

EQUITY & ABORIGINAL TITLE

A Cultural Economics Research Note on Post-Colonial Consciousness

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Index

[Introduction](#)
[Property & Title](#)
[Equity & Common Law](#)
[Equity & Aboriginal Title](#)
[Conclusions](#)
[References](#)
[Endnotes](#)

Introduction

In cultural economics Law is not a technical subject but rather a cultural artifact arising from the unique historical experience of a specific culture with its distinctive patterns of custom, habit and life ways ([Schlicht 1998](#)). More to the point, each system of Law has its own definition of what can and cannot be bought and sold, *i.e.*, what is Property.

In reading the opinion of the Honourable Mr. Justice Vickers (2007) ¹ in *Tsilhqot'in Nation v. British Columbia*, I must conclude, however, that Aboriginal Title has been the one-sided story of Canadian Law – as a technical subject - struggling to integrate a cultural experience and diversity dramatically different from Anglosphere Common Law and Francophone Civil Code. This presents a problem.

The philosopher John Dewey reasoned that when Law looks outside itself for insight, (in Dewey's case about corporate legal 'personality') the results can be unfortunate because "the human mind tends toward fusion rather than discrimination, and the result is confusion" (Dewey 1926, 670). Similarly, in copyright, Law looks Janus-like with one face towards copyright as trade regulation of a State sponsored monopoly and the other towards the natural or 'human' rights of a Creator. This is captured in the title of Part I of the Canadian Act: *Copyright and Moral Rights in Works* (Chartrand 2006).

In analytic psychology there is an expression: *reculer pour mieux sauter* – step back to better leap forward. In this research note I step back to look at the roots of Anglosphere property rights seeking a bridge between 'the spirit of the Law' and Aboriginal Title. As evidenced by the note's title, I believe that bridge to be Equity, a unique strand of Anglosphere Law distinct from

Common Law. I will argue, nonetheless, that ‘path dependency’, ‘precedent’ and history are in play, as in the Common Law itself. This reflects, from my perspective, the more general psychological Law of Primacy: That which comes first colours all that comes after. And what comes next is a cultural economicsⁱⁱ research note, not a legal opinion. *Caveat emptor!*

Property & Title

Property is the right to the possession, use, or disposal of a thing. This implies ownership or ‘proprietorship’. In feudal times it referred to a piece of land under one owner, *i.e.*, a landed estate. Such estates were initially associated with a Title such as the Duchy of Cornwall. With Title came Property. Title was granted by the Sovereign and consisted of a bundle of rights & obligations (*e.g.*, fealty) which were often qualified by the Sovereign. Some could be inherited; some could not; some rights were included, some were not. All Property and Persons, however, were ultimately subject to the Sovereign.

Under Common Law, all Property (and, in constitutional monarchies, all Persons) remains ultimately subject to the Sovereign whether Crown or State, *a.k.a.*, the ‘People’. Sovereignty is supreme controlling power ultimately exercised through overwhelming coercive force. The territory over which Sovereignty is asserted is established by continuing occupancy and/or by conquest.

Today, Title to Property usually takes the form of a document, deed or certificate establishing the legal right to possession. The coercive power of the State may be invoked to protect and defend it. There are three contemporary forms. There is immovable or ‘real’ Property such as land, buildings and fixtures which together with moveable Property or ‘chattel’ (derived from the Anglo-Saxon for cattle) constitute *tangible* Property. Then there is *intangible* Property such as business ‘good will’ and intellectual property such as copyrights, patents, registered industrial designs and trademarks. Each of these rights & obligations are granted by and subject to the pleasure of the Sovereign whether Crown or State. In Law each consists of different bundles of rights & obligations, *e.g.*, the term of a patent vs. copyright.

John R. Commons (1924) observed in his classic *Legal Foundations of Capitalism* that Property, in the economic sense of what can be bought and sold, is the history of its ever increasing intangibility. In this sense, Property has become not so much the thing in-and-of-itself but rather an evolving set of rights & obligations associated with it, *e.g.*, a warranty. Thus Property

today includes intangibles like artistic & literary works, inventions, futures options, equity shares, software and investment certificates in land and buildings, *e.g.*, ‘CDOs’ or Collateralized Debt Obligations including an unknown number of sub-prime mortgages. Such intangible Property is arguably the legal foundation of the knowledge-based economy (Chartrand 2007).

With respect to ‘real’ Property there are two principal forms of Title. First, allodial Title refers to absolute ownership without service or acknowledgement of or to any superior. This was the practice among the early Teutonic peoples before feudalism. It is important to note the political and economic as well as legal implications of such myth. For example, leading up to the English Civil War of the 1640s Parliament needed an argument to counter the ‘Divine Right of Kings’ claimed by the Tudors and the Stuarts. They found it in Anglo-Saxon Myth. Among the ancient Anglo-Saxons the chief was chosen by members of the tribe based on throneworthiness, *i.e.*, the candidate who could provide the most loot, pillage, plunder and rape. Ancient Anglo-Saxon kings were thus invested with authority by the people and hence Parliament is supreme (MacDougall 1982). Allodial ownership is, however, virtually unknown in Common Law countries because ultimately all Property is subject to the Sovereign – Crown or State. In this sense there is no such thing as absolute private property.

Second, fee simple or ‘freehold’ is the most common form of Title and the most complete short of allodial. It should be noted that the ‘fee’ refers not to a payment but to the estate or Property itself as in the feudal ‘fief’. Fee simple is, however, subject to four basic government powers - taxation, eminent domain, police and escheat (derived from the feudal practice of an estate returning to a superior Lord on the death of an inferior without heir). In addition, fee simple can be limited by encumbrances or conditions. These may include limitations on exclusive possession, exclusive use and enclosure, acquisition, conveyance, easement, mortgage and partition. In addition it may or may not include water rights, mineral rights, timber rights, farming rights, grazing rights, hunting rights, air rights, development rights and appearance rights.

Proprietors – allodial or fee simple – may, subject to limitations in their Title, lease, let and/or rent their real Property. In the Civil Code tradition the legal right to use and derive profit or benefit from Property belonging to another person (so long as it is not damaged) is called ‘usufruct’ from the Latin meaning ‘use of the fruit’, not ownership of the tree. In Common Law, one might call it ‘tenant title’. It does not constitute legal Title but does

entitle the holder to use the Property and to have that right enforced by the State against the legal Titleholder and others.

Finally, there is occupancy or possession-based Title. In effect, this invokes ‘squatter’s rights’. It does not represent legal Title. Nonetheless, if possession by occupancy is not disputed it may, in time, become legal Title. Having established the nature of Property & Title I now turn to Equity & Common Law.

Equity & Common Law

The Common Law is one of the great contributions of the Anglosphere to humanity. Formally beginning in the reign of Henry II in the 12th century, Common Law, unlike Statutory and Regulatory Law, is unique.

Two things make Common Law different. First, judges may “make” Law by setting precedents. The body of precedent is called “common law”. If a similar case was resolved in the past, a current court is bound to follow the reasoning of that prior decision under the principle of *stare decisis*. The process is called *casuistry* or case-based reasoning. If a current case is different, however, then a judge may set a precedent binding future courts in similar cases. Casuistry must begin again, however, if changes or amendments to Statutory or Regulatory Law have the effect of negating precedent.

Second, Common Law is rooted in trial by jury, *i.e.*, one’s peers. This is viewed as a fundamental civil right in the Anglosphere. For my purposes, however, it is not relevant.

What is relevant is that before Common Law - beginning with Henry II - another unique Anglosphere juridic institution emerged – Equity. With the Norman Conquest of 1066 all rights and privileges of the previous regime were abrogated by right of conquest. In effect William the Conqueror had *carte blanche* to shape a kingdom without accounting for pre-existing feudal rights and obligations. Unlike other European kingdoms, it was his exclusive unqualified and personal domain. He was absolute Sovereign. Nonetheless, what he conquered was a patchwork of Angle, Saxon, Jute, Danish, Viking and Celtic settlements, regions, laws and languages.

The new King divided up his new Property, after accepting fealty, to a new Anglo-Norman aristocracy. The new local rulers, while subject to the King, also, in effect, inherited rights and privileges acceded to traditional rulers under local legal systems. Some were honoured and survived to become incorporated into Common Law.

William's new subjects, however, soon brought to his attention (and that of his successors) inequities in a supposedly unified kingdom. At the extreme, in one jurisdiction theft of a loaf of bread cost a hand; in another, two days in the stocks hit by rotten vegetable and insults thrown by one's neighbours. It was not guilt or innocence they cried but fairness of punishment before the King. This is arguably the root of Equity – a separate and distinct strand of jurisprudence parallel to the Common Law of precedent.

Over time responsibility for hearing calls for mercy was transferred to the King's Lord Chancellor and a court of his own – the Court of Equity also known as the Court of Conscience or of Morality. In fact until Sir Thomas More (a lawyer) became Chancellor in 1529, all had been men of the cloth. Two aspects of Equity played a critical role in the Sovereign's ability to control his vassals. These were trusts and tenant-landlord disputes. Trusts (from which modern charities and financial trusts evolved) generally concerned widows and orphans left to the mercy of a local lord. The most famous is Lady Marion of the Robin Hood legend who was an orphan and ward of the King. With respect to tenant-landlord disputes, Equity balanced the feudal local lords by judiciously connecting the King to his subjects. This was called the 'rent bargain' by J.R. Commons (1924). It stabilized the social system of post-Conquest England.

While *Magna Carta* (1215) and subsequent developments increasingly limited the King, Equity and Common Law continued to develop as parallel systems of courts with precedence given to Equity. It was not until 1873 in the United Kingdom that the two systems of courts merged. Nonetheless the two strands of Anglosphere jurisprudence continue to this day in all Common Law countries with Equity retaining precedence.

The economic concept of Equity arguably derives from legal Equity. In fact the Chancellor of the Exchequer exercised a concurrent jurisdiction in Equity with the Lord Chancellor's Court. There are two economic definitions of Equity, each reflecting its historical roots. First, there is Equity as the capital of a firm which, after deducting liabilities to outsiders, belongs to the shareholders. Hence shares in a limited liability corporation are also known as equities. This links back to the historical treatment of trusts under Equity.

Second, there is Equity as 'fairness'. While often used with reference to taxation it is a general economic concept. With respect to taxation Equity has three dimensions: horizontal, vertical and overall burden. Horizontal Equity refers to 'like treatment of like'. Vertical Equity refers to 'unlike treatment of unlike'.

Overall Equity refers to the accumulated impact of all forms of taxation. Crudely, it is the difference between earned and disposable income after all taxes – income, excise, sales, *et al.*

Equity & Aboriginal Title

The Norman Conquest was decided at the Battle of Hastings in 1066 with the death of King Harold. William, Dukeⁱⁱⁱ of Normandy, became Sovereign King of England. He broke up his conquest into fiefs assigning Title to a new Anglo-Norman aristocracy after accepting oaths of fealty. In short order the multicultural nature of the newly acquired kingdom led to development of Equity and then to Common Law.

How different was the case in Canada or more generally British North America? First contact was exploratory including settlement by privateers. As with the Vikings in Newfoundland and the initial French settlement at Port Royal, the first British settlement at Roanoke, Virginia did not survive the climate and/or hostility of First Nations.

Subsequent contact began with treaties of friendship with First Nations signing as equals followed by a creeping conquest and finally conquest by attrition. Sovereignty in the East was arguably achieved only because First Nations allied themselves with the French in what became Canada, the British in what became New England, the Dutch in New Amsterdam and the Swedes in what became Pennsylvania. Hostility between European powers was, in turn, played out through existing hostilities between their First Nations' allies.

After the exit of the Dutch and the Swedes it became a battle between the French and their Algonquin allies and the British and their Iroquois allies. Between battle casualties and epidemics introduced by the Europeans, the population of the First Nations declined dramatically leading in the case of the Iroquois to the 'Great Pursuit' of Iroquoian survivors beginning in 1649.

With the final defeat of the French on the Plains of Abraham in 1759 the British became the only European power north of Florida and east of the Mississippi and, of course, in the far north where the Company of Adventurers of the Hudson Bay held sway as it did later in British Columbia. Then, in 1763, a Royal Proclamation asserted British Sovereignty declaring First Nation Title effectively usufructary in nature and dependent on the pleasure of the Sovereign. It is perhaps not coincidental that Pontiac's Great Rebellion against the British also began in 1763.

Treaties signed between equals in the East were gradually compromised as British power and population waxed and that of

the First Nations waned. The settlement drive to the West proceeded on this basis. Treaties with additional First Nations were signed and promises made but now on the assumption of British/Canadian Sovereignty defined as overwhelming coercive force as demonstrated in the two Riel Rebellions. Arguably this attitude continued until the drive to the West reached the Rocky Mountains and the far North. After the Douglas Treaties in British Columbia in the 1850s, however, no new treaties were signed in these two areas. Elsewhere gaps in the treaty system were subsequently filled with so-called 'Numbered Treaties'.

It was failure to continue the treaty-making process in British Columbia and the North that has arguably led to the problem of Aboriginal Title today. While treaties have not, at least in some instances, been fully honoured presenting the Crown with legal difficulties, lack of treaties presents it with a dilemma.

Precedent requires formal surrender – through treaty - of lands of the First Nations. Without this formality what, if any Title, do they retain? Is it allodial, fee simple or something else? And if they retain Title should it be recognized or ignored assuming Sovereignty by conquest?

In brief, before repatriation of the Constitution Common Law defined Aboriginal Title as a usufruct right, *i.e.*, a right of use, subject to the Crown. This was in keeping with the Royal Proclamation of 1763. Use of Crown land was restricted to 'traditional' activities such as hunting and fishing excluding mineral rights (mining was not considered a traditional activity) or other development rights that would alter the Crown's asset without its permission. In addition, no one except the Crown could buy land set aside for the First Nations.

This position, however, suffered from the limitations of the Royal Proclamation. It dealt only with Upper Canada or what became the Province of Ontario. Extension to the West and North where the privateering Hudson Bay Company held sway remains questionable in Law (Vickers, 2007, 480, 152). Furthermore, occupancy-based Title was not recognized. It would, however, have defined on what parts of Crown land usufruct rights function depending, of course, on a given court's interpretation of occupancy and its extent.

As previously noted, Common Law precedent can be negated by Statute. This, according to Justice Vickers (2007, 500-1, 157-8), is arguably the case of Aboriginal Title with enactment of the *Constitution Act*, 1982, and particularly s. 35(1). Explicit reference is made to and respect called for 'Aboriginal Title'. In

case law since 1982 there has emerged a new view of Aboriginal Title as a *sui generis* or a one-of-a-kind Property.

It is *sui generis* in three ways. First, it varies between First Nations depending upon their specific claim requiring reconciliation of therefore differing aboriginal laws of Property and the Common Law in a given case. Second it is not allodial, fee simple, usufruct or occupancy-based but rather some unique mix that again varies between First Nations. Third, it is *sui generis* relative to other Common Law countries with a similar post-colonial consciousness, *e.g.*, Native Title in Australia.

To determine Aboriginal Title the Law must look therefore outside itself in the first instance to differing aboriginal customs, practices and laws of Property. In the second it must then formulate a unique mix of property rights establishing the nature and extent of Aboriginal Title in each case. As Dewey (1926) noted when Law looks outside itself problems can arise.

The initial Anglosphere experience was, in fact, conquest and organization of a multicultural kingdom in 1066. It resulted in creation of Equity followed by Common Law. Justice Vickers, however, makes only one reference to Equity referring to the *Law and Equity Act* (Vickers 2007, 116, 31). He does, however, call for ‘Reconciliation’ (Vickers, 2007, 1138-1382, 441-458) which, for my purposes, is ‘remedy’ under Equity.

There are maxims of Equity the first of which is: Equity regards as done that which ought to be done. The second is: Equity will not suffer a wrong to be without a remedy. Treaties ought to have been signed. A wrong was done.

The *sui generis* nature of current Common Law makes Aboriginal Title specific to each case. All such cases share, however, two things in common. First, Common Law restricts remedy to real or fixed and to a lesser extent chattel or movable Property, *e.g.*, the caribou, deer, fish, *et al.*

Second, to establish the nature and extent of Title each court collects, collates and assesses evidence of pre-contact customs, habit, practice and especially laws of Property. Arguably when Justice Vickers writes of ‘Reconciliation’ he means between Common Law and First Nation’s law of Property.

However, as Justice Vickers also notes: “For there to be a lasting reconciliation, this relationship must be negotiated with reference to contemporary interests and needs, bearing in mind the realities of modern society” (Vickers, 2007, 509, 160-161).

The reality of modern society is the global knowledge-based economy (Chartrand 2007). It is an economy of intangible

not real Property. Microsoft and other software & hardware industrial giants rest on the intangible foundation of copyright and patent. 'Branding', *i.e.*, trademark, is a way of life even for Nation-States. Where in Common Law is the First Nations Brand? How many 'brands' are of potential commercial value in global markets?

Quite simply, remedy under Equity requires extension of Aboriginal Title to include intangible Property. This means the intellectual property of the First Nations, *e.g.*, as demonstrated by ethnographic narratives admitted in evidence under Common Law. One reason the courts have yet to extend Aboriginal Title to intangible Property is arguably Statutory rather than Common Law. Canada has not, for example, acceded to the 2003 UNESCO *Convention on Intangible Cultural Heritage*. Similarly, while the United States has enacted *Public Law 101-601: The Native American Graves Protection and Repatriation Act of 1990* it too has not acceded to the Convention. On the other hand Canada has acceded to the 2005 UNESCO *Convention on Cultural Diversity* while the U.S. has not (Chartrand March 2007).

Conclusions

Common Law deals with specific cases. A decision made in one case may or not set precedent for others. Equitable extension of Aboriginal Title to include intangible Property can, on the other hand, be dealt with more generally by Statute and applied to First Nations with existing treaties as well as those in the process of establishing Aboriginal Title.

Sui generis intellectual property rights are increasingly common on the world stage, *e.g.*, typography of integrated circuits, deposit of microorganisms for patent purpose, digital copyright, *etc.* Old rights and uses can be grandfathered while new rights extend only into the future. Development of an appropriate mechanism to extend Aboriginal Title to intangible Property in Canada will, however, require investigation of the experience of other Nation-States, *e.g.*, Australia, New Zealand and the United States, as well as the impact of the 2003 UNESCO *Convention on Intangible Cultural Heritage*.

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Endnotes

ⁱ In referencing the opinion of Justice Vickers the number after ‘2007’ refers to the paragraph while the second refers to the page.

ⁱⁱ For the American Economics Association, cultural economics falls under the heading:

Z000 - Other Special Topics: General

Z100 - Cultural Economics: General

Z110 - Economics of the Arts

Z120 - Religion

Z130 - Social Norms and Social Capital; Economic Anthropology

http://www.econlit.org/subject_descriptors.html

ⁱⁱⁱ It should be noted that the title ‘Duke’ was originally the Roman title for a military governor of a province while Count was the title of the civilian governor. These titles were handed out by the later emperors to barbarian German tribal leaders as a means of maintaining the myth of Imperium.