# M'INTOSH TO MABO

## SOVEREIGNTY, CHALLENGES TO SOVEREIGNTY AND REASSERTION OF SOVEREIGN INTERESTS

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## I ABORIGINAL SOVEREIGNTY

Sovereignty and aspects of its defeasance, acknowledgement, assertion or recovery comprise a series of topics, which are encountered in an ever-decreasing sphere of coincidence. No meaningful discussion of any of these topics can begin without first surveying the history of the preceding topic. As such, it is a tournament of privileges, which will result in the discovery of complicated theories and deliberate obfuscation to curtail indigenous rights of self-governance and title. Even in the confirmation of these unique powers and apparent efforts to be forthright on the part of the colonizing nation these privileges are tainted by limitations and impediments.

Sovereignty is best discussed in a known context, rather than as a vague concept. Black's Law Dictionary defines "sovereignty" as:

> The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.[1]

This paper will review the comparative state of sovereignty of indigenous peoples in the United States, Canada, New Zealand and Australia. In each country, different areas of the Black's definition will fall to the wayside. The evidence presented will reveal that in no single country do indigenous people enjoy the full spectrum of sovereignty's absolute, independent, uncontrollable authority over internal, political and governmental institutions. That said, the vast differences that remain at the heart of the subject expose a disparity that is extraordinary in its scope and compelling in its nature.

Sovereignty is approached from different directions, which reflect the priorities of the society in which the conflict is raised. In some countries, the sovereignty arguments arise from the fight for indigenous title to land and in others it is a function of the fight for the right of self-governance. The approach most consistent with Black's definition is that of the right to self-governance.[2] This is an assertion of theory based upon the reality that once title is established the fight for self-governance begins anew, albeit, with the distinct advantage of both possession and ownership defined by the political system of the colonial nation with which the aboriginal people are in conflict.

Where relevant, reference will be made to the source of the sovereignty. It is key to the understanding of this issue to clearly perceive whether the source of the sovereign power is inherent and, as such, preceded colonization, or whether the source is derivative and, as such, was delegated from the colonizing authority. The theory to be presented here is that when it is adjudged inherent, it is far less likely to be limited, impeded or rescinded.

## II UNITED STATES

The case of initial impression in the United States court system to discuss and determine issues of Native American sovereignty was *Johnson v. M'Intosh*[3], decided in 1823. Chief Justice Marshall, writing for the majority, made three determinative statements in his opinion that seemed to set the stage for a limited and vague right of sovereignty. First, Chief Justice Marshall said, "…their rights to complete sovereignty, as independent nations, were necessarily diminished"[4]. He further explained, "While different nations of Europe respected the right of the natives as occupants, they asserted

the ultimate dominion to be in themselves" and concluded, "The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles."[5] Without saying so explicitly, Chief Justice Marshall was arguing a limited recognition of the Doctrine of Discovery.[6] He made strenuous rational arguments that the entire property ownership system that had grown from the initial royal grants of title would be upset by a complete recognition of a sovereign Native American title and property right in fee simple.[7] He equivocated in his statement about England that, "[H]er claim of all of the lands to the Pacific ocean, because she had discovered the country washed by the Atlantic, might, without derogating from the principle recognized by all, be deemed extravagant."[8] In doing so, Chief Justice Marshall recognized the legal fiction involved in his decision but nevertheless acknowledged the political and legal necessity to establish such a theory.

The political reality of a limited Native American sovereignty was further defined in *Cherokee Nation v. Georgia*, decided in 1831.[9] Chief Justice Marshall stated unequivocally that, "The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts."[10] Full sovereignty was being advocated by counsel for the Cherokee Nation but was defeated in favor of a new argument, denying them the rights of a "foreign nation" as considered in Article III of the United States Constitution and instead, expressed as:

> They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[11]

In doing so, Chief Justice Marshall created a new political entity, the domestic dependent nation, and a variety of sovereignty that had yet to be seen on the world stage and for which limits clearly existed, even if they were undefined.

*Cherokee Nation* was followed a year later by another case, *Worcester v. Georgia*[12], which established that the laws of the State of Georgia had no effect on the lands of the Cherokee Nation.[13] The rationale was beautifully expressed but short lived. The Chief Justice stated:

> The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers that are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[14]

The *Worcester* decision seemed to recognize and create a status very similar to that of a foreign nation wholly contained within the boundaries of another and if taken in conjunction with the *Cherokee Nation* decision, would have created the broadest sense of sovereignty possible in the full context of nations. However, fifty-six years later a case was presented that completely turned this theory upside down.

A murder case came to the Circuit Court of the United States for the District of California.[15] In the case, two Indians were charged with the murder of another Indian on the Hoopa Valley Reservation.[16] If *Worcester* were to be taken on its face then the defendants would be liable only under the laws of the tribe and only within the tribal system of justice. However, in an opinion clearly influenced by the Indian Wars which had occurred subsequent to the United States Civil War, the United States Supreme Court

found that, "Because of the local ill feeling, the people of the States where they [Indians] are found are often their deadliest enemies."[17] Based upon that consideration the court determined that:

> From their very weakness and helplessness**,** so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.[18]

This rationale provides the basis for a policy of preemption, codified in the Indian Appropriations Act[19], and asserts the authority of the federal government to prosecute crimes on Indian reservations.

The combination of the *Cherokee Nation* case and the *Kagama* case provides the legal authority for the teeth of Congress' Plenary Power Doctrine. The Plenary Power Doctrine originated with the United States Constitution, Article I, Section 8, Clause 3, which states that Congress shall have the power, "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"[20]. The addition of these cases to the "Indian Commerce Clause" creates the stage from which Congress may preempt the sovereignty of Native American tribes.

Sovereignty was limited, but not completely discarded. The treaties previously reached with Native American tribes were still binding law in most parts. The United States Supreme Court seized upon the opportunity in *Winans*[21] to remind the legal community that a Treaty was an instrument that granted rights to the federal government from the Indian Tribe and not vice versa, a notion that recognizes an inherent, rather than a derivative sovereignty.[22] However, this reverence for the inherent theory of sovereignty shifted in 1934, when the federal government attempted to reorganize the governmental

processes of the Native American tribes into structures, which included constitutions and representative bodies and generally were more in keeping with a perceived democratic process.[23] This legislation, The Indian Reorganization Act[24], not an impediment to self-government and was not mandatory, but rather, was an encouragement and authorization to restructure their government processes as well as a derivative form of sovereignty.[25]

This set the stage for a case, which cleared the air about the source of sovereignty for Native Americans. In *Iron Crow v. Oglala Sioux Tribe*[26] the issue at bar was whether the Oglala had a right to levy taxes.[27] The court found that the Oglala had the right to levy taxes and that right was completely in keeping with its sovereignty.[28] Judge Vogel specifically indicated the source and limitations of Native American sovereignty in his opinion when he referred to *Kagama*:

> …the Constitution, as construed by the Supreme Court, acknowledges the paramount authority of the United States with regard to Indian tribes but recognizes the existence of Indian tribes as quasi sovereign entities possessing all the inherent rights of sovereignty excepting where restrictions have been placed thereon by the United States itself.[29]

*Iron Crow* reflected the prevailing opinion of Native American sovereignty until 1978, when the United States Supreme Court asserted an important restriction in *Oliphant v. Susquamish Indian Tribe*.[30]

*Oliphant* held that pursuant to treaty and Congressional action the Susquamish Indian Tribe did not have the right to prosecute non-Indians.[31] The court continued with its examination of this limitation upon the sovereign powers of the tribe and determined that, "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."[32] Sovereignty as regards civil matters was confronted in *Montana v. United States*[33]. In *Montana* the court found that an Indian

Tribe may exercise civil authority over non-Indians when the matter at hand affected the tribe's political, economic, health or welfare interests.[34] Exercise of sovereignty over non-tribal members came up again in 1990 in *Duro v. Reina*[35]. The United States Supreme Court determined in *Duro* that an Indian tribe did not have criminal jurisdiction over an Indian who was not a member of their tribe.[36]

> Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States. … As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.[37]

As such, Justice Kennedy articulated a civil liberties argument to defeat an assertion of sovereignty by Native Americans upon a class of people with whom they similarly were situated.[38] The response to this decision was a quick exercise of congressional plenary power to override the *Duro* decision and restore authority to Indian tribes to assert criminal jurisdiction over all Indians, without a requirement of membership in the offended tribe.[39] Specifically, the statute defined self-governance as:

> "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;[40]

The series of cases which form the modern scope of United States Native American sovereignty regarding civil disputes begins with *Williams v. Lee*[41]. In *Williams* a unanimous United States Supreme Court reiterated that states have no power to regulate

the concerns of Indians on their reservations unless an act of Congress specifically delegated the power on an particular issue.[42] Additionally, it endorsed the exercise of civil jurisdiction over suits against Indians by non-Indians for controversies arising in Indian country.[43] *Montana v. United States*[44] was the next influential sovereignty and civil disputes case. Decided in 1981, *Montana* held that Indian tribes have jurisdiction over issues and controversies which affect their interests, including those brought by non-Indians.[45] The third case providing significant direction in Tribal authority over civil controversies involving non-Indians was decided in 1997.[46] *Strate v. A-1 Contractors*[47] was also a unanimous decision, albeit one that would limit tribal sovereignty.[48] The court decided that tribes may not assert jurisdiction over a dispute between two non-Indians that occurs on reservation land that is owned in fee by a non-Indian entity.[49] In this case the land was a stretch of highway.[50] The decision provides some instructive dicta, which briefly recaps the matter of tribal sovereignty over criminal and civil matters:[51]

> Tribal-court jurisdiction over non-Indians in criminal cases is categorically restricted under *Oliphant,* we observed, while in civil matters "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."[52]

The court quoted directly from *National Farmers v. Crow Tribe*[53] in their recap and left little doubt that Native American sovereign power to decide such matters exists in a limited fashion.[54]

## III CANADA

Any discussion of the sovereignty concerns of First Nations in Canada must begin with reference to British rule and the Royal Proclamation of 1763.[55] The Indian

Provisions section of the Act began with a tremendous flourish of respect for the First Nations stating, "[T]he several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed".[56] However, the same flourish ended with a presumption of dominion over the First Nations' lands by indicating that those lands were in fact, "Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us".[57] Additionally, the document outlawed the purchase, taking or possession of land without the express written permission of the Crown and specifically forbade the Royal Governor to issue that permission.[58] The Proclamation assumes and asserts dominion[59] not unlike the Doctrine of Discovery endorsed in *Johnson v. M'Intosh*.[60]

Law Professor Bradford Morse of the University of Ottawa described the development of issues surrounding sovereignty in Canada as having taken two distinct, consecutive paths prior to the modern era.[61] Professor Morse cited the Commission on Aboriginal Peoples in stating: "Treaty-making was initially the primary vehicle for determining the relationship between the Crown and First Nations. The treaty process was not, however, extended throughout all of Canada, and treaties were rarely fully honored by the Crown."[62] Professor Morse subsequently explained that the process shifted from that of treaty making with indigenous people to one of assimilation.[63] The effect on sovereignty being that "the authority and functions of traditional Aboriginal governments were significantly eroded."[64]

As such, the search by Inuit, Metis and Indian First Nations of Canada for a sovereign right of self-government is a precarious path through treaties and their specific effect in light of the Proclamation of 1763,[65] the Constitution,[66] and the Indian

Act.[67] Two specific portions of the Constitution and the Indian Act are particularly relevant to the discussion of sovereignty. The first portion of the Constitution at issue is section 25, as revised in 1982, which states, in relevant part:

> **25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
> a. any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> b. any rights or freedoms that now exist by way of land claims agreements or may be so acquired.[68]

The second portion of the Constitution at issue is section 35, as revised in 1982, which states, in relevant part:

> **35.** 1. The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2). In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
> (3). For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
> (4). Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[69]

The portion of the Indian Act at issue is section 81, which reads, in relevant part:

"**81**. (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes…"[70]

There follows a lengthy but not exhaustive list of justifications for the assertion of by-laws and sovereign jurisdiction of matters of concern to First Nations.[71]

The relevant portion of the Constitution appears on its face to import the protections alluded to in the Proclamation in their full force and effect, which makes the question of their intended effect even more relevant. The Indian Act appears on its face to

operate like a codified version of *Montana v. United States*[72] providing for the power to exercise authority in areas of concern to the tribe.[73] Inevitably, these issues were examined at close quarters with relevant and contested treaty language and the Supreme Court of Canada issued instructive interpretation.

In 1985, the case of *Guerin v. The Queen*[74] reached three helpful conclusions. The first discussion was a reiteration of the fiduciary duty of the Crown as codified in the confirmation of the Indian Act:[75] Through the confirmation in s. 18(1) of the Indian Act of the Crown's historic responsibility to protect the interests of the Indians in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests lie.[76]

> Where by statute, by agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[77]

Thus, the government of Canada, by expressing a sovereign interest in the protection of its aboriginal population incurs an obligation that mirrors the diminution of indigenous sovereignty.

The second instructive discussion in *Guerin* provides a structure to the fiduciary relationship and indicates that the obligation is based upon the assertion of the Discovery Doctrine principle that aboriginal title was alienable only to the Crown.[78]

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.[79]

The determination that the predicate condition to a fiduciary relationship is the assumption of sovereign control over the alienability of indigenous title in 1763 seems to indicate very clearly that the spirit of that agreement colors the current law and limitations on self-government.

The third instructive portion of *Guerin* is the clarifying statement, "Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it."[80] This statement is both a recognition of the inherent sovereignty of the aboriginal titleholders and an admission that the aboriginal title was changed forever by the arrival of Crown authority.[81]

In the process of delicately extracting clear frameworks of aboriginal sovereignty from the context of treaties and the formative Acts listed here *Regina v. Sioui*[82] lends very helpful analysis. The first helpful indication in *Sioui* is the recognition that the initial interaction of the Crown with the First Nations of Canada considered and assumed a certain amount of sovereignty in the ownership of land and self-government of the Tribes.[83] In relevant part the opinion states:

> The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.[84]

The second and very relevant legal determination in the *Sioui* opinion was the recognition that treaties between the Crown and indigenous peoples were not the formalistic European documents that the Crown had encountered elsewhere but were to be taken in the context in which they were made and, in that context, were equally binding.[85] The specific text of the opinion stated.

> The colonial powers recognized that the Indians had the capacity to sign treaties directly with the European nations occupying North American territory. The *sui generis* situation in which the Indians were placed had forced the European mother countries to acknowledge that they had sufficient autonomy for the valid creation of solemn agreements which were called "treaties", regardless of the strict meaning given to that word then and now by international law.[86]

The Supreme Court of Canada found reason to recognize both inherent and derivative sovereign interests of the indigenous peoples of Canada in their recognition of the premises expressed in the Proclamation and the relevant treaties negotiated and signed since that time. Evidence of this is offered in *Guerin* and *Sioui*.

The recognition of certain sovereign interests for First Nations did not have a blanket application. The Supreme Court delineated the context in which rights would be recognized in two further cases. The first relevant case is that of *Regina v. Pamajewon*.[87] In *Pamajewon* Justice Osborne attaches a Tribe specific consideration in the determination of self-government.[88] Specifically, he states:

> Any broad inherent right to self-government held by the appellants was extinguished by the British assertion of sovereignty. The success of a claim to any more specific right of self-government will depend on the historical evidence regarding the aboriginal community of the particular claimant.[89]

In so doing, Justice Osborne relates that the experience, custom, and preserved treaty rights of each First Nation is different and derived from its individual experience.[90]

Justice Osborne turned to another 1996 Supreme Court of Canada case for the test to determine the specific self-government rights of individual first nations.[91] The test he turned to was articulated in *Van der Peet v. The Queen*[92] and it required a showing of two elements, a custom/tradition element and an integral/distinctive-to-the-culture element.[93] The opinion specifically stated:

> [T]he following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.[94]

As such, the recognition of a presupposed right of self-government by a First Nation will require a showing that the particular activity was a custom or tradition. Further, that it is integral or distinctive to the culture of that First Nation, and if it conflicts with Canadian law that was preserved by treaty commensurate to the conditions set forth in this test.

In *Regina v. Gardner,*[95] the court summarized the essence of this set of criteria and indicated that the standards used in determining the criteria are neither static nor restricted to a particular point in time, but rather evolve based on the custom of the tribe.[96] Quoting *Van der Peet*:

> The characterization of aboriginal rights should refer to the rationale of the doctrine of aboriginal rights, i.e., the historic occupation and use of ancestral lands by the natives. Accordingly, aboriginal practices, traditions and customs would be recognized and affirmed under s. 35(1) of the Constitution Act, 1982 if they are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. Furthermore, the period of time relevant to the assessment of aboriginal activities should not involve a specific date, such as British sovereignty, which would crystallize aboriginal's distinctive culture in time. Rather, as aboriginal practices, traditions and customs change and evolve, they will be protected in s. 35(1) provided that they have formed an integral part of the distinctive aboriginal culture for a substantial continuous period of time.[97]

As such, consideration of the limits of any single First Nation's sovereignty, notwithstanding sovereignty derived from political advantage in any given political subdivision,[98] is derived of this method of review.

The case that determined the Nisga Nation's sovereignty disposition is an example of this process at work.[99] In *Campbell v. British Colombia,* the British Columbia Supreme Court considered a challenge to the Nisga Nation's treaty purporting to settle their sovereign rights.[100] The outcome is instructive as the application of the process designed by the Supreme Court of Canada. The *Campbell* Court noted that the preamble to the Constitution establishes an expectation that "gaps" in sovereignty will occur and may be resolved.[101]

> British imperial policy, reflected in the instructions given to colonial authorities in North America prior to Confederation, recognized a continued form, albeit diminished, of aboriginal self-government after the assertion of sovereignty by the Crown. This imperial policy, through the preamble to the Constitution Act, 1867, assists in filling out "gaps in the express terms of the constitutional scheme."[102]

The plaintiff challenged the treaty, asserting that it "violate[d] the Constitution because parts of it purport[ed] to bestow upon the governing body of the Nisga'a Nation legislative jurisdiction[,]" thus failing to comply with the Constitution's division of powers.[103] The court, however, disagreed, [104] declaring:

> the assertion of Crown sovereignty and the ability of the Crown to legislate in relation to lands held by Aboriginal groups does not lead to the conclusion that powers of self-government held by those Aboriginal groups were eliminated. Such a conclusion would be inconsistent with the principles underlying aboriginal rights set out in paragraph 95 above, first articulated by Chief Justice Marshall and later affirmed by the Supreme Court of Canada in cases like Sioui.[105]

Thus, the court upheld the Nisga'a Nation's right to limited independent legislative authority, subject to federal or provincial constraints.[106] As such, the circuitous route set out by the history of Canadian jurisprudence, regarding the sovereignty of its First Nations and the determination of the powers of self-government to which they are inherently and derivatively entitled, appears to have worked in favor of the Nisga Nation.

## III NEW ZEALAND

Historical development of the sovereignty of indigenous peoples in New Zealand began prior to the Treaty of Waitangi[107] with the Declaration of Independence,[108] signed by thirty-five Maori Chiefs on October 28, 1835.[109] In the Declaration, the Maori Chiefs used a uniquely "Western" document to assert a sovereignty not previously memorialized in a written instrument.[110] The translated document expressly both proclaims the Chiefs' authority for executive and legislative power and anticipates the possibility of future alienation of that power.[111] Specifically, the document states, in part:

> 2. All sovereign power and authority within the territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity, who also declare that they will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled.[112]

The document specifically stated in its text that a copy of the Declaration was to be transmitted to the King of England with thanks for His Majesty's recognition of the Maori flag.[113]

Four and a half years later, on February 6, 1840, the Crown negotiated the Treaty of Waitangi with the Maori Chiefs, thereby alienating the sovereignty of the Maori people.[114] Article I of the Treaty ceded, without reservation, complete sovereignty to the British Crown on behalf of the Maori Chiefs, irrespective of whether or not the Chiefs were a part of the ruling Confederation of United Tribes.[115] The text of the Treaty appeared on its face to be without any qualification or equivocation:[116]

> The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.[117]

The second article of the Treaty set forth the Crown's assurances in return for ceding sovereignty.[118] In addition to recognition as loyal British subjects, the indigenous peoples of New Zealand were to receive "full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries [sic] and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession."[119] The caveat was that "the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate,"[120] such that an indefeasible right to purchase land of aboriginal title accrued to the Crown, not unlike the discovery doctrine relied on by the courts in the United States and Canada.

The apparent effect of these two articles, when taken in tandem, is that the indigenous peoples of New Zealand have absolutely no claim to any sovereign right of self-determination because that right was ceded in full from the original possessors to the Crown of England. However, that contention is not without challenge. In 1987, the Wellington Court of Appeal resolved a sovereignty claim raised in *New Zealand Maori Council v. Attorney-General*[121] with a determination of law based on two theories.[122] As regards the North Island of New Zealand, the court found the Treaty of Waitangi to be legitimate, binding and dispositive.[123] With regard to the South Island, the court found sovereign title in the Crown by virtue of discovery.[124] In conclusion, the court found that

"[t]hese proclamations were approved in London and published in the London Gazette of 2 October 1840. The sovereignty of the Crown was then beyond dispute and the subsequent legislative history of New Zealand clearly evidences that Sovereignty in New Zealand resides in Parliament."[125] With that, the Wellington Court of Appeal foreclosed any claim of indigenous sovereignty.

New Zealand legal scholars acknowledge that the matter may be closed for now but offer theories as to a possible resurrection of Maori sovereignty.[126] Ani Mikaere and Stephanie Milroy of the University of Waikato point out that challenges by Maori to the sovereignty of the Crown were increasing as of the year 2000 and that, at least in part, the surge was due to an increase in awareness of inconsistencies between the Maori and English texts of the Treaty.[127] These scholars concluded that "[g]iven the increasing attention being paid to both the Maori text of the Treaty of Waitangi and the Declaration of Independence, as well as the growth in Maori cynicism at the Crown's claim to sovereignty, further challenges of this sort are inevitable."[128]

Three years later, Professor Paul Rishworth of the University of Auckland expanded on the work of Ms. Mikaere and Ms. Milroy.[129] Professor Rishworth argued that two concurrent, confounding factors cause confusion, giving rise to discontent and challenges to the Treaty of Waitangi and its transfer of sovereignty.[130] The first factor is that, as a document of legal importance, the Treaty is simply too short to give much direction or clarity to the confusion.[131] The second factor, acknowledged by Ms. Mikaere and Ms. Milroy, is that "it is in Maori and English versions, neither of which are direct translations of each other."[132] He explains, "[i]n its English version the Treaty might be thought a fairly straightforward exchange, albeit momentous: Maori sovereignty is ceded

to the Crown in exchange for promises that Maori property rights will be protected and that Maori will be treated equally as British subjects."[133]

The Maori text of the Treaty of Waitangi differs in more that just tone and choice of prose.[134] Indeed, the Maori text ceded something very different from what the Crown purported to have received.[135] Professor Rishworth points out that most of the Maori signed the Maori version of the Treaty and thus assented to very different terms:[136]

> [i]n Te Tiriti o Waitangi, the Chiefs cede only governorship while retaining chieftainship over their possessions, tangible and intangible. This is well capable of meaning, as we know, that Maori were promised a continuing chiefly authority over their own affairs, divorced from property ownership (but that, as well, where it is retained).[137]

Although the courts have determined the question of sovereignty in keeping with *New Zealand Maori Council*, Rishworth observes the curious political reality of devolution, in which the Crown has devolved itself of certain interests in Maori institutions.[138] He states that "[r]econciling [the Crown's cession of authority in specific areas of Maori governance] with the Crown's claim to an absolute sovereignty, in which Maori are subjects, is a challenge."[139]

Finally, Professor Rishworth concludes that the practical result is somewhat different than the controversy would lead one to believe. He argues that the:

> outcome in the courts at least is that the Treaty is seen to generate principles that are essentially "process" oriented: that the Crown must deal fairly and in good faith with Maori tribes, with consultation and so on. A process conception of the Treaty sits relatively comfortably within the human rights paradigm.[140]

Notwithstanding the professor's affection for the political solution, the weight of the legal authority appears to be riding against him, especially in the context of the well-settled Wellington Court of Appeal decision that sovereignty is and has been decided for one hundred sixty years.[141]

## IV AUSTRALIA

Australia also began as an English Colony. As with the United States, Canada and New Zealand, the question of aboriginal sovereignty arose before Australia came into being as a nation. A patchwork of authority regarding aboriginal sovereignty rights has developed in absence of any formal treaty between the governments of England or Australia and the aboriginal peoples of Australia. The patchwork includes case law and legislation that alternately recognize, run from, obscure or reflect a measure of autonomy to be memorialized or obfuscated as convention or convenience dictate. The authority shows that the power of self-governance and self-determination is laid upon principles that are various and far-flung without a clear federal mandate to guide them.

The Australian courts historically recognized an aboriginal system of justice, as addressed by the court in *Regina v. Ballard*.[142] In that case, both the murder defendant and the murder victim were Australian aborigines.[143] When the accused appeared before the Supreme Court of New South Wales, the Chief Justice relied upon the existence and reliability of a native system of justice to administer the matter.[144] The decision was predicated upon the court's aversion to becoming the duty-bound venue to resolve not just criminal but also property disputes between aboriginal residents.[145] It is in this dismissive manner, probably motivated by a need to be expeditious, that the court inadvertently recognized a small piece of sovereign self-governance by the acknowledgement of an aboriginal system of justice.

The nexus of any discussion of modern notions of aboriginal sovereignty in Australia begins with the Proclamation delivered by Governor Bourke on October 10, 1835.[146] Governor Bourke articulated the legal principle of "terra nullius"[147] or literally translated, "no earth."[148] The Proclamation created the legal fiction that no title in fee existed with any person prior to that date.[149] The effect of this pronouncement was to create, where it had not existed in fact, an opportunity for the Crown to claim title in fee to all of Australia based upon the discovery doctrine. As such, the discovery doctrine has played a role in defeasing aboriginal title in the United States, Canada, New Zealand and Australia.

By 1835, no title in fee existed in any aboriginal resident of Australia, except that which might come to him through the Crown. However, the Crown had taken notice of her native inhabitants and pursued a direction very similar to that which it had used in the United States, Canada, and New Zealand; it declared itself the fiduciary caretaker of its native ward. Passage of the Aboriginal Protection Act[150] in 1869 established a caretaker/ward relationship between the government of Victoria and the aboriginal peoples living within the state.[151]

Subsequently, in 1900, England passed the Australian Constitution and established definite Crown authority over the indigenous peoples of Australia.[152] Authority was established through a simple, but passive, manner. Chapter One, section fifty-one, of the Commonwealth of Australia Constitution Act specifically enumerated the powers of Parliament.[153] The section expressly declined to enumerate powers relating to Australian people of the aboriginal race.[154] Because the states are seized of the powers not specifically enumerated to the Parliament, and because the principle of "terra

nullius"[155] divested the aboriginal people of any preexisting title or right to self-governance, it followed that the state legislatures became immediately seized of the right to legislate all matters concerning the interests of the indigenous population.

In essence, the states had already begun to exercise this power by enacting Aboriginal Protection Acts similar to the one enacted in Victoria.[156] The rationale behind such acts for Australia was similar to the motives of the United States, Canada or New Zealand, in which a fiduciary relationship arose from the defeasance and divestiture of aboriginal rights that created a ward and guardian relationship.[157]

The condition of this patchwork, piecemeal, state-by-state approach to indigenous sovereignty, or lack thereof, changed in 1972 when Australia signed the International Covenant on Economic, Social and Cultural Rights.[158] The Covenant articulated principles that were adverse to the history and experience of the aboriginal and Australian peoples. Specifically, Article I of the Covenant made two bold statements, which, if taken in context, foretold great changes on the horizon for sovereignty concerns of the aboriginal people. Article I, Clause 1 of the Covenant stated that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[159] Furthermore, Article 1, Clause 3 of the Covenant bound the government of Australia to recognize the rights of its indigenous peoples.[160] The relevant clause states that "[t]he States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."[161]

On March 10, 1976, the effective date of the Covenant, the context in which aboriginal people lived within Australia began to shift. In that year, two important pieces of domestic legislation were enacted which began the process of recognizing and acting upon the sovereignty and self-government of Australia's native people.[162] First was the Aboriginal Councils and Associations Act.[163] It was designed to provide a structure for the varied native tribes by providing "for the Constitution of Aboriginal Councils and the Incorporation of Associations of Aboriginals and for matters connected therewith."[164]

The second act of the same year, in keeping with the Covenant, helped to begin the process of determining an equitable solution to disputes over land. [165] The Aboriginal Land Rights (Northern Territory) Act provided, among other things, "for the granting of Traditional Aboriginal Land in the Northern Territory for the benefit of Aboriginals."[166]

As the framework began to fit together to grant aboriginal people a larger role in land ownership and self-government, challenges were inevitable. The first bold claim asserted by the aboriginal people was a claim to sovereignty over the entire continent of Australia on the premise that the royal claim was void.[167] *Coe v. Commonwealth of Australia*[168] reached the High Court of Australia three years after the Covenant took effect. The aboriginal plaintiff alleged, inter alia, that "Captain James Cook RN….wrongfully proclaimed sovereignty and dominion over the east cost of the continent now known as Australia for and on behalf of King George III" in April of 1770.[169] Furthermore, the plaintiff claimed that "Captain Arthur Phillip, RN. wrongfully claimed possession and occupation for the said King George III … that area of land extending from Cape York to the southern coast of Tasmania and embracing all the land

inland from the Pacific Ocean to the west as far as the 135th longitude" in January of 1788.[170]

The plaintiff took on Governor Bourke's determination of "terra nullius"[171] directly with the argument that:

> 7A. The whole of the said continent now known as Australia was held by the said aboriginal nation from time immemorial for the use and benefit of all members of the said nation and particular proprietory (sic) possessory and usufructuary rights in no way derogated from the sovereignty of the said aboriginal nation.
>
> 8A. (also 21A) The proclamations by Captain James Cook, Captain Arthur Phillip and others and the settlement which followed the said proclamations and each of them wrongfully treated the continent now known as Australia as *terra nullius* whereas it was occupied by the sovereign aboriginal nation as set out in paragraphs 5A, 6A and 7A hereof.[172]

The plaintiff's position was nothing less than a complete departure from the conventional understanding sovereignty and title, and the court was simply unwilling to make such a change. The court first disposed of the sovereignty issue:[173] "[t]hus what I have called the first branch of the proposed statement of claim cannot be allowed because generally it is formulated as a claim based on a sovereignty adverse to the Crown."[174] The court declined to dismiss the issue of title with such haste: "[t]his declaration may not be in the precise form which would or could be granted but a statement of claim will not be struck out because the declarations and other relief sought are defective."[175] The court thus sought to incorporate the new direction of the law in this area, as laid out in the Covenant and the subsequent acts protecting aboriginal interests. In so doing, the *Coe* court foreshadowed an inevitable showdown, realized in *Mabo v. Queensland*.[176]

The High Court of Australia first addressed the facts of *Mabo* in 1988, when it considered an aboriginal claim of title that dated to a point prior to "discovery" of

Australia by Captains Cook and Phillip.[177] The facts of *Mabo* were tailor made to give instruction and direction on this new legal horizon. Essentially, the aboriginal Torres Strait Islanders had occupied their remote portion of Australia, primarily unfettered by Crown rule, until the Crown asserted a sovereign interest in the land.[178] When challenged by the aboriginal claimants, the Crown passed a declaratory act affirming that it effectively had established sovereignty over a century earlier and extinguishing any other native rights.[179] The court in *Mabo I* declined to determine what, if any, aboriginal rights had actually survived the Crown's initial annexation of the territory in 1879, instead focusing exclusively on the validity of the declaratory act.[180] The court instead ruled that the declaratory act's impermissible effect was to discriminatorily deny rights to ethnic aboriginal Australians in violation of pre-existing antidiscrimination legislation.[181]

A mere four years after the court ruled in favor of *Mabo I*, the parties were once again before the court to litigate their aboriginal rights to land.[182] In the final round, *Mabo II*, the plaintiff picked up the argument where the court had left it, claiming that native title, if not extinguished by the Australian government through the 1985 declaratory act, must still exist.[183] The two most important and dispositive findings made by the court were, first, that the title was never effectively extinguished by the Crown and, second, that the land has been continuously held from some date prior to the discovery by Captains Cook and Phillip.[184] The opinion states, in relevant part, that:

> the common law of this country recognises [sic] a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland.[185]

The holding of *Mabo II* represents the culmination of small steps of policy change, which led to the judicial recognition of a legal concept, native title, that had been denied by the declaration of "terra nullius"[186] some 157 years prior.

The Australian Aborigines thus had judicial support to challenge Crown title in favor of native title, and the Wiradjuri Tribe's case was primed to test the limitations of *Mabo II*.[187] In *Coe v. Australia*,[188] the plaintiff argued several theories of why and how Australia should cede title to land in New South Wales that already had been granted in fee to subsequent owners.[189] The *Coe* plaintiffs advanced arguments predicated upon their right to self-government pursuant to development following the International Covenant on Economic, Social and Cultural Rights[190] and the *Mabo I* cause for alienation without compensation inconsistent with anti-discrimination legislation. *Mabo II* asserted, and *Coe* argued, that the origin of native title preceded discovery by the British Crown, as well as advancing arguments of breach of fiduciary duty, inter alia.[191] However, the court found no merit in some of the plaintiff's claims and focused on the item which was central to all of the causes of action plead, "[c]ertainly the sovereignty claim is the central element in the case pleaded in the statement of claim."[192] The court went on to distinguish this case from *Mabo II*:[193]

> 5. Furthermore, within the lands claimed there are many areas of land which have been dealt with by statutes and are the subject of freehold and other grants of title. Hence, the plaintiff is asserting a claim to many parcels of land in New South Wales which are the subject of grants of freehold and other title. That is a matter of particular relevance to the plaintiff's assertion of native title in accordance with the decision in Mabo v. Queensland (No.2).[194]

As such, *Coe v. Australia* provides an instructive look at the limitations the court is willing to set in the new Post-Mabo regime.

Australia's experience is unique in that is the single country that steadfastly refused to enter into a formal treaty with its indigenous peoples. Nevertheless, it acknowledged and affected change as a result of a changing outward perspective toward the world stage rather than an inward focus on property rights. Although the question of formal sovereignty is somewhat difficult to answer, the legislative actions of Australia and her many states in areas that affect aboriginal title and rights clearly reveal that the only remaining way in which they have been excluded is as a direct party to the legislation that has controlled and defeased so much of their prior inherent rights.

## V CONCLUSIONS

This survey of cases, legislation, declarations and treaties encompasses four nations and approximately 240 years. The situations have stark differences and striking similarities. All four nations and their policies regarding indigenous persons were heavily influenced by England. Each of the cases surveyed was either operative, illustrative or instructive regarding the limitations on the indigenous rights to self-governance and title to land. Each nation incorporated some variety of a discovery doctrine, ward/guardian doctrine and preemption doctrine. With the exception of Australia each nation had an era of treaty making with the indigenous peoples. With the exception of New Zealand, each nation exercised some sort of assumption that original and remaining aboriginal sovereignty was inferior to that of the Crown. Additionally, it appears from the experiences of the indigenous peoples of the United States, Canada, New Zealand and Australia that sovereignty which is asserted and preserved as inherent and preceding the

influence of England may be preserved in some way. However, those rights to self-governance and title, which are derived of a treaty or legislative act are less durable and more likely to be subsequently limited and curtailed. Finally, none of the indigenous peoples in any of the four countries listed above enjoys complete sovereignty. Those privileges vary based upon the context in which the actors find themselves; on reservation land, off reservation land, on reservation land held in fee simple by an indigenous person, or by a non-indigenous person. Finally, even in Australia where no treaty was ever offered to the aboriginal people, external forces, such as multilateral treaties on human rights, are having a net positive influence on the need and articulation of the sovereign rights of indigenous peoples.

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[1] BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).
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[3] Johnson v. M'Intosh, 21 U.S. 543, 574 (1823).
[4] *Id.*
[5] *Id.*
[6] *Id.* at 582.
[7] *Id.* at 580-581.
[8] *Id.* at 582.
[9] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
[10] *Id.* at 16.
[11] *Id.* at 17.
[12] Worcester v. Georgia, 31 U.S. 515 (1832).
[13] *Id.* at 562.
[14] *Id.* at 560.
[15] United States v. Kagama, 118 U.S. 375 (1886).
[16] *Id.* at 376.
[17] *Id.* at 384.
[18] *Id.*
[19] Indian Appropriations Act, § 9, 23 Stat. 385 (1885).
[20] U.S. CONST. Art I, §8, cl. 3.
[21] United States v. Winans, 198 U.S. 371 (1905).
[22] *Id.*
[23] Indian Reorganization Act, 25 U.S.C.A. § 461 (1934).
[24] *Id.*
[25] *Id.*
[26] Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (1956).
[27] *Id.* at 91.
[28] *Id.* at 99.

[29] *Id.* at 92.
[30] Oliphant v. Susquamish Indian Tribe, 435 U.S. 191 (1978).
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[32] *Id.*
[33] Montana v. United States, 450 U.S. 544 (1981).
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[35] Duro v. Reina, 495 U.S. 676 (1990).
[36] *Id.* at 693.
[37] *Id.*
[38] *Id.*
[39] 25 U.S.C.A. § 1301(2).
[40] *Id.*
[41] Williams v. Lee, 358 U.S. 217 (1959).
[42] *Id.* at 220.
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[44] See *supra* n.38 and accompanying text.
[45] *Id.*
[46] Strate v. A-1 Contractors, 520 U.S. 438 (1997).
[47] *Id.*
[48] *Id*. at 445.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 449.
[52] *Id.* at 442.
[53] Nat'l Farmers Union Ins. Co.s v. Crow Tribe of Indians, 471 U.S. 855 (1985).
[54] *Id at 856.*.
[55] Royal Proclamation of 1763, 3 Geo. 3, (Eng.).
[56] *Id.*
[57] *Id.*
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[61] Bradford W. Morse, *Indigenous Renascense: Law, Culture & Society in the 21st Century: Common Roots But Modern Divergences: Aboriginal Policies in Canada and The United States*, 10 St. Thomas L. Rev. 115 (1997).
[62] Morse at 115.
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[65] Royal Proclamation of 1763, 3 Geo. 3, (Eng.).
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[67] Indian Act, R.S.C., ch. I-5, §81 (1985) (Can.).
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[75] *Id.* at 336.
[76] *Id*.
[77] *Id.*
[78] *Id.* at 376.
[79] *Id.*
[80] *Id.* at 378.
[81] *Id.*

[82] Regina v. Sioui, [1990] 1 S.C.R. 1025 (Can.).
[83] *Id. at* 1055.
[84] *Id.*
[85] *Id.* at 1056.
[86] *Id.*
[87] Regina v. Pamajewon, [1996] 2 S.C.R. 821 (Can.).
[88] *Id.* at 831.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] Van der Peet v. The Queen, [1996] 2 S.C.R. 507 (Can.).
[93] *Id.* at 549.
[94] *Id.*
[95] R. v. Gardner, [1996] 138 D.L.R. (4th) 204 (Can.).
[96] *Id.* at 216.
[97] *Id.* (quoting R. v. Van de Peet, [1996] 2 S.C.R. 507 (Can.)).
[98] Such as political advantage from a majority aboriginal population in a particular state or province.
[99] Campbell v. British Columbia, [2000] 189 D.L.R. (4th) 333 (Can.).
[100] *Id.* at 349.
[101] *Id.* at 351.
[102] *Id.*
[103] *Id.* at 340.
[104] *Id.* at 364.
[105] *Id.*
[106] *Id.* at 349.
[107] Treaty of Waitangi, Feb. 6, 1840, Eng.-Maori, 89 Consol. T.S. 473-75.
[108] THE DECLARATION OF INDEPENDENCE OF THE NORTHERN CHIEFS para. 2 (Maori 1835).
[109] THE DECLARATION OF INDEPENDENCE OF THE NORTHERN CHIEFS (Maori 1835).
[110] THE DECLARATION OF INDEPENDENCE OF THE NORTHERN CHIEFS para. 2 (Maori 1835).
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[114] Treaty of Waitangi, Feb. 6, 1840, Eng.-Maori, 89 Consol. T.S. 473-75.
[115] Treaty of Waitangi, Feb. 6, 1840, Eng.-Maori, art I, 89 Consol. T.S. 473-75.

[116] *Id.*
[117] *Id.*
[118] Treaty of Waitangi, Feb. 6, 1840, Eng.-Maori, art. II., 89 Consol. T.S. 473-75.
[119] *Id.*
[120] *Id.*
[121] New Zealand Maori Council v Attorney-General [1987] 1 N.Z.L.R. 641.
[122] *Id.*
[123] *Id.* at *141.
[124] *Id.* at *142.
[125] *Id.*
[126] Ani Mikaere & Stephanie Milroy, *Treaty of Waitangi and Maori Land Law*, 2000 N.Z. L. REV. 363; Paul Rishworth, *Human Rights*, 2003 N.Z. L. REV. 261.
[127] Ani Mikaere & Stephanie Milroy, *Treaty of Waitangi and Maori Land Law*, 2000 N.Z. L. REV. 363, 374.
[128] *Id.*
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[137] *Id.*
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[140] *Id.* at 279.
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[143] *Id.* at 100.
[144] *Id.* at 103.
[145] *Id.* at 105.
[146] Proc. of Gov. Bourke, Oct 10, 1835 (U.K.).
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[150] Aboriginal Protection Act, 1869, Vict. (Austl.).
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[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] Aboriginal Councils and Ass'n Act, 1976, (Austl.); Aboriginal Land Rights (Northern Territory) Act, 1976, (Austl.).
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[166] *Id.*
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[169] *Id.*
[170] *Id.*
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[173] *Id.*
[174] *Id.*
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[179] *Id.* (citing the Queensland Coast Islands Declaratory Act, 1985 (Austl.)).
[180] *Id.*
[181] *Id.* (citing the Racial Discriminaton Act, 1975 (Austl.)).
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[184] *Id.*
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