject matters for negotiation of self-government agreements. Significantly for aboriginal cultural heritage claims, subject matters within the first category of "core powers" include:

- *Aboriginal language, culture and religion*
- *education*

....

- *administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws*

...

- *natural resources management*⁶¹

⁵⁸ *Ibid.* at 7.

⁵⁹ *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.*

⁶⁰ *Federal Policy, supra* note 27 at 4-5. A consideration of the application of the Charter to self-government agreements is beyond the scope of this thesis.

⁶¹ *Federal Policy, supra* note 27 at 5.

The inclusion of "culture" within this "core" category at first glance suggests that aboriginal groups will have extensive jurisdiction over cultural heritage issues under self-government. However, the issue is not so simple. The second category of powers, although not specifically referring to cultural heritage subjects, indicates that matters which "have impacts which go beyond individual communities" must be the subject of negotiation with settler governments.⁶² As is shown below, this is significant in the regulation of cultural heritage issues outside the defined territory of the Nisga'a under the Nisga'a AIP. Finally, the third category of "national interest" powers, on which negotiation is prohibited, includes "intellectual property".⁶³ Accordingly, it seems, aboriginal self-government powers to regulate "culture" under the first category are not permitted to cross into an area covered by intellectual property laws. Where this occurs, aboriginal jurisdiction ends. The significant practical effect of this interplay of categories on aboriginal cultural heritage claims is apparent in the Nisga'a AIP.

4. The Nisga'a AIP

The Nisga'a AIP will be the first modern constitutionally enshrined treaty endorsing comprehensive self-government provisions in Canada and an important precedent in the implementation of the Federal Policy. As noted in the introduction to this Chapter, it contains the most comprehensive provisions on the regulation of aboriginal cultural heritage in any self-government or land rights agreement in Canada to date. In particular, its provisions for Nisga'a government power over the "regulation and

⁶²*Ibid.* at 6.

⁶³*Ibid.* at 6-7.

reproduction of cultural symbols"... are of potential interest in relation to the debate surrounding the communal designs disputes.

4.1 Introduction: The Nisga'a Nation

The Nisga'a have lived in the remote Nass River area of north-western British Columbia for 10,000 years.⁶⁴ Their population today numbers roughly 9,000, two thirds of whom live in Nisga'a traditional lands. The remaining population live primarily in the neighbouring small urban centres of Prince Rupert, Prince Edward and Terrace. The Nisga'a have had a long history at the forefront of aboriginal rights claims in Canada and the world.⁶⁵ In 1968 the Council launched the landmark *Calder* action⁶⁶ claiming a declaration that their aboriginal title to 1,000 square miles of territory around the Nass River had never been extinguished. The case is named after Frank Calder, who was at that time was the council's president. As noted in Chapter 5, the decision was ultimately hung on a technicality in the Supreme Court, a result the Nisga'a regarded a disappointing rebuff. However, the equivocal result of the decision paved the way for the Nisga'a to become the first aboriginal group to begin land claim negotiations with the federal and British Columbia governments, in 1976. The Nisga'a AIP is an important step in this long process. Although subject to final agreement, the Nisga'a AIP is the first agreement to

⁶⁴ Nisga'a Tribal Council, *Nisga'a: People of the Nass River* (Vancouver: Douglas & McIntyre, 1993) (hereinafter "*People of the Nass River*"), foreword.

⁶⁵ Through the contact period the Nisga'a consistently maintained claims to their territory, despite being removed under protest to reserves in the earlier part of this century. In 1890 the Nisga'a formed the Nisga'a Land Committee, the first of its kind in Canada. In 1913 the Nisga'a took an historic land claims petition to the Imperial Government, but were rebuffed. The following decades were a period of intense repression of aboriginal political activity. Canada imposed its infamous ban on fund-raising for aboriginal land claims and the suppression of aboriginal culture, was vigorously pursued. However, by the 1950s the political atmosphere was beginning to become more liberal and in 1955 the Nisga'a Land Committee was reconstituted as the Nisga'a Tribal Council: see generally, the judgment of Judson J in *Calder v. British Columbia*, *supra* note 33; and *People of the Nass River*, *supra* note 64.

⁶⁶ *Calder v. British Columbia*, *ibid.*

combine a land claim and self government regime,⁶⁷ and is the first embodiment of the 1995 federal policy.

4.2 Structure

The AIP is non-binding on the parties until ratification of a Final Agreement.⁶⁸ Until ratification occurs the parties will continue to negotiate based on the AIP.⁶⁹ The most significant aspect of the AIP is the agreement on Nisga'a Lands,⁷⁰ which are to be recognized as communally owned Nisga'a property.⁷¹ The Nisga'a Lands do not represent all of the Nisga'a traditional territories and does not include any existing private property interests in the area.⁷² In fact, according to one estimate, Nisga'a Lands will include only 10 per cent of Nisga'a traditional territories.⁷³ However, the designation of the Nisga'a Lands do represent the final process in securing a sizable land base to complement Nisga'a self-government and the development of a self-sufficient Nisga'a economy. In basic form the Nisga'a AIP represents a "territorial deal", allowing the Nisga'a to set up their own formally recognised constitution with their own government⁷⁴ and court with powers generally confined to Nisga'a territories.⁷⁵ In this sense the Nisga'a AIP does little to affect settler interests outside Nisga'a territories.

⁶⁷ D. Sanders, *The Nisga'a Agreement* (paper presented to the American Anthropological Association Conference, San Francisco, California, November 21, 1996) [unpublished] (hereinafter "*The Nisga'a Agreement*").

⁶⁸ *Nisga'a AIP*, *supra* note 1, Chapter on "General Provisions", section 3.

⁶⁹ *Ibid.*, Chapter on "Ratification of this Agreement", section 5.

⁷⁰ The term "Nisga'a Lands" refers to the land which is to become the treaty territory of the Nisga'a under the Final Agreement (see *Nisga'a AIP*; Chapter on Definitions; Chapter on Land and Resources and Appendix 1.). It does not refer to other land regarded by the Nisga'a as within their traditional territory (for a map of Nisga'a traditional territories, see *People of the Nass River*, *supra* note 64 at 3.

⁷¹ *Nisga'a AIP*, *supra* note 1, Chapter on "Land and Resources", section 3.

⁷² *Ibid.*, Chapter on "Land and Resources" section 8.

⁷³ Sanders, *The Nisga'a Agreement*, *supra* note 73 at 6.

⁷⁴ *Nisga'a AIP*, *supra* note 1, Chapter on "Nisga'a Government", section 10a.

⁷⁵ Nisga'a law-making power outside Nisga'a territories appears to be contemplated only in limited areas such as child welfare: see Sanders, *The Nisga'a Agreement*, *supra* note 73 at 11.

Perhaps most significantly, the AIP provides that the Final Agreement will be an exhaustive codification of the Nisga'a's rights under section 35(1) of the Constitution.⁷⁶ Consistently with the 1995 federal policy, the Final Agreement will then become a section 35(1) treaty.⁷⁷ Although this will provide certainty, it also means that the Nisga'a are thereafter excluded from the benefit of possible future developments in the judicial recognition of section 35(1) aboriginal rights, including rights in aboriginal cultural heritage. It is therefore crucial that they are satisfied with the protections given to them as treaty rights under the Final Agreement.

4.3 Cultural Heritage Provisions

Nisga'a cultural heritage embodies a rich and complex association with their natural surroundings.⁷⁸ The Nisga'a lifestyle is closely associated with the resources of the Nass river, which includes fish such as salmon, steelhead and oolichan. Nisga'a society is matrilineal and is governed by hereditary chiefs and matriarchs. Its is organized into four clans, Wolf, Eagle, Raven and Killer Whale, and then into "wilps" or houses. These clans and houses own traditional names, stories and crests. Nisga'a cultural heritage is embodied in all aspects of daily life including their language, which is taught in Nisga'a run schools, their "Adawaak" or oral histories, and "Ayuuk"; or laws and traditions; the ceremonial passing on of names; button blanketing and the carving of totem poles or "pts'aan" in distinctive tribal designs. The Nisga'a are also the custodians of a long and distinguished carving tradition, and venerate many ancestral objects associated with former leaders and dignitaries. Their traditional lands contain large many ancient rock carvings, or

⁷⁶ *Nisga'a AIP*, *supra* note 1, Chapter on "General Provisions", section 24.

⁷⁷ *Ibid.* section 2.

⁷⁸ The following description of Nisga'a culture is taken from *People of the Nass River*, *supra* note 64.

petroglyphs, and other significant sites. The Nisga'a have always maintained an intense relationship with their traditional lands, with many geographical features associated with the characters and events of their oral traditions. The Nisga'a cultural heritage permeates everything:

*This is a culture that transforms everything - masks, spoons, totem poles, the cedar panels of finely wrought long houses - into elaborate works of art.*⁷⁹

The Nisga'a AIP reflects the strong connection of the Nisga'a with their cultural heritage. There are two main categories of provisions. One is "cultural artifacts and heritage". The other is "culture and language", which deals with "contemporary", intangible aspects of Nisga'a cultural heritage. It is the intangible aspects which are of most relevance to the communal design cases.

(a) The Provisions on Intangible Cultural Heritage

The AIP general provisions state that:

*subject to the Final Agreement, Nisga'a citizens will have the right to practice their culture and use their language.*⁸⁰

This provision appears to be a basic and today uncontroversial guarantee against prohibitions on cultural practices such as the anti-potlatch laws.⁸¹ However, more specific provisions on language and culture are found in the chapter on Nisga'a lawmaking power.⁸² More significantly, section 30 of the AIP section on Nisga'a Government powers states as follows:

⁷⁹*Ibid.* at 6.

⁸⁰Nisga'a AIP, *supra* note 1, General Provisions.

⁸¹ See for example Sanders, *Indian Self-Government*, *supra* note 40 at 11, noting that the current debate is "not about preventing the recriminalization of the potlatch".

⁸²Nisga'a AIP, *supra* note 1, Chapter on "Nisga'a Government".

30 Culture and Language

*Nisga'a Government [sic] may make laws to preserve, promote and develop Nisga'a culture and language, including laws to authorize or accredit the use, reproduction and representation of Nisga'a cultural symbols and practices, and the teaching of Nisga'a language...*⁸³

This provision is unprecedented in any land claims or self-government agreement in Canada to date. Significantly it enshrines Nisga'a law-making power to prevent the unauthorised reproduction of "cultural symbols". This term is undefined. Arguably, it could include designs such as the communal designs the subject of the aboriginal copyright cases. If this power were enforceable against non-Nisga'a members, it would provide a significant precedent for combating cultural appropriation claims. For example, it could give aboriginal communities the ability to enter licensing arrangements with outsiders for appropriate use of their communal aboriginal designs. However, the section continues with a powerful proviso which negates these significant possibilities:

*...provided that Nisga'a jurisdiction to make laws in respect of culture and language does not include jurisdiction to make laws in respect of intellectual property or the authority to prohibit activities outside of Nisga'a Lands except as provided for by federal or provincial law.*⁸⁴

This provision means that section 30 powers are essentially limited to internal disputes, and in any event does not cover anything which might be regarded as "intellectual property".⁸⁵ Outside Nisga'a Lands, only federal or provincial laws, or Nisga'a Laws

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Given that section 30 specifically includes power "to authorize or accredit the use, reproduction and representation of Nisga'a cultural symbols and practices", the intended meaning of the term "intellectual property" is unclear. It must be assumed that a distinction is drawn between the regulation of communal cultural property rights, on the one hand, and the "intellectual property" created by individuals, on the other. This is the opinion of Professor Joost Blom, Faculty of Law, University of British Columbia (personal communication, April 1997).

going no further than these laws, may apply. The status quo with regard to cultural appropriation claims therefore ostensibly remains unchanged in the area of intangible cultural heritage. The potential of the provision has been read down. However, it provides a very interesting precedent which might be expanded under future initiatives if the federal government is prepared to relinquish its ban on negotiation over intellectual property and other matters of "national significance".

(b) Other Provisions: Cultural Artifacts and Heritage Chapter

A detailed discussion of repatriation issues is beyond the scope of this thesis. However, it should be noted that the Nisga'a AIP provisions on repatriation of objects from the Royal British Columbia Museum ("RBCM") and the Canadian Museum of Civilization ("CMC") are very significant. In short, the AIP provides that various identified "Nisga'a artifacts" held by these museums will be transferred in full legal title to the NCG. Objects which are to be retained by the museums by agreement are to be looked after pursuant to "Nisga'a laws and practices". These provisions signify a clear move on the part of both British Columbian and federal governments beyond legal niceties towards repatriation by agreement. The AIP represents an important precedent, suggesting that repatriation agreements may become an incident of self-government and land claims agreements in Canada.

Another interesting provision in this Chapter of the AIP concerns the devolution of cultural property. The AIP provides that NCG will have standing in any court proceedings in which the devolution of "cultural property" is at issue. "Cultural property" is defined to include:

ceremonial regalia and similar personal property associated with a Nisga'a chief or clan...and other personal property which has cultural significance to the Nisga'a Nation.

In such an action, the court must consider “*evidence and representations concerning Nisga'a laws and customs relating to the devolution of cultural property*”. Arguably, this provision indicates that self-government agreements can include provision for aboriginal communities to define their “cultural heritage” for themselves, in accordance with their right of self-determination.

Other provisions on Nisga'a cultural heritage concern sites and objects outside Nisga'a Lands but within Nisga'a traditional territories. They include provisions on the ownership of discovered objects⁸⁶; the protection of archaeological “heritage sites”,⁸⁷ and renaming of geographical sites in accordance with Nisga'a traditional names.⁸⁸ However, they do little to advance the existing legal regimes under settler law, leaving these Nisga'a interests largely under provincial control.⁸⁹

5. Evaluation of the Canadian Experience

5.1 General Comments

As discussed earlier, the Canadian experience of self-government differs quite significantly from conditions in Australia. This should be borne in mind in the following

⁸⁶ *Nisga'a AIP*, *supra* note 1, Chapter on “Cultural Artifacts and Heritage”, section 25.

⁸⁷ *Ibid.*, section 17.

⁸⁸ *Nisga'a AIP*, Chapter on “Land and Resources”, *ibid.*, section 61.

⁸⁹ For example, the provision on objects found in Nisga'a traditional territories (*supra* note 86) provides that the province remains as legal owner of the objects, subject to a discretionary right to transfer ownership to the Nisga'a; the provision on archaeological and heritage sites (*supra* note 87) goes no further than existing rights of consultation in provincial legislation; and the province's obligation to rename of geographical sites in accordance with Nisga'a traditional names (*supra* note 88) need only be carried out in accordance with the province's “general policy guidelines”. Provisions regarding human remains are not yet determined.

evaluation. However, some general observations can be made on the utility of self-government in providing for the resolution of communal designs and other cultural appropriation disputes. I will do by reference to the issues identified as significant in Chapter 4.

5.2 Conceptualising Group Ownership of Property

As noted above, the Canadian self-government model is primarily a territorial one focused on reserve communities. Accordingly, it provides a ready made model for conceptualising communal ownership of land. Beyond land, the Nisga'a AIP provisions demonstrate the conceptualisation of group ownership of cultural artefacts to be repatriated from the museums, and of "cultural symbols". Self-government can also provide comprehensive mechanisms for organising group rights and responsibilities in relation to cultural heritage. It is conceivable that such groups could one day join in actions such as the *R&T Textiles* litigation⁹⁰ in their own right in order to pursue the unauthorised use of their designs, rather than as mere equitable beneficiaries of Mr Milpururru's action.⁹¹

5.3 Diversity in Aboriginal Communities

Chapter 4 discussed the concerns of some commentators that blanket solutions applied across all aboriginal communities could be inappropriate given their diversity. The incremental approach to self-government in Australia was also noted at the beginning of this Chapter. In Canada self-government policy has, after a long period of intense debate,

⁹⁰ *Bulun Bulun v. R&T Textiles*, No DG3 of 1995 (Federal Ct. of Australia), discussed in Chapter 5.

⁹¹ It will be recalled that Mr Milpururru appears in the litigation on behalf of the traditional owners of Ganabingu country, on the basis of their alleged equitable ownership of copyright in Mr Bulun Bulun's designs.

developed into a national policy. However, the strength of this policy is its flexibility. The policy does not seek to impose one model on all communities, but allows each to negotiate its own destiny according to the lists of powers set out in each of the three categories. The Nisga'a AIP is an example of this. The AIP reflects the Nisga'a's cultural identity and priorities, as evidenced by their negotiation of some quite unique provisions regarding repatriation and the regulation of cultural symbols. Arguably, similarly flexible arrangements should be incorporated in any proposal to address the aboriginal copyright issues so that individual communities can determine their priorities for themselves.

5.4 Problems with the Use of Settler Courts

The biggest advantage of self-government policy over aboriginal rights is its avoidance of the necessity to seek the determinations of settler courts at first instance. The Nisga'a AIP sets up a Nisga'a Court and provision for the codification of Nisga'a Laws. This avoids, at least in areas over which the Nisga'a Court will have jurisdiction, problems associated with the "interpretive monopoly" of settler courts. Similarly, it can be seen that self-government in this form avoids the freezing culture, authenticity and commercial adaptation issues which have become a feature of Canadian aboriginal rights litigation in recent years. Under the Nisga'a AIP, the Nisga'a are free to exploit their cultural heritage any way they see fit, subject only to the jurisdiction issue mentioned below. In particular, in contrast to aboriginal rights litigation, self-government provides a mechanism for aboriginal communities to assert their own definitions and priorities in relation to their cultural heritage. This is clearly demonstrated in the *Nisga'a AIP*, through its lawmaking powers on culture and language, and in the provisions regarding the devolution of Nisga'a

“cultural property”. It is suggested that this possibility alone makes self-government initiatives worthwhile considering as a long-range solution to cultural appropriation claims.

5.5 Urban Artists

As noted above, the Canadian self-government experience has focussed on reserve communities. Accordingly, there is little in Canadian self-government policy to date which addresses the situation of urban aboriginal peoples.⁹² A recent exception is the Report of the *Royal Commission on Aboriginal Peoples*.⁹³ The Report’s most interesting discussion for these purposes on how urban aboriginal peoples could be included in moves towards self-government. The models proposed include communities of interest, extended “nation” jurisdictions and integration within settler institutions by board representation.⁹⁴ Although beyond the scope of this Chapter to consider in detail, these suggestions provide some indication that a self-government initiative over cultural heritage in Australia need not exclude urban aboriginal artists. If the “urban issue” identified by Gray⁹⁵ is to be addressed through self-government, it would be necessary to look more closely at urban models such as those proposed by the Royal Commission.

5.6 The Jurisdictional Issue

The main limitation on the Canadian experience of self-government is, as illustrated by the Nisga’a provisions on intangible cultural heritage, that of jurisdiction. The focus of self-government in Canada at this stage is primarily on the recognition and

⁹²See references cited above, *supra* note 28.

⁹³RCAP Report, *supra* note 29.

⁹⁴See RCAP Report, at 586-598.

⁹⁵See S. Gray, “Black Enough? Urban and non-traditional Art and Proposed Legislative Protection for Aboriginal Art” (1996) 7:3 Culture and Policy 29, discussed in Chapter 4.

formal elaboration of internal governance powers. The federal government negotiation categories under the Inherent Right Policy confirm this emphasis. However, cultural appropriation claims such as the communal designs disputes are not about internal disputes, but about the relationship between aboriginal and settler interests in culture. This demonstrates the weakness of self-government as a strategy to combat cultural appropriation. For example, if a communal designs dispute were to arise, for example, between the Nisga'a and tourist operators who were selling t-shirts with Nisga'a designs outside Nisga'a territorial jurisdiction, there would be nothing that the Nisga'a could do to prevent it other than under settler laws, which may not assist. Accordingly, the Nisga'a AIP demonstrates that, where aboriginal peoples are unable to assert jurisdiction, they are still left with the status quo.

5.7 Future Directions: Co-operative Agreements

From this analysis it can be seen that the Canadian experience of self-government has both advantages and disadvantages when considered in the context of the aboriginal copyright cases. It has the greatest potential in respect of internal disputes, consolidating power to resolve disputes in internal courts and allowing for the direct implementation of traditional laws regarding culture without external settler bias. The issues become more complex under self-government in matters which impact outside "individual communities" or on issues of "national interest". Here the continuing influence of the "reserve model" with its territorial focus is most clearly demonstrated. Self-government in this form is of limited utility in the *Milpurrurru* situation.

However, the outward-facing potential of self-government is the opportunity it provides for the building of inter-governmental relationships with other aboriginal communities and with settler governments. In Canada for example, there is immediate practical potential in self-government in the area of joint negotiations (in Canada, category 2 under the 1995 federal policy). Possibilities here include enforcement agreements between aboriginal communities and federal agencies counteracting contraventions of existing intellectual property laws and the development of tribal court jurisprudence allowing the cross fertilisation of new principles of cultural heritage law in settler courts. Although in Australia a self-government policy of any detail is a long way away, it is suggested that the Canadian experience will provide a long term source of inspiration and caution as the consideration of reform proposals addressing the issues raised in the aboriginal copyright cases are slowly worked through. Despite its jurisdictional limitations, the Nisga'a AIP provides a fascinating example of how aboriginal peoples can implement their own perspectives and priorities in the protection of their cultural heritage.

Chapter 7

Conclusion

This process, which in Australia is called the process of reconciliation, must tackle some very basic legal issues and concepts. Issues such as sovereignty, self-determination, land rights, racial discrimination, customary law and native title...

Patrick Dodson, then Chairperson of the Aboriginal Council for Reconciliation, 1993.¹

Over the course of the coming year we may expect completion of the *Stopping the Rip-Offs Report*² and a judgment in the *R&T Textiles* case,³ both aimed at addressing the issues arising from the aboriginal copyright cases discussed in Chapter 3. The *Stopping the Rip-Offs* Report will recommend special legislation on the basis of its extensive public consultation process. The *R&T Textiles* judgment will determine whether copyright and native title can blend together to recognise the commercial aspects of aboriginal art as well as its connection to traditional land. Both of these developments will significantly influence the shape of future debate over the aboriginal copyright cases. However, I have argued in this thesis that the complexity of the issues raised by the aboriginal copyright cases and the diversity of aboriginal communities means that no one solution will emerge in the near future.

In this thesis I took a broader view of the issues surrounding the aboriginal copyright cases in order to explore how they fitted into wider debates on cultural

¹ P. Dodson, "Foreword", *Indigenous Peoples: Issues for the Nineties* (1993) 16 U.N.S.W.L.J. ix.

² Attorney-General's Legal Practice, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islanders* (Canberra: Attorney-General's Legal Practice, 1994), discussed in Chapter 3.

³ *Bulun Bulun v. R&T Textiles* No DG3 of 1996 (Darwin Registry, Federal Ct. of Australia), discussed in Chapter 5.

appropriation, decolonisation and the recognition of cultural difference. In this broader light the aboriginal copyright cases appear as one example of cultural appropriation claims made by aboriginal peoples in their wider struggle towards decolonisation.

In order to contextualise the cases, in Chapter 2 I examined the shifting categorisations of aboriginal cultural heritage in art and ethnographic theory, and the corresponding shifts in aboriginal peoples' political status towards self-determination. In Chapter 3 I argued that this shift in status had occurred under settler laws as aboriginal claimants moved up the "ladder" of settler legal categories and achieved full protection as copyright owners. I then explored the shift in reform proposals over the past decades towards a new focus on the "dilemma of difference", dealing with how aboriginal copyright owners could retain this hard-won equality but achieve positive recognition of their cultural difference. As I discussed in Chapter 4, an important aspect of this dilemma is how aboriginal "traditions" may be recognised as the basis of rights without freezing them, and how the special communal aspects of aboriginal artists may be recognised without being confined within artificial standards of "authenticity".

In Chapters 5 and 6 I argued that the Canadian experience of aboriginal rights and self-government demonstrates that respect for aboriginal cultural difference and the aboriginal right of cultural self-determination can be theorised within a state structure. In Chapter 5 I examined how aboriginal rights could provide an avenue for achieving enforceable cultural rights against outsiders in order to combat cultural appropriation. In particular, the Chapter analysed how aboriginal laws regulating culture could be recognised within the settler legal system. In Chapter 6 I examined self-government as a

form of internal self-determination through which aboriginal peoples could regain control of the definition and management of their cultural heritage. I then focussed on the effectiveness of both aboriginal rights and self-government to address communal designs disputes. I concluded that, although neither provided perfect solutions, both had insights to offer into the future direction that Australian developments might take. Key to the Canadian developments is the conceptualisation of aboriginal peoples as distinct groups with communal rights which transcend the individual/state split in cultural property rights under existing settler regimes.

The question which might be addressed in future is how these larger developments in "legal decolonisation" might provide practical inspiration for future directions in aboriginal peoples' attempts to protect their communal designs from appropriation in the Australian context. It is suggested that the Canadian experience should be examined with a critical eye so that some of its less useful features can be avoided or worked through. For example, in the context of aboriginal rights, the "integral to a distinctive culture" test merely exacerbates the existing problems of bias in the interpretation of aboriginal cultures by the settler society, and should be avoided if possible for more "objective" methods of ascertaining aboriginal rights, such as a focus on establishing evidence of aboriginal laws as occurs under the *Mabo* test. The Canadian cases can then be examined for their more useful principles such as their expansion of the concept of aboriginal rights beyond native title. Similarly, in the context of self-government policy, it is argued that it is not necessary for self-government models always to exclude urban aboriginal peoples in favour of a "reserve" model. The good features of self-government, such as its flexibility and cultural

specificity, can be utilised and adapted to the particular problem of cultural appropriation through agreements with settler governments.

Finally, it is emphasised that neither aboriginal rights nor self-government policy in any form should be seen in isolation. Use of the settler courts and use of the political process remain, like aboriginal strategies, interconnected ways of addressing the settler society. The purpose of this thesis has been to examine how the Canadian experience of these forms of "negotiation towards decolonisation" might be used by aboriginal peoples to address issues of cultural appropriation. It is suggested that this experience will become increasingly relevant in Australia as other issues of decolonisation such as land rights and compensation for past government assimilation policies converge with cultural appropriation issues. The question of how the settler society will respond to the issue of cultural appropriation remains to be seen. However, there is no doubt that aboriginal peoples in Australia regard this response to be crucial to the establishment of a harmonious future relationship with the settler society.

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