

RE-LIVING THE PRESENT

Title, Treaties, and the Trickster in British Columbia

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FIRST NATIONS HAVE AN INTELLECTUAL TRADITION that teaches people about ideas that are partial and incomplete. This tradition is transmitted through a character known as the trickster. In his adventures the trickster roams from place to place fulfilling his goals through contradictory behaviours that are simultaneously altruistic and self-interested. The trickster displays transformative power as he takes on new personae in the manipulation of his objectives. He can be mean and kind, full of charm and cunning, and helpful and mischievous. Lessons are learned as the trickster engages in actions that in some particulars are representative of the listeners' behaviour and on other points are uncharacteristic of their comportment. The trickster encourages an awakening of understanding because his actions help to place our conduct in a different light. Through the use of contrast, listeners are compelled to reconcile the notion that their ideas are partial and incomplete. This comment draws on this intellectual tradition and sites the trickster character at the centre and edge of legal and political events in British Columbia. His interaction with the ideas and actual conversations surrounding Aboriginal rights in the province may highlight where confusion, misinformation, and self-contradiction appear in the various approaches to the issue of Aboriginal title and treaties. The trickster's travels, insights, and experiences illustrate that Aboriginal methodologies are alive and well, and are relevant in understanding the events around us.

TRANSGRESSING THE LAW IN TIME AND PLACE:
NANABUSH GOES WEST

Nanabush, the woodland trickster of the Ojibway, has travelled far from home.¹ He has left the Great Lakes, crossed the Prairies, and finds himself in a land of large trees, fast rivers, and broad ocean shores. To make the journey he has had to transform himself many times: Badger, Crow, Old Man, Coyote, and now Raven.² He marvels at the beauty of this place. It's 1872 in the newly formed province of British Columbia. The Lower Mainland is little more than a rough timber camp, with a few farms dotting the landscape.³ It is still largely Aboriginal. A group of business and political leaders has gathered in New Westminster to discuss relations with the Indians. Raven wonders where the Indians are. He perches on the windowsill and listens in. The meeting is called to order. As the conversation dies, the small collection of farmers, merchants, and mill and cannery owners gives its attention to the convener. A civil servant strides to the front of the room and takes his place at the podium. He was once a surveyor and has had some experience with the Indians. Raven thinks he is a curious man, rather dour, with his black suit and hat and long white beard.⁴ The members of the group settle into their chairs and await his speech. The speaker clears his throat and begins: "Let us not talk of treaties with the Indians. It is nonsense."⁵ The crowd murmurs approval. Raven chokes out surprise. Not distracted, the man goes on: "The absurd claim of the Indians of title to public land has never been acknowledged. On the contrary, it has been distinctly denied!⁶ As civilized people in the midst of savagery we have special entitlements in this emerging corner of the Empire. We

¹ For more about Nanabush and his adventures in Canadian law, see John Borrows, "With or Without You: First Nations Law (in Canada)," *McGill Law Journal* 41 (1996): 629; John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy," *University of Toronto Law Journal* 47 (1997): 417; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster," *American Indian Law Review* 22 (1998): 37.

² First Nations across Canada know the trickster by these different names.

³ For a description of the Lower Mainland in this period, see Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (Vancouver: UBC Press, 1997), 68-102.

⁴ The Nisga'a impression of the first surveyors in their territory is recorded in a video interview by Bill Cameron, with Alvin McKay, in *CBC Journal Native Series 1* (Toronto: Canadian Broadcasting Corporation, 1990).

⁵ For one British Columbian's views on Indian treaties in this period, see British Columbia, *Papers Connected With the Indian Land Question 1850-1875* (Victoria: Government Printer, 1875), app., 11.

⁶ *Ibid.*

carry the heritage and laws of Britannia with us, wherever we settle. The land in this province all belongs to the Queen.⁷ True, there are less than 19,000 British citizens in the province, and the Chinese and Indians together outnumber us two to one.⁸ But these Indians in our midst are bestial, not human. They are ugly and lazy.”⁹ The crowd laughs, the speaker smiles. Raven marvels at how some tribes think they are better than others. The man resumes his tone. “The Indians are lawless and violent and must be brought under the laws of the country. Despite their condition, the law entitles them to the same civil rights as the rest of the population.¹⁰ Nothing more. Why should they have special rights, the law does not make such distinctions. True, except with special permission, we have denied them the right to take up land as others can, through settlement and pre-emption.¹¹ But we have need of good land to encourage settlers to emigrate and build up this country.¹² We can’t have Indians claiming their every fishing spot, village, camp site and trading post. There would be scarcely little left. And, yes, we have taken the provincial franchise away from them¹³ – but this is for their own good. They do not know their own best interests.”¹⁴ He scans the

⁷ See Proclamation 2, issued by Governor James Douglas on 14 February 1959:

“All the lands in British Columbia, and Mines and Minerals therein, belong to the Crown in fee.” See British Columbia, *List of Proclamations for 1858 to 1864* (New Westminster: Governments Printing Office, n.d.). This statute was based on jurisprudence like *Campbell v. Hall* (1774), 1 Cowp. 204, and earlier statutes such as An Act for Extending the Jurisdiction of the Courts, 1803, 43 Geo. III, c. 138; and an Act for Regulating the Fur Trade and Establishing a Criminal and Civil Jurisdiction Within Certain Parts of North America, 1821, 1 and 2 Geo. IV, c. 66. Both these acts were repealed and replaced by the Imperial Act to Provide for the Government of British Columbia, 2 August 1858.

⁸ In fact ten years after union, in 1881, after a considerable period of growth in their population, there were only 19,069 “White” people in the province. See Harris, *Resettlement of British Columbia*, 140. This is based on extrapolations from figures in his research. There would be significantly fewer than 19,000 White people in the province, and substantially more than 30,000 Aboriginal and Chinese people. “White” is a word the settlers used to describe themselves.

⁹ Trutch’s prejudice towards the Indians is found in Robin Fisher, “Joseph Trutch and Indian Land Policy,” *BC Studies* 12 (Winter 1971–2): 3, quoted in Paul Tennant, *Aboriginal Peoples and Politics: Indian Land Question in British Columbia, 1849–1989* (Vancouver: UBC Press, 1990), 39.

¹⁰ Expressions of this view are found in Joseph Trutch’s communication. See *Ibid.* They are also found in George Stewart, *Canada Administration of the Earl of Dufferin* (Toronto: Rose-Belford, 1878), 492–3.

¹¹ British Columbia, *An Ordinance to Define the Law Regulating Acquisition of Land in British Columbia*, 31 March 1866. Enforcement of this provision is found in British Columbia, *Papers Connected with the Indian Land Question*, 49.

¹² British Columbia, *Papers Connected with the Indian Land Question*, 33.

¹³ Qualification and Registration of Voters Act, 1872, s. 13.

¹⁴ British Columbia, *Papers Connected with the Indian Land Question*, 42.

room, searching for disagreement. All is quiet; Raven too. He wants to remember what's said. He thinks this will be a good one to tell the people later; he can't resist a good story. The speaker proceeds, "And no one can fuss over our recent reductions to the size of their reserve land; it is of no real value to them. Its unproductive, uncultivated condition is utterly unprofitable to the public interests.¹⁵ When we entered the dominion, all this was sanctioned. The Constitution by the terms of union permitted us to continue to treat the Indians as we always have. We will be honourable in following this law. We will act as good citizens. We have fulfilled our constitutional obligation and pursued a 'policy as liberal as that hitherto pursued by the British Columbia government prior to its entrance into confederation.'¹⁶ We are the founders of this great province. Let's not talk of treaties. What's past is past. We can only be just in our own time. We must be just today." An enthusiastic chorus of hands and voices mark the end of the speech. Raven is amused. He will visit here again. They are his kind of people: capable of honesty and deception, charm and cunning, kindness and mean tricks.

Nanabush decides its time to go and see some Indians. He heads north, follows the coast. Weeks later he comes to a beautiful river, flies up its valley. The Nass hasn't changed much since he was last here. When he approaches a village people watch him cautiously. He remembers these people, the Nisga'a. He helped them after the flood by bringing fire to the Earth. He gave them law to govern themselves, the Ayuukhl.¹⁷ Sometimes on seeing him they yell out "Txeemsim, Txeemsim."¹⁸ Nanabush likes the recognition. Raven is popular here. He goes past Gingolx, on to Sii Ayans. At the village he observes his figure carved in strange trees without branches, his characters sewn on the people's blankets. He must tell the Ojibway of this, they could learn something from these people. He decides to stay. He could get used to this. As he settles in, he finds the eagle, killer whale, and wolf are good companions.¹⁹ He rediscovers the delicacies of salmon, steelhead, and oolichan. So he gets comfortable, watches the generations come and go. The people fish, trap, and trade. They laugh,

¹⁵ Ibid.

¹⁶ British Columbia, *Sessional Papers*, 1871, 12. See also Robin Fisher, *Contact and Conflict: Indian European Relations in British Columbia* (Vancouver: UBC Press), 161. For Trutch's role in these negotiations, see Tennant, *Aboriginal Peoples and Politics*, 43-5.

¹⁷ Alex Rose, ed., *Nisga'a: People of the Nass River* (Vancouver: Douglas and McIntyre, 1993), 15.

¹⁸ This is the trickster's name in Nisga'a territory.

¹⁹ These are the clans of the Nisga'a, along with the Raven.

cry, and wonder about the world around them. It is a rich world. But in time, he notices a change. One day he wakes up and sees that the Nisga'a are not what they once were. He feels weary. He is getting tired of all the poverty, sickness, sadness, and suicide. The people have lost heart. The Indian Act has interfered with their traditional governance and land holding systems.²⁰ Their potlatch was outlawed and their beautiful masks shipped to New York and Toronto.²¹ Their totem poles were cut down and buried or sent away.²² Children were also shipped, and sometimes buried, stolen from parents and sent to residential schools.²³ When these schools closed, the children continued to go, but now as part of the child welfare or criminal justice systems.²⁴ And every attempt to resist these indignities has been quashed. When they assert title, their reserves are "cut-off" and made smaller.²⁵ When they try to go to court, land claims are all but outlawed.²⁶ With no vote, they have no political remedies. With no access to court, they have no legal remedies either. Nanabush gets bored with all this. He decides to head down south again.

He arrives on a good day. It's the summer of 1969. The Liberal Association of Vancouver has gathered at the Seaforth Armories for dinner. Prime Minister Pierre Trudeau has fled Ottawa's humidity to address them. Raven is looking forward to hearing him. He has heard that this man talks of a "Just Society." Raven settles by an open door and listens. After the mandatory salmon and rice have been served the prime minister takes the floor. He starts slowly. He has some policy to discuss – a proposal, really. "We won't recognize aboriginal rights," he says.²⁷ Heads nod agreement. "We can go on

²⁰ An Act to amend certain Laws respecting Indians and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia, sc 1974, c. 21.

²¹ Indian Act, RSC, 1886, c. 46, s. 114. For commentary, see Douglas Cole and Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the North-West Coast* (Vancouver: Douglas and McIntyre, 1990).

²² Totem poles were cut down and used in the community as foundations for a building constructed by the non-Nisga'a.

²³ Report of the Royal Commission on Aboriginal Peoples, "Residential Schools: Chapter 10," in *Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services, 1996), 333-408.

²⁴ This point is also made in A.C. Hamilton and C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1: *The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991), 509-33.

²⁵ British Columbia Indians Land Settlement Act, 1 July 1920, RSC; Order in Council PC 1265, 19 July 1924. For commentary, see Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986) 145-61.

²⁶ Indian Act, RSC, 1927, c. 98, s. 114. For commentary, see *ibid.*, 59

²⁷ Prime Minister Pierre Trudeau's speech, which is quoted throughout this paragraph, is found in Peter Cumming and Neil Mickenburg, *Native Rights in Canada*, 2nd ed. (Toronto: Indian-Eskimo Association, 1972), app. 4.

adding bricks of discrimination around the ghetto in which Indians live, and at the same time helping them preserve certain cultural traits and certain ancestral rights. Or we can say you are at a cross roads – the time is now to decide whether the Indians will be a race apart in Canada, or whether they will be Canadians of full status.” The room is attentive. Raven is curious; why can’t Indians be different, preserve their culture, and be full Canadians? The Prime Minister gathers momentum, “It’s inconceivable, I think, that in a given society one section of a society should have a treaty with the other section of society. We must all be equal under the laws and we must not sign treaties amongst ourselves.” The crowd absorbs his thought. Raven remembers that there really are no treaties in British Columbia anyway. This is interesting, he thinks, that once you devastate a people and make them unequal, you then promise equality. Is this justice, he wonders? He strains to hear more. Trudeau continues, “Indians should become Canadians as all other Canadians. This is the only basis on which I see our society can develop as equals. But aboriginal rights, this really means saying, ‘We were here before you. You came and cheated us, by giving us some worthless things in return for vast expanses of land, and we want to reopen this question. We want you to preserve our aboriginal rights and to restore them to us.’ And our answer – our answer is ‘no.’” These are strong words. Raven is silent. He now sees how the promise of equality can become a pretext for eliminating different ways of evaluating life. He listens to the explanation for such action: “If we think of restoring aboriginal rights to the Indians, well what about the French, who were defeated at the Plains of Abraham? Shouldn’t we restore rights to them?” Some in the crowd search their memory, wonder “Did the Indians in BC battle the English? Was there a conquest?” Recollection is vague, no similar military battles are recalled. Yet the prime minister goes on, “And what about the Acadians who were deported – shouldn’t we compensate for this? What about the Japanese Canadians who were so badly treated at the end or during the last war? What can we do to redeem the past?” The question hangs in the air. Some wonder if the Acadians and Japanese shouldn’t be compensated. Raven turns the question around, thinks of the compensation British Columbians have freely received using Indian land all these years. As people are lost in thought, the prime minister raises his hand, points over the audience, then his finger punctures the air, “I can only say as President Kennedy said when he was asked about what he would do to compensate for

the injustices that the Negroes had received in American society. We will be just in our time. That is all we can do. We will be just today.” He is finished. Ringing applause engulfs the room. Raven laughs. It’s easy to ask people to forget the past when this is to their benefit. He knows who will win and who will lose by this strategy.

Over the next few weeks Raven watches as the Indians clearly reject Trudeau’s speech.²⁸ They don’t want the government to repeal the Indian Act, despite its repression.²⁹ He loves this; he knew they were just like him, paradoxical. They want to keep the very legislation that colonized them because they say it recognizes their special status. This is exactly how Txeemsim would have planned it. But he does notice that the prime minister’s speech has served as a rallying point for many Aboriginal groups. They want change, but they don’t trust the government to bring it about without abrogating their rights. He then sees his old friends the Nisga’a press their land claim before the courts. It’s the *Calder* case.³⁰ When the Supreme Court of Canada recognizes Aboriginal title as a legal interest, he knows something is up. When the government starts to negotiate with them, he decides to hang around, see where this leads. But things get bogged down. For sixteen years, the province doesn’t come to the table.

And then, suddenly, it’s the spring of 1999. The Nisga’a have ratified the treaty and it is being debated in Parliament and has passed the Legislature. Raven notes it’s a surprisingly clear day for February. The sidewalks are still wet, but standing on Hastings he has warmth on his back not felt for months. Across the harbour he can see “the Lions” on the North Shore mountains. Despite lingering fog, it looks like the sun might prevail today. Up the hill, inside the Hotel Vancouver on Georgia Street, people are gathered for a conference discussing the proposed Nisga’a treaty. Raven makes his way there. He wants to hear what people have to say about this agreement. Inside, people from all walks of life are in attendance: students, politicians, academics, civil servants, lawyers, businesspeople, and retired folk. The organizers have worked hard to attract a good cross-section of the public. They hope to make some contribution to the debate on the issue in the province. Raven listens to the speakers, is agitated by what he hears. He wonders why the treaty provides that

²⁸ Harold Cardinal, *The Unjust Society: The Tragedy of Canada’s Indians* (Edmonton: Hurtig, 1969).

²⁹ Sally Weaver, *Making Canadian Indian Policy: The Hidden Agenda, 1968-1970* (Toronto: University of Toronto Press, 1981).

³⁰ *Calder v. AG of BC* (1973) 34 DLR 145 (scc).

Nisga'a conduct will be judged largely by non-Nisga'a laws, even if it is the Nisga'a who make them.³¹ At the same time he is astonished to see some deny others the very political protections they themselves hold most dear. A well-known member of the media is on the program. Raven decides to say something. He knew he would get a chance to retell this story one day. It's his turn to speak. He rises and grasps the podium, surveys the audience. He bellows, "Let's trash the treaty. Let's scrap any talk of special group rights in British Columbia. We can't countenance race-based entitlements that sanction apartheid in our midst.³² We must ensure that all British Columbians have equal rights and responsibilities under the Canadian Constitution.³³ We can't build walls around communities based on race."³⁴ He pauses, no need to tell them about the *Delgamuukw* case. Besides, where did the Court get off saying that Aboriginal title is a constitutionalized proprietary interest.³⁵ As he loosens his grip on the stand and peers over the mike he can see that some cautiously approve of his approach, while others are openly hostile. The reception is mixed, which feels right to him. He shifts his stance: "We must be vigilant against gov-

³¹ For example, the Nisga'a will hold their land in fee simple, not according to their Wilps (House system), and these lands may be registered in the provincial land title system. Many forestry, fisheries, wildlife management, and environmental standards will ultimately be measured against provincial laws (not the Ayuukhl) for their validity. Appeals from Nisga'a Court will be to the Supreme Court of British Columbia and so on.

³² David Black, owner of Black Newspapers (which publishes forty-eight papers in British Columbia), expressed this view in an interview with Ben Meisner on CKPG Radio in Prince George on Friday, 23 October 1998. Dr. Keith Martin, a Reform Party MP from the riding of Esquimalt-Jaun de Fuca, has expressed similar views: "Apartheid or separate development failed in South Africa, and it will fail in B.C." See Craig McInnes, *Globe and Mail*, 24 July 1998. Aboriginal people also do not want to be victims of racism and apartheid. Chief Louis Stevenson of the Peguis First Nation tried to bring this to the world's attention. For reports on this, see Paula Mallea, *Aboriginal Law: Apartheid in Canada?* (Brandon: Bearpaw, 1994), 1-7; Boyce Richardson, *People of Terra Nullius* (Toronto: Douglas and McIntyre, 1993), 126.

³³ See Resolutions from the 12th Annual Convention of the Nisga'a Tribal Council in letter from Frank Calder to Jean Chretien, 10 November 1969 (DIAND file 1/24-2-16, vol. 2). See also Gordon Campbell, *Policy Positions: One Law For All*, 5 October 1998, <http://www.bcliberals.bc.ca/platform/policy/positions/treaty/html>. Gordon Campbell is the leader of the provincial Liberal Party.

³⁴ Chief Joe Mathias has lamented racist policies in Canada that deny Aboriginal people ownership of land. See Frank Cassidy, ed., *Reaching Just Settlements: Land Claims in British Columbia* (Lantzville, BC: Oolichan, 1991), 14-17. Mel Smith has also deplored the use of race to separate people. See *Our Home or Native Land?* (Vancouver: Stoddart, 1995).

³⁵ Preston Manning, leader of the Official Opposition in the House of Commons, expressed a similar view in the *Globe and Mail*, Tuesday, 16 June 1998, A23; editorialist Trevor Lautens said this decision "drastically undermined the Crown ownership of 94 per cent of the land mass of BC," *Vancouver Sun*, Saturday, 28 February 1998; Terry Morley labelled the decision "imprudent," *Vancouver Sun*, Saturday, 20 December 1998; writer Gordon Gibson called it a "breathtaking mistake," *Globe and Mail*, 16 December 1998. The case is reported as *Delgamuukw v. The Queen* (1998), 1 CNLR 14 (SCC).

ernment attempts to erode our democratic rights without input or participation. Too much has been done in secret; the government has kept the average person in the dark.³⁶ So-called consultation concerning our rights has been a sham. So far, consultation has consisted of the government telling people what already has been negotiated and decided. Nothing changes as a result of public meetings. The government has worked behind closed doors. How about letting the public in on this deal?³⁷ He considers his next thought. He won't tell them about the Nisga'a Agreement-in-Principle's two-year availability and its months-long review by a special legislative committee.³⁸ Why complicate a good tale. Raven studies the crowd again. This is a good audience; still no consensus. He launches into his final assault: "How can we permit great changes to the structure of society without a referendum?"³⁹ Racially based governments require a constitutional amendment because they are not envisioned in the Constitution. The people must have their say. Some people who live on Nisga'a lands might be considered second class citizens, subject to an alien government's laws but unable to effectively influence these laws. Do we want to live in a country that constitutionalizes the denial of

³⁶ The Reform Party of Canada made this point, and the ones that follow in the next few sentences, in a document entitled, "What the Nisga'a Deal Means to You," <http://www.reform.ca/duncan/whatdeal.html>. The Assembly of First Nations has made similar points about the government before and, in 1990, wrote: "Important policy frameworks should not be dictatorily or unilaterally imposed." See Assembly of First Nations, "A Critique of Federal Land Claims Policies," in Frank Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, BC: Oolichan, 1991), 232, 246.

³⁷ Gordon Gibson has asked this question. See *Globe and Mail*, 21 July, 1998, A15.

³⁸ A report was produced from this committee. See Select Standing Committee on Aboriginal Affairs, *Towards Reconciliation: Nisga'a Agreement-in-Principle and British Columbia Treaty Process* (Thirty-sixth Parliament, Legislative Assembly of British Columbia, 3 July 1997).

³⁹ Those who have lined up in favour of a referendum are numerous. The Liberal Party of British Columbia initiated legal action to force a referendum on the treaty. Editorials in many newspapers, such as the *Financial Post*, 23 October 1998, and the *Globe and Mail*, Friday, 24 July 1998, have also called for a referendum. Mel Smith has said, "In my view, the Nisga'a Agreement attempts to establish a third order of government without benefit of a formal constitutional amendment," *Merritt Herald*, 21 October 1998, 23. The federal Reform Party supports a referendum on the treaty. See "Federal Reform Joins Bid to Force Nisga'a Vote," *Vancouver Sun*, Friday, 24 July 1998.

Aboriginal people in British Columbia also wonder about significant constitutional changes that affect the structure of their society by their inclusion in the province without their consent. It would be interesting to see the question of their consent to inclusion in British Columbia put to a majority of Aboriginal people in the province in a referendum. If Aboriginal people could vote on this question separately, while the rest of the province votes on the Nisga'a treaty, this should satisfy those who wish to see true representative participation in a referendum. The Cree in Quebec have asserted a similar point in: Grand Council of the Cree, *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (Nemaska, James Bay, PQ: Grand Council of the Cree [of Quebec], 1995), 297-350.

people's rights because they are not members of the charter group? Do we want to limit and qualify some people's political participation by not recognizing certain fundamental rights?" He'll let these points sink in, see which way people take them. The trickster, as always, wonders who they will see in his words and to whom they will attribute wisdom and foolishness. He finishes, "Mistakes have been made by focusing on the past. Why turn back the clock?"⁴⁰ Together we must work towards a better future for all Canadians."⁴¹ Polite and sparse clapping, and some hissing, close off his remarks. Raven loves it. He's done his work. It's time to head for home, before the Ojibway begin to think Nanabush has deserted them.

⁴⁰ Mel Smith, *Vernon Morning Star*, 12 October 1998, 12. Harold Cardinal (*The Unjust Society*, 24) also wrote about the importance of not turning back the clock: "Positive Indian identity does not mean a desire to return to the days of yesteryear."

⁴¹ Former Chief of the Assembly of First Nations expressed these views in Assembly of First Nations, *First Peoples and the Constitution: Conference Report of March 13-15, 1992* (Ottawa: Supply and Services, 1992), 34, and in his book with Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Viking, 1993), 24, 245-8.