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Rights-based 'Recognition': The Canadian Experience

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Introduction

Comparative study can provide a rich vein of insight in the field of Indigenous law and policy. The lessons from any particular country can be elusive, often part-buried in historical contextual differences. So it is with regard to Canada – Australian legal observers sometimes baulk at dissimilarities in that country such as the 'treaty history' and the existence of government fiduciary-type duties.[1] Yet for many reasons the comparative inquiry should not end there.

In the first place, specific differences (such as those mentioned above) often do not withstand close scrutiny as justifications for insularity, being in essence just differences in the application of common underlying legal and political tenets.[2] Secondly, the contextual similarities are often greater than the differences. With respect to Canada and Australia, for example, these include similarities in legal heritage, in governmental 'trajectory' and structure, in the histories of land take-up and conflict, in the pattern of ideological evolution, and in the long trail of Indigenous disadvantage.[3] Thirdly, and perhaps more importantly, much of the study in the field of Indigenous law and policy is no place for narrow technical comparison. A broader lens is required. Aboriginal histories are a product of shared international experience, and the rationalisation and repair of colonial endeavours must to some extent be a shared international undertaking.[4]

On the specific issue of constitutional recognition, where Australia's wavering progress might seem to invite some tenacious comparative inquiry, the

1 See, for example, in the context of native title, *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 131, 135, 137; *Wik Peoples v Queensland* (1996) 187 CLR 1, 125-6; *Fejo v Northern Territory* (1998) 195 CLR 96, 130, 148-9; *Western Australia v Ward* (2002) 213 CLR 1, [639].

2 See further Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) Pt 1.

3 See generally Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Native Law Centre, University of Saskatchewan, 1983) 1; and Jeremy Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in Mabo' (1995) 17 *Sydney Law Review* 5, 21ff.

4 Cf Beverley McLachlin PC, 'Reconciling Sovereignty: Canada and Australia's Dialogue on Aboriginal Rights', in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 101.