Contested Ground: Treaties, Land Claims, and Indigenous Sovereignty in North America

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Table of Contents

Introduction

This book examines how law has structured relationships among Indigenous nations and settler states across North America, and how those relationships have been contested, renegotiated, and defended over time. Treaties, statutes, judicial opinions, and administrative practices have repeatedly been used to dispossess Indigenous peoples of land, jurisdiction, and resources. Yet those same instruments have also provided footholds for resistance, recognition, and renewal. By placing legal doctrine alongside historical experience and contemporary organizing, the chapters that follow aim to show both the limits of the law and its strategic possibilities.

Our approach is comparative and interdisciplinary. While the focus rests primarily on the United States and Canada, we pay sustained attention to cross-border nations whose territories predate international boundaries and whose rights are shaped by multiple legal orders. We bring together archival records, case law, treaty texts, government reports, and community accounts to situate doctrine within lived geographies and histories. Each chapter pairs legal analysis with concrete case studies so that readers can see how principles operate on the ground—in fisheries and forests, in courtrooms and council chambers, along rivers and pipeline corridors.

The narrative proceeds chronologically and thematically. Early chapters explain the legal foundations laid by empire: the Doctrine of Discovery, the Royal Proclamation of 1763, and, in the United States, the Marshall Trilogy that still underpins federal Indian law. We then trace the transformation from treaty diplomacy to policies of removal, allotment, and assimilation, showing how land cessions and statutory schemes fractured territorial integrity and attempted to remake Indigenous governance. At the same time, we highlight the persistence of Indigenous legal orders and political strategies that constrained, redirected, or outlasted these projects.

Midway through the book, the emphasis shifts to rights reserved and rights recognized. Topics include usufructuary rights to fish and hunt, the reassertion of tribal and First Nations authority during the self-determination era, and landmark decisions recognizing Aboriginal title and the duty to consult. We examine northern settlements such as the Alaska Native Claims Settlement Act and the creation of Nunavut, as well as co-management regimes that link ecological stewardship to jurisdiction and livelihood. Throughout, we attend to the social infrastructure of sovereignty—health care, education, housing, and water—treating these not as “policy add-ons” but as core treaty commitments.

The final third of the book looks forward by analyzing contemporary conflicts and emerging frameworks. We consider the legal architecture surrounding energy

development and environmental review, the politics of sacred sites and repatriation, and the movement for land back through purchase, trust acquisition, and legislative action. We also explore transboundary mobility and the rights of nations divided by borders, the expanding role of international human rights norms and UNDRIP, and the practical challenges of implementing free, prior, and informed consent in domestic law.

Readers will find two through-lines across the chapters. First, law is never static; it is made and remade through negotiation, litigation, legislation, and daily practice. Second, the most durable gains emerge where legal strategy is coupled with community organizing, intergovernmental diplomacy, and stewardship grounded in place. For students, these pages offer a map of doctrines, institutions, and precedents. For practitioners and advocates, they provide a toolbox—briefing templates, statutory pathways, and negotiation models—illustrated by successes, setbacks, and lessons learned.

“Contested Ground” is ultimately an invitation to read treaties as living constitutional documents and to understand sovereignty as both a legal status and a set of responsibilities. By situating legal histories within the larger arc of Indigenous resurgence, the book aims to clarify what has been promised, what has been taken, and what pathways exist for principled reconciliation. The goal is not to romanticize law, but to use it with clear eyes: as a terrain of contest, a record of commitments, and a means—among others—for protecting land, culture, and collective self-government.

CHAPTER ONE: Mapping the Ground: Indigenous Polities and Legal Orders before Contact

Before the first European ships appeared on the horizon, the land that would become Canada and the United States was already governed. It was not an empty wilderness awaiting the imposition of order, but a dense mosaic of nations, laws, and diplomacy. Hundreds of distinct languages were spoken, each carrying its own ways of understanding the world, and each embedded in systems of governance that had evolved over millennia. The ground was mapped not only by rivers, mountains, and coastlines, but by relationships—kinship ties, trade networks, territorial boundaries, and sacred responsibilities. To understand what followed in the centuries of treaty-making and land claims, it is essential to begin with the legal and political orders that existed prior to sustained European contact.

The diversity of Indigenous polities in North America was staggering. In the northeast, the Haudenosaunee, or Iroquois Confederacy, united five—and later six—nations through a constitutional framework known as the Great Law of Peace. This was not a loose alliance but a structured governance system with councils, clan representation, and procedures for deliberation and consensus. The Haudenosaunee had a sophisticated approach to jurisdiction, balancing local autonomy with collective decision-making on matters of war, diplomacy, and trade. Their political system was durable enough to influence later democratic ideas, but its primary function was to maintain peace and balance within and among nations.

Further south, along the rivers and valleys of the Southeast, powerful chiefdoms and confederacies such as the Cherokee, Creek, Choctaw, and Chickasaw organized complex societies. These nations possessed sophisticated agricultural systems, urban centers, and legal codes that regulated everything from property disputes to criminal offenses. Cherokee law, for instance, was codified and updated through councils, with established procedures for resolving conflicts and maintaining social order. Governance was not merely ceremonial; it was administrative and judicial, embedded in communal life and reinforced through oral tradition and practice.

On the Great Plains, mobile nations like the Lakota, Dakota, and Nakota developed legal and diplomatic systems suited to vast landscapes and shifting alliances. Territorial boundaries were recognized and respected, and access to hunting grounds was regulated through kinship ties and inter-nation agreements. Diplomatic protocols governed meetings between nations, including gifts, speeches, and ceremonial exchanges that signaled respect and set the terms of engagement. Law here was not confined to written codes but was lived through ceremony, oral tradition, and the

enforcement of norms by community leaders and councils.

Along the Pacific Northwest Coast, the potlatch system structured governance, law, and economy. Nations such as the Tlingit, Haida, Kwakwaka'wakw, and Coast Salish used these ceremonial gatherings to affirm rights to names, territories, and resources. The potlatch was not merely a feast; it was a legal institution where titles were transferred, disputes were settled, and alliances were solidified. Houses and clans held defined territories, and rights to harvest fish, hunt marine mammals, and gather cedar were tied to specific places and lineages. These systems were robust enough to withstand centuries of disruption and continue to be practiced today.

In the desert southwest, Pueblo nations like the Hopi and Zuni organized around communal governance and religious authority. Their legal orders emphasized balance, reciprocity, and the stewardship of scarce water and agricultural land. Leadership structures were often collective, with councils of elders guiding decisions through consensus. Property and resource use were governed by long-standing traditions that prioritized community well-being and ecological sustainability. These polities were not isolated; they engaged in trade networks that extended across hundreds of miles, carrying goods, ideas, and diplomatic protocols.

Across the subarctic and boreal forests, nations such as the Dene, Cree, and Anishinaabe developed flexible governance systems suited to seasonal movement and resource harvesting. Territorial stewardship was organized around family groups and clans, with leadership responsibilities distributed among elders and skilled hunters. Law was intertwined with spiritual teachings, emphasizing respect for animals, plants, and the land itself. These traditions were not static; they adapted to changing environmental conditions and shifting social relationships, demonstrating a capacity for innovation that would be crucial in later negotiations with colonial powers.

Agricultural societies like the Mandan, Hidatsa, and Arikara along the Missouri River built permanent villages and developed legal frameworks to manage communal resources, trade, and conflict resolution. Their societies were stratified, with clear roles for civil and religious leaders, and they engaged in extensive trade networks that connected them to nations across the Great Plains and beyond. The sophistication of their governance is often overlooked in narratives that emphasize nomadism, but their legal orders were as complex as those of any sedentary society.

On the Atlantic seaboard, nations such as the Wampanoag, Penobscot, and Mi'kmaq navigated seasonal cycles of fishing, hunting, and agriculture. Their legal systems governed territorial use, marriage, and diplomacy, and were enforced through councils and community accountability. These nations were among the first to encounter Europeans, and their legal and diplomatic skills would be tested in the centuries that followed. Yet their systems were well-established long before European arrival, reflecting deep knowledge of local ecosystems and social organization.

Maritime nations of the Northwest, including the Nuu-chah-nulth and Makah, developed legal orders centered on whaling and fishing. Rights to hunt whales were deeply regulated, involving spiritual protocols, skill requirements, and community oversight. These laws were not merely practical; they embodied a cosmology that linked human action to the natural world. The sophistication of these systems challenges the notion that law only exists in written form; oral legal traditions carried the same weight and authority.

In the eastern woodlands, governance often revolved around kinship and clan systems, with responsibilities and rights flowing through matrilineal or patrilineal lines depending on the nation. Clan mothers, for example, held significant authority in selecting and deposing chiefs among the Haudenosaunee. These structures were not peripheral to law but central to it, ensuring accountability and continuity. The legal landscape was pluralistic, with multiple layers of authority—household, clan, nation, and confederation—each addressing different scales of decision-making.

Trade and diplomacy were governed by well-established protocols. Wampum belts, for instance, were not mere tokens; they were legal instruments that recorded agreements and served as mnemonic devices for treaties. In the Great Lakes region, nations used ceremonial exchanges to affirm alliances and set terms for trade. These practices demonstrate that law was not an abstract concept but a lived reality, embedded in material culture and performance.

Land tenure systems varied widely. Some nations practiced collective stewardship, where territory was held by the group and access was regulated through kinship or leadership. Others recognized individual or family rights to specific plots, particularly in agricultural societies. In many coastal and riverine areas, rights to harvest specific resources—salmon runs, shellfish beds, berry patches—were clearly defined and rigorously defended. Disputes were resolved through councils, mediation, and sometimes restorative practices that prioritized harmony over punishment.

Spiritual worldviews were inseparable from legal orders. For many nations, law was not a human invention but a reflection of cosmic balance. Stories and ceremonies encoded legal principles, teaching respect, reciprocity, and responsibility. Leaders were often chosen for their spiritual knowledge as much as their administrative skills. This integration of law and spirituality meant that violations had consequences beyond the material—they disrupted relationships with the natural and supernatural worlds.

Conflict resolution was nuanced. While warfare was part of inter-nation relations, many nations prioritized restorative justice. Among the Anishinaabe, for instance, councils would work to restore balance after disputes, emphasizing healing rather than retribution. These approaches were not naive; they recognized that ongoing coexistence required repairing relationships. Such systems would later be contrasted

sharply with colonial legal approaches that prioritized punitive justice and property rights.

Women held varied but significant roles in legal and political systems. Among the Haudenosaunee, clan mothers controlled land and resource decisions and had the power to remove chiefs who failed to meet their responsibilities. In many Plains nations, women managed camp logistics and had influence in decision-making, particularly regarding movement and resource use. Their participation in councils and ceremonies underscores that Indigenous legal orders were not monolithic but reflected diverse gender roles and responsibilities.

Children were educated within legal frameworks from a young age, learning protocols, stories, and responsibilities. This education was not formalized in schools but embedded in daily life and seasonal cycles. Elders served as repositories of law, ensuring continuity across generations. The authority of elders was not absolute but was respected as a source of wisdom and precedent, much like a judiciary in contemporary systems.

Environmental stewardship was a core legal principle. Nations managed resources with an eye toward sustainability, regulating hunting seasons, harvest quantities, and territorial use to prevent depletion. This was not merely practical; it was a legal obligation tied to spiritual teachings and collective survival. In contrast to colonial notions of land as property to be exploited, Indigenous legal orders often emphasized stewardship and relational accountability.

Inter-nation diplomacy was highly developed. Protocols for meeting, negotiating, and recording agreements were standardized and respected. The use of belts, speeches, and ceremonies ensured that treaties were not merely verbal but performed and material. These practices created a shared understanding of obligation and memory, laying the groundwork for later treaty-making with colonial powers. The sophistication of these systems was evident in the way they managed complex alliances and rivalries.

The legal landscape was dynamic, not static. Nations adapted their laws in response to environmental changes, population shifts, and new technologies. For example, the introduction of the horse on the Great Plains transformed mobility, trade, and warfare, leading to adjustments in territorial boundaries and diplomatic strategies. This capacity for legal innovation would be critical as nations faced the unprecedented challenge of European colonization.

Oral histories and traditional knowledge systems functioned as legal archives. Stories carried precedents, defined rights, and explained the origins of laws. This was not “myth” in the colonial sense but a sophisticated legal database, maintained through rigorous oral transmission. The accuracy of these transmissions was ensured through

repetition, ceremony, and communal accountability. When Europeans later dismissed oral traditions, they failed to recognize a robust legal system.

Technology and law were intertwined. For example, the development of sophisticated fishing weirs on the Pacific Coast required agreements about placement, maintenance, and access. These technical systems were governed by legal norms that ensured equitable use and prevent conflict. Similarly, agricultural practices among Pueblo nations were regulated by laws that managed water rights and planting schedules. The integration of law and technology underscores the complexity of Indigenous governance.

Urban centers existed long before European contact. Cahokia, near present-day St. Louis, was a large settlement with complex social and political structures. While the exact legal system is not fully known, archaeological evidence suggests organized governance, trade regulation, and possibly formal dispute resolution. The existence of such centers challenges the frontier myth of a “wild” continent awaiting European order.

Seasonal movement was legally structured. Nations did not roam randomly; they followed established routes and protocols that governed access to seasonal resources. These routes were often shared through diplomatic agreements, ensuring peaceful coexistence in overlapping territories. The legal frameworks for seasonal movement demonstrate a sophisticated understanding of spatial governance and resource management.

The legal concept of reciprocity was central. Relationships with the land, animals, and other nations were governed by obligations of respect and give-and-take. This is evident in ceremonies like the potlatch, where giving was a legal act that affirmed status and responsibility. Reciprocity was not merely moral; it was enforceable through social and legal mechanisms. This principle would later be at odds with colonial legal systems that emphasized extraction and ownership.

Legal pluralism was the norm. Different nations, and sometimes different communities within nations, had distinct legal traditions. This diversity was not seen as a problem to be solved but as a reality to be navigated. Diplomacy often involved bridging different legal systems, finding common ground while respecting differences. This experience with pluralism would later inform Indigenous strategies in dealing with colonial legal systems.

The scale of governance varied. Some nations had centralized leadership; others were more decentralized. The Cherokee, for instance, had a national council, while many Plains nations operated through bands or bands within larger nations. This diversity meant that there was no single “Indigenous law” but a spectrum of legal orders. Recognizing this diversity is crucial for understanding the varied experiences of treaty-

making and land claims.

The environment shaped legal orders. Coastal nations developed laws around marine resources; desert nations focused on water management; forest nations emphasized hunting and gathering protocols. This environmental specificity meant that laws were deeply tied to place, making displacement particularly disruptive. The loss of land was not just economic; it was a loss of the legal and cultural context in which law was practiced.

Knowledge systems were sophisticated and empirical. Observations of animal behavior, plant cycles, and weather patterns were integrated into legal norms about harvesting and movement. This was not “superstition” but a legal system grounded in long-term observation and adaptation. The dismissal of Indigenous knowledge as unscientific was a colonial construct that ignored the empirical rigor of these systems.

Leadership was often accountable. Chiefs and councils could be removed for failing to meet responsibilities, a practice that ensured leaders served the community. This accountability was a legal mechanism, enforced through social pressure and formal councils. It stands in contrast to colonial systems where authority was often concentrated and less accountable.

Women’s legal authority was significant in many nations. Matrilineal systems, for example, determined clan membership and land stewardship. Women’s councils often had veto power over decisions made by male leaders. These systems were not uniform, but they demonstrate that Indigenous legal orders recognized diverse sources of authority, including gender-based roles.

Children’s rights and responsibilities were defined early. Education included learning protocols for resource use, conflict resolution, and diplomacy. This was a legal education, preparing youth to participate fully in governance. The transmission of law through family and community ensured its continuity and relevance.

Spiritual leaders often held legal authority. Among Pueblo nations, religious leaders were central to governance, ensuring that laws aligned with spiritual principles. This integration meant that legal violations had spiritual consequences, reinforcing compliance through belief systems. The separation of law and religion, common in colonial systems, was alien to many Indigenous orders.

Trade laws were complex. Nations regulated trade through protocols that ensured fairness, safety, and respect. Disputes over trade were resolved through diplomacy and legal processes. These systems were essential for maintaining relationships across vast networks, from the Great Lakes to the Gulf of Mexico. The sophistication of trade law demonstrates the interconnectedness of Indigenous North America.

Justice systems emphasized restoration. Punishment was often focused on repairing harm and restoring balance, rather than retribution. This approach recognized that ongoing relationships required healing. Colonial observers often misunderstood these systems as lenient, but they were rigorous in their goals and enforcement.

The legal landscape was dynamic and adaptive. Nations responded to new challenges—disease, climate shifts, technological changes—by adjusting laws and governance. This adaptability would be tested in the centuries to come, but it was a hallmark of Indigenous legal systems. The notion that Indigenous law was static is a colonial myth.

All these legal orders coexisted and interacted. The continent was a web of nations, each with its own laws, but also engaged in diplomacy and trade that required mutual recognition. This pluralistic reality meant that when Europeans arrived, they encountered not chaos but a sophisticated legal landscape. The challenge would be how to fit colonial law into this existing framework.

It is important to recognize that law was not separate from daily life. It governed planting, hunting, marriage, trade, and ceremony. It was lived and breathed, not confined to courts or documents. This embeddedness made it resilient but also vulnerable to colonial systems that sought to separate law from culture and place.

The legal orders prior to contact were not perfect, but they were effective. They maintained peace, regulated resources, and provided mechanisms for resolving disputes. They evolved over time, reflecting changes in society and environment. Their existence sets the stage for understanding the treaties and land claims that would follow, as Indigenous nations sought to protect their legal systems in the face of colonial expansion.

In the chapters that follow, we will see how these legal orders interacted with colonial law, sometimes in conflict, sometimes in negotiation. The story of treaties and land claims cannot be understood without this starting point: the continent was already governed, already mapped, and already legally complex. The contested ground of North America did not begin with European arrival; it began with the intersection of two or more legal worlds, each with its own authority and legitimacy.

Understanding this pre-contact legal landscape is not merely an academic exercise. It is essential for recognizing the sovereignty that Indigenous nations continue to assert. The legal principles developed over millennia—stewardship, reciprocity, accountability, and pluralism—remain relevant today. They inform contemporary governance, land claims, and treaty negotiations. They are not relics of the past but living traditions that have adapted and survived.

The diversity of Indigenous legal orders means that there is no single narrative of "Indigenous law." Instead, there are many stories, many systems, and many strategies. This diversity is a strength, providing a rich toolkit for navigating contemporary legal challenges. It also complicates colonial attempts to impose uniform legal systems, as each nation brings its own history and principles to the table.

By beginning with this pre-contact map, we lay the foundation for understanding the legal encounters that followed. The treaties, statutes, and court decisions discussed in later chapters are not the first legal documents in North America. They are additions to a long and complex legal history. Recognizing this changes how we read contemporary legal disputes—it situates them within a deeper narrative of sovereignty and negotiation.

As we move forward, keep in mind that law is not just about rules; it is about relationships. Pre-contact legal orders were designed to maintain relationships between humans, and between humans and the natural world. This relational approach continues to shape Indigenous legal strategies today, emphasizing balance and responsibility over domination and extraction. It is a perspective that challenges colonial legal assumptions and offers alternative ways of thinking about justice and governance.

The ground was already mapped, already governed, and already contested long before European arrival. The arrival of colonial powers did not introduce law to North America; it introduced a different set of legal claims and assumptions. The story of treaties, land claims, and sovereignty is the story of how these different legal worlds collided, negotiated, and continue to coexist. It is a story that begins not with discovery, but with the existing legal orders of Indigenous nations.

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