RECLAIMING HISTORY, LAND AND RIGHTS: A COMPARATIVE EXAMINATION OF LAND RESTITUTION IN AUSTRALIA, CANADA, NEW ZEALAND, THE UNITED STATES AND SOUTH ARFICA

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Land and aboriginal rights restitution/reconciliation schemes face two fundamental and conflicting challenges: On the one hand, they need to address the claims of those who were dispossessed by colonization and racist governments in ways that meaningfully address petitioners' sense of grievance and, ideally, ameliorate their economic situation. On the other hand, the restitution regimes must be politically acceptable to the larger electorate. Achieving this latter goal means that restorative regimes cannot be too disruptive of the economic order that is, to a significant degree, the result of past dispossessions.[1] Additionally, whatever process is devised to assess claimants' historical grievances, it must be clear to the general public that petitioners are required to meet clearly articulated and rigorously applied standards to validate their claims. Finally, settlement processes must appear to be reasonably expeditious and not too costly. The messy nature of history and historical evidence makes it difficult to achieve these various conflicting challenges.

Claims regimes, whether legislated or developed by the courts have sought to meet the above challenges by: (a) defining who can make a claim, (b) specifying what can be claimed redress is available to petitioners, (c) establishing procedures and venues for claims adjudication, and (d) stating how findings/rulings will be treated (Figure 1). I will compare and contrast the ways this has been attempted in five different types of regimes. These

are: the United States Indian Claims Commission [USICC] (1946-78), the Waitangi Tribunal of New Zealand [WT] (1975-present), the Aboriginal Land Rights Commission of the Northern Territory of Australia [ALRC] (1976-present), the Commission on Restitution of Land Rights [CRLR] in South Africa (1994-present), and aboriginal and treaty rights litigation in Canada (mostly 1982-present). I have been involved in the latter process as an expert-witness specializing in the economic historical geography of Canadian aboriginal people. This experience aroused my curiosity about the ways evidence is presented and evaluated in relation to the cultural/historical questions that claims raise. For this reason I will focus on definitions of claimants, what they could claim, and the processes and venues that were available to them to pursue their grievances.

Defining eligible claimants

The legislation that created the USICC, the ALRC, and the Waitangi Tribunal had/have different criteria for determining who was (is) eligible to file petitions.[2] The pioneering United States *Indian Claims Commission Act* [ICCA] (1946) defined eligible claimants as being: 'any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska.'[3] The phrase 'other identifiable group' broadened the field of potential claimants beyond those that the problematic and ill-defined political and social anthropology terms 'band' and 'tribe' would have allowed.[4] Subsequently, the USICC, which the ICCA established, turned to current American case law regarding Indian title (specifically *United States vs. Santa Fe Pacific Railway* (1941)) to narrow the field of eligible claimants to those whose ancestors had belonged to 'organized societies' that used and occupied specific tracts of land to the exclusion of other groups at the time of dispossession by Euro-Americans.[5]

The USICC had been in operation almost thirty years when, in 1975, the New Zealand government created the Waitangi Tribunal as a permanent commission of inquiry.[6] Initially legislators considered the USICC as a potential model, but they decided that it had many shortcomings that were to be avoided.[7] Key among the problems that they hoped to circumvent were the lengthy and costly adversarial battles that took place about the legitimacy of petitioners. Accordingly, the TWA specified that only Maori, 'or any group of Maoris of

which he or she is a member,' could make claims, but defined the latter very broadly to include anyone of the Maori race of New Zealand and any descendants of such a person.[8] Commonly claims are put forward by the traditional local political and land owning/using groups, known as 'hapu,' which are led by traditional hereditary chiefs, or *rangatira*.

The year after the creation of the Waitangi Tribunal the Labor Government of Australia took action by passing the *Aboriginal Land Rights Act (Northern Territory)* [ALRA] to address land rights issues concerning the Aborigines of the Northern Territory. This region of the country was under federal jurisdiction and, therefore, the involvement of a state government was not required. For Australia, passing the act represented a bold step because, unlike Canada, New Zealand and the United States, Australian law had never recognized the presence of Aborigines on the land through treaties, or by any other means. Rather, the legal fiction of 'terra nullius' held sway, which presumed that Aborigines were too primitive to have effectively occupied the continent. This myth was not dispelled until 1992, when the High Court ruling in the Murray Islanders' title suit, which is remembered as *Mabo and others v. Queensland (No. 2),* concluded that the

petitioners did hold common law native title, because it had not been extinguished by government action intended for that explicit purpose.[9]

The pioneering ALRA, which the drafters hoped would serve as a model for the rest of the country, was intended to address the claims of 'traditional owners.'[10] According to the act: 'Traditional Aboriginal owners, in relation to land, means a local descent group of Aboriginals who (a) have common spiritual affiliations to a site on the land being affiliations that place the group under a primary spiritual responsibility for that site and the land; and (b) are entitled by Aboriginal tradition to forage as of right over that land.'[11] The drafters[12] of this legislation were strongly influenced by the Australian social anthropologists' current conceptualizations of the nature of Aborigines' societies, particularly the idea that a local descent group's primary links to the land were of a spiritual nature. On the other hand, the act's definition of eligible claimants represented a crucial and deliberate departure from anthropological thinking at that time by not specifying that a 'local descent group' had to be patrilineal.[13] Also, the act made no mention of patrilineal clans. Until the 1970s local patrilineal descent groups and clans had figured prominently (almost exclusively) in anthropologists' configurations of aborigines' societies.

Although the initial claims submissions and supporting experts reports followed the standard practice of anthropologists of the 1970s by emphasizing the male spiritual connections to the land, soon petitioners and their supporting experts provided revisionist research that detailed women's roles and responsibilities in ritual and other land use practices. From claimants' perspectives this had the practical effect of enlarging the territory groups potentially could claim.[14] For some groups this was crucial because substantial portions of their traditional territories had been alienated to

newcomers and could not be reclaimed. Another reason for this shift in focus was that the claims process had the affect of expanding the spatial scope of research to include groups who lived in varied ecological settings.

The Restitution Land Rights Act [RLRA] (1994) of South Africa represented a major departure from the above schemes by shifting the emphasis away from considerations of the aboriginality of claimants and determinations of their traditional land use and tenure practices prior to colonial dispossessions.[15] Instead, the Act focused on Black and Colored[1] individuals and communities who had lost land as a result of racial discrimination following the passage of the Natives Land Act in 1913. The latter legislation had decreed that only thirteen percent of the country was available for settlement by blacks.[16] Subsequent legislation and government actions led to further displacements and losses of land. Specifically, the RLRA states that persons were entitled to 'restitution of property or equitable redress' if they had been dispossessed of a right in land after 19 June 1913 'as a result of past racially discriminatory laws or practices, or was a direct descendant' of such a person,' or was 'a community or part of a community' displaced for those reasons.[17] The act defined a community as being: 'any group of persons whose rights in land are derived from shared rules determining access to land held in common by such a group, and includes part of any such group.' Notably, these shared rules did not have to be aboriginal in origin. Rather, they simply had to be operating when dispossession based on racism took place after 1913.[18]

In Canada the landmark aboriginal title suit of the Nisga'a of British Columbia known as *Calder v. Regina* (1973) raised the possibility that

[1] They were racial categories that the apartheid governments had used.

aboriginal title survived in vast areas of the country that had not been covered by historic land surrender treaties. This startling Supreme Court decision prompted the federal government of Canada, which is responsible for aboriginal people, to create a claims process in 1976. It addressed aboriginal title claims (termed 'comprehensive claims'), disputes concerning alleged federal government breaches of treaty rights, and failures of the Crown to exercise its fiduciary responsibility toward aboriginal people. [19] The latter two types of grievances are referred to as 'specific claims.' Fifteen years after establishing the claims process, the federal government created an Indian Specific Claims Commission [ISCC] (1991-2008) to provide reviews of specific claims that the federal government had rejected.[20] In the aftermath of the *Delgamuukw* (1997) ruling of the Supreme Court of Canada, British Columbia and Canada created the British Columbia Treaty Commission to address title claims in the province.

In spite of these federal and British Columbia initiatives, Canadian aboriginal people have continued to pursue their claims in the courts. They have done so for several reasons. First, the federal government has controlled the claims schemes and unilaterally decided which petitions to accept or reject. Second, the process was/is very slow.[21] Third, the ISCC's authority was limited to reviewing specific claims that the government had rejected. Fourth, its recommendations were non-binding. The federal government moved to address some of these issues with the passage of the *Specific Claims Tribunal Act* in 2009, which created an independent tribunal that was authorized to recommend financial compensation.[22] Fourth, litigation sometimes is used to spur negotiations.

Since the passage of the *Constitution Act* of 1982, there has been an

avalanche of litigation in Canada. Apart from the problems of the federal claims process, the primary reason for this spike in litigation is that the Act extended constitutional protection to existing aboriginal and treaty rights, but left it to the courts to determine what rights survive and where they apply. Aboriginal litigants can include any aboriginal person. The *Constitution Act* identified them as being Indian,[23] Inuit, or Métis (people of mixed Indian-European ancestry).[24] Treaty claims can only pursued by Indians whose ancestors signed historic treaties with Canada. Similar to the USICC, Canadian courts require claimants to establish their aboriginality in reference to evolving case law. Key components of this identity are: (1) genealogy,[25] (2) the existence of an ancestral 'organized group' that occupied a specific territory,[26] and (3) this group engaged in culturally defining traditional practices when Britain or Canada established effective control locally and their descendants continue to exercise these practices in a modern form.[27] These three components were the subject of intense dispute in the litigation in which I have participated as an expert-witness over the past twenty-eight years.

Petitions

In addition to defining who could file claims, the various claims acts under review specified what could be claimed and indicated the types of restitution that were available. In theory, American Indian tribes should have been able to bring before the USICC a wide array of their historical grievances against the federal government. [28] In reality, the commission quickly narrowed its focus to the provisions of the ICCA that dealt with losses of tribal lands. These included (1) alienations that were the consequence of treaties (there were hundreds), contracts, and agreements

with the United States that could be considered fraudulent, unfair, made under duress, involved unconscionable consideration; (2) circumstances where mutual or unilateral mistakes had been made (whether of law or fact, or any other ground cognizable by a court of equity); or (3) were occasions where the United States took tribal lands, whether as a result of treaty or cession or otherwise, without paying the compensation agreed to by the claimant's ancestors. Also considered were (4) dispossessions that had taken place without the benefit of treaties and had not been the consequence of warfare against the United States. Essentially this focus meant that the commission acted as a land claims commission. Yet, it could not restore lands to claimants! The commission only had the power to recommend the financial compensation that should be paid to successful petitioners. Worse, Section 2 of the ICCA stipulated that any award would be subject to 'offsets,' which were deductions for money or property or funds previously expended gratuitously by the United States.[29] Often these offsets were substantial.

Whereas the United States (and Canada) had been blanketed with hundreds of land surrender treaties, in New Zealand a single treaty—the Treaty of Waitangi (1840)—facilitated colonial settlement.[30] Although the British gained pre-emption rights over Maori land through this agreement with Maori chiefs, it was not simply a land surrender. Rather, the treaty was a complex agreement between Britain and the Maori that aimed to achieve conflicting goals: these were the protection of Maori interests, the promotion of settler interests, and securing strategic advantages for Britain.[31] Subsequent Maori-settler relations were further complicated by the existence of English and Maori treaty texts that included key concepts and words that are not readily translated from one language to the other. Inevitably fundamental disagreements arose about the meaning of the treaty and

whether the government had fulfilled its obligations to various Maori tribes (*iwi).*

More specifically, the TWA allowed the Maori to bring forward claims that are based on enactments, regulations, legislative instruments or other practices of the Crown after 1840,[32] or omissions of the Crown after that date, that petitioners alleged were not consistent with the application of the treaty.[33] This provision has meant that the Maori have been able to bring forward a much greater array of claims than American Indians, Australian Aborigines, or South Africans were/are able to bring forward. Regarding successful petitioners, the 1975 act gave the Tribunal the general power to make non-binding recommendations of its choice. Amendments to the TWA in 1988 and 1990 authorized it to make binding recommendations for the return of crown land, or interests in crown land, or compensation for certain losses on crown lands.

The ALRA of Australia provided a much narrower scope for claims petitions and awards. Also, the Aboriginal Land Commissioner's authority was more limited than that of the Waitangi Tribunal. For example, in the Northern Territory only those Aborigines who could establish that they had ongoing ties to unalienated Crown lands could bring forward petitions. Although approximately fifty percent of the crown lands in the territory fell into this category, it meant that some Aborigines were barred from making claims simply because the patchwork of settlement happened to include their ancestral lands. In this way the scheme protected settlers' interests. If the Aboriginal Land Commissioner was satisfied that a given group of claimants had proven that they were traditional owners of available crown land, he reported his findings and recommendations to the Minister of Aboriginal Affairs and the Minister for the Northern Territories.

In South Africa the RLRA specified that any person or community who claimed to have been dispossessed on racial grounds was required to identify the land that had been taken and describe the nature of the right.[34] According to Section I of the act, the latter were defined broadly as meaning : 'any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.'[35]

Although land restitution was at the top of the agenda for the democratic African National Congress [ANC] government when it came to power in 1994 (the act was the first piece of legislation it passed), major hurdles stood in the way. Chief among them was a provision in the new constitution that protected existing private property rights. The ANC had agreed to its inclusion in order to facilitate a peaceful transition from the apartheid government of the National Party [NP]. Although this constitutional provision did allow for the expropriation of private land for 'public purposes,' owners were entitled to 'just and equitable compensation.' This precluded a radical reversal of land ownership patterns that reflected the country's apartheid past.[36] In the end, most urban restitutions have been payments of 'equitable compensation.'[37] Restitutions of land largely have been limited to a to a few rural areas and 'public lands.'[38] The latter mostly involve National Parks, where large land transfers have been complex agreements that restrict land use to specific purposes (usually conservation and tourism) and involve revenue sharing schemes.[39] In other words, the successful claimants did not regain full control of their ancestral lands.

Claims Hearings

Claims hearings procedures and settings have varied greatly. The ICCA stated that the USICC 'shall establish an Investigation Division to investigate all claims referred to it by the Commission.'[40] The founding commissioners, who were lawyers and former judges,[41] never created this division, however. Instead, they operated the USICC like a court. Indian plaintiffs hired lawyers to represent them and the latter retained experts, mostly anthropologists, historians, and land evaluators, to collect and present cultural/historical evidence in support of their claims.[42] The federal government was the defendant in all cases and was represented by the Indian Claims Section of the Department of Justice [DOJ]. The DOJ retained its own experts and funded major historical research projects to collect the evidence to defend the federal government against claimants.

There were two phases to claims hearings. The first focused on determining the legitimacy of the petitioners' claim and the second aimed at determining the probable value of disputed lands at the time of alienation. Most of the intense clashes of experts took place in phase one. During the formative years of the 1950s, two opposing camps of anthropological experts presented two different imaginings of Indian cultures on the eve of dispossession.[43] The traditional perspective put forward in support of Indian claims held that the continent had been divided into contiguously bounded tribal areas. According to this outlook, if one took into account all types of land use (aesthetic, economic, and spiritual) there had been no vacant lands prior to Euro-American incursions. The anthropologists who supported the government's defense adopted the newer and more dynamic perspective of cultural ecology. This involved focusing more narrowly on subsistence uses of land.[44] The DOJ favored this perspective arguing that only losses of

subsistence use were compensable. From the department's perspective the other advantage of this approach was that it reduced the government's potential liability by supporting the argument that substantial portions of the Indian domain had not been exploited, or had been of marginal economic importance, or included substantial areas where tribal collecting and hunting territories had overlapped.

Operating the commission like a court instead of an investigative body meant that competing perspectives of Indian history and culture were tested according to the adversarial method. The DOJ, which had vigorously opposed the creation of the commission, ardently fought each case. Hearings, particularly the first phase, quickly became hostile affairs. After experts presented their evidence-in-chief (direct evidence) opposing lawyers commonly subjected them to harsh cross-examinations. Often re-directs, and sometimes re-cross-examinations, followed. This drawn out 'testing' of the evidence was a major reason why the commission's work dragged on for thirty-two years instead of the five years congress originally envisioned. Even after that long period the commission had not completed its work. The remaining cases were transferred to the Federal Court of Claims. During the long life of the USICC, rarely were Native voices heard directly. Rather, anthropologists and historians acted as their surrogates in hearings that took place far away from the homelands of the petitioners.

New Zealand legislators hoped to avoid many of the negative aspects of the USICC when they created the Waitangi Tribunal. Among the most visible departures was the effort to make the process accessible to the plaintiffs by convening Tribunal hearings at ceremonial centers/meeting houses (*Maraes*) in the petitioners' communities. Sessions, which are often well-attended by local Maori, begin and end with appropriate Maori greeting

and farewell ceremonies. Also, some of proceedings are conducted in the petitioners' language. In these ways Tribunal sessions facilitate reconciliation by giving local communities the opportunity to witness the telling of their stories and airing their grievances. The USICC failed to do this.

Similar to the ICCA, the TWA established the Tribunal as a commission of inquiry. The original idea was that it would provide claimants and the Crown with independent and objective reports regarding the factual bases of claims and, where appropriate, make recommendations about how the Crown could remedy the situation and/or prevent future breaches of the treaty. TWA gave the Tribunal the authority to undertake, or commission, its own research to supplement and/or check evidence submitted by parties to claims. In contrast to the USICC, the Tribunal has exercised this power extensively. Regarding the testing of evidence, the Tribunal took the position that as a commission of inquiry: 'concepts of standards and burdens of proof are inappropriate except to the extent that the Tribunal must find to its own satisfaction that a claim is well founded.'[45] Regarding the standard of proof that had to be met, the Tribunal determined that it was 'appropriate to adopt the standard of proof customarily applied in civil proceedings, viz. The balance of probabilities.' Even after it gained the authority to make binding recommendations regarding certain Crown lands following amendments to the TWA (1988, 1989 and 1990), the tribunal rejected the Crown's argument that a higher standard of proof was required when it exercised these expanded powers.[46]

Although the Tribunal is more user-friendly for the plaintiffs than its American predecessor was, it is, nonetheless, a product of New Zealand's legal and judicial styles.[47] This has meant that, similar to the USICC, the

process is dominated by lawyers, albeit tribunal members have had varied professional backgrounds. Expert and lay witnesses who appear for the plaintiffs, the government (defendant) and other interested parties in a dispute, are subject to cross-examinations. Often these are lengthy and hard-hitting. Partly for this reason, sometimes hearings have been drawn out over several years,[48] making them much more lengthy than any of those of the USICC had been. As a result, usually after a hearing the WT has to confront a mass of diverse historical and cultural evidence and conflicting interpretations when preparing its reports and recommendations. This has been especially the case for enquiries involving multiple claims and large areas. For instance, the hearing of the Ngai Tahu claim of the Southern South Island involved convening 23 hearings over three and one-half years. The tribunal received 900 submissions and heard 262 witnesses before issuing a report of over 1600 pages in three volumes.[49]

In comparison to the USICC or the WT, the ALRC of Australia is a much more modest affair. It is comprised of a single commissioner, who must be a siting member of the Supreme Court of the Northern Territory. The first commissioner, Justice John Toohey (1977-82), who subsequently was appointed to the High Court, established most of the procedural precedents. Regarding the commission, Toohey observed that its proceedings under the ALRA 'are not truly analogous to those of conventional court proceedings nor to those of Royal Commissions. With the latter there are no parties in the sense in which that term is ordinarily understood and often on one upon whom any onus of proof lies.' Toohey continued: 'A Royal Commissioner is entrusted with the task of inquiring into a particular matter and ordinarily he is assisted by counsel as the only or at any rate the most appropriate way of ensuring that the necessary facts are

brought to his attention. Under the Land Rights Act there are applicants who presumably prefer to present their case in the way that they think best with witnesses whom they decide to call and with such counsel as they engage.'[50]

Beginning with the first claim, Toohey established the practice of holding portions of claims commission hearings both in the more formal setting of a courtroom, often in the city of Darwin, and in the territory of the claimants. He received most of the Aborigines' evidence in the latter locations.

Similar to the ICCA and the TWA, the ALRA gave the commissioner the authority to conduct his own investigations. Toohey and his successors have done so. Beginning with the first claim that came before him, Toohey hired his own anthropologist to check claims books and assess the evidence submitted by interested parties. To avoid developing a built-in bias, he hired a different anthropologist for each succeeding case, often choosing his expert from among those who had appeared in previous hearings on behalf of plaintiffs or other interested parties. From the outset Toohey ruled that there would be 'no strict adherence to the ordinary rules of evidence' and that 'hearsay evidence may be admitted,' but its weight would be a matter for submission and determination.' Of particular importance, he permitted the presentation of videotapes of meetings of large numbers of claimants even though this precluded cross-examining those who testified in this manner. Toohey reasoned that this was the only way of making sure that all claimants had the opportunity of being heard in a reasonable length of time.

Commissioner Toohey's relaxation of the rules of evidence extended to accepting the Aborigines' traditional ways of testing the claims of individuals and coming to a consensus about their rights through public meetings. According to Toohey, this helped him weigh evidence in ways

that would not have been possible following standard courtroom procedures. For instance, when discussing the transcript of a meeting of about 200 plaintiffs and experts, he observed: 'No doubt there are defects in this sort of material. It was suggested for instance that some of the questions put by Mr. Avery [the petitioners' anthropologist] at the meeting were leading in nature but I accept that for the most part leading questions were only used for confirmation or clarification of basic information already offered spontaneously.' Toohey added: 'It is possible too that some persons may dominate a meeting to the exclusion of others. With all that in mind the important thing is that people spoke in front of the community of matters relating to their own country such as the locations of places and dreaming paths about which others would have a general knowledge.' Toohey continued: 'There were instances where people spoke and later corrected themselves or were corrected by others, but it is fair to say that out of that meeting a general consensus arose regarding the identity of owners of land and the territory to which their ownership related.'[51]

Toohey made another very important procedural decision about the order in which he received evidence. In the first four hearings, anthropological experts led off the testimony. Aboriginal witnesses followed them. In the fifth claimToohey reversed this arrangement.[52] Toohey explained that he did so: 'because the claimants were employed … and taking their evidence first left them free to return to work with the least possible interruption.[53] Quickly he saw that there were unanticipated advantages from hearing witnesses in this order: 'It cast the anthropologists more truly in the role of recorders. A comprehensive and helpful claim book was available to give a broad picture before the evidence began, but there was not the same tendency to see the anthropological model as one into

which the evidence of all witnesses should fit.'[54] After adding that he did not want to overstate the merits of this approach, or suggest that hearing always should proceed in this fashion, Toohey noted that: 'Dr. Merlin, an anthropologist called by counsel assisting the Commissioner, thought that the procedure followed [for the Yingawunarri] had been useful. She also made the point that there was a tendency to confine the evidence of Aboriginal witnesses to traditional ownership when some may have been able to speak with authority on such matters as the use of roads, dips and bores in the area.'[55] In these ways, the WT and ALRC made the claims hearing process more accessible to petitioners than the USICC had been. Along the way, the voices of aboriginal claimants became stronger and less subjected to reformulation by academic experts acting as their surrogates.

In South Africa, the RLRA created the Commission on the Restitution of Land Rights [CRLR]. Initially it consisted of national chief commissioner [NLC] and five regional commissioners [RLC].[56] Two years after creating the CRLR, the government established a statutory court, the Land Claims Court [LCC], to approve agreements negotiated by the commission, grant restitution orders, and adjudicate disputes on the basis of claims investigations it received (mostly from the claims commission). Petitioners also could bypass the commission and take their case directly to the LCC.[57] Very few have done so. Until 1999 the LCC was responsible for sanctioning all settlements and issuing court orders to implement them.[58] Thereafter, the court only handled disputed claims. LCC judgments can be appealed to the High Court. This separation of the adjudicatory function from the CRLR was based on the experience of commissions and tribunals in Canada, Australia and New Zealand. Also, it reflected the widespread distrust of the South African judiciary that lingered from the Apartheid era.[59]

Although the CRLR was highly centralized at the outset, over time, especially after 2006, the regional land claims commissioners [RLCC] gained substantial authority. Cherryl Walker's account of her experience as one of the first RLCC makes it clear that she and her colleagues were more proactive and operated much more informally than had been/is the case with their counterparts on the USICC, ALRC, or the Waitangi tribunal. Partly this results from the RLRA, which gave commissioners wide-ranging responsibilities. Most notably, the commission was mandated to: (1) help petitioners fill out the required claims forms,[60] (2) investigate claims,[61] which often involved consulting with experts and interviewing witnesses; and (3) facilitate negotiations of settlements among the parties involved.[62] The act did not require commissioners to hold formal hearings where interested parties to a claim could challenge the evidence submitted. In other words, regional commissioners had broad responsibilities and extraordinary latitude when discharging them.

Walkers' handling of the Bhangazi claim to a portion of the Greater St. Lucia Wetland Park is an excellent example of the scope of actions that were available to a RLCC.[63] This was a complex case. The claimants had been cattle grazers, shifting cultivators, collectors, hunters and fishers who lived along the coast of the Indian Ocean and inland. The expansion of tourism in their homeland, which had been part of a national park continuously from 1938, led the Bhangazi to migrate from the area and disperse. Walker's researching of the claim, which involved undertaking oral histories and obtaining a report from a leading historian of the Zulu, enabled her to recount this history. She also learned that some of the claimants had sustained clan, spiritual, and ritual ties to their old homeland.

Although the Bhangazi's past and current linkages to the claimed area were clear, Walker faced several problems. A nearby tribal group, the Mpukonyoni Tribal Authority led by Chief Mkhwanzi, submitted a list of the people who supposedly had been driven out of the claim area. The Mpukonyoni' list of claimants did not accord with that of the Bhangazi. Chief Mkhwanzi contended further that the Bhangazi were subordinate to him and therefore lacked the authority to file an independent claim. Officials in the Department of Land Affairs [DLA], which included individuals from the former NP government's Department of Regional and Land Affairs,[64] backed the Mpukonyoni. They did so largely because the latter's chiefs had cooperated with the Apartheid government before 1994. Also problematic for Walker was the fact that the DLA, with the support of conservation groups, opposed any settlement that would allow claimants to return to the area and resume their former land use practices. Such land use would threaten conservation programs and tourism promotion in the park area.

Commissioner Walker negotiated around these problems by building a 'definitive list of claimant households.'[65] This involved her assembling a team of community elders, a lawyer, a surveyor, and an anthropologist. She also included staff members from her office, the DLA and the National Parks board. With this ungainly group in tow Commissioner Walker travelled over the claim area and identified 381 abandoned dwelling sites. Subsequently Commissioner Walker tracked down 417 living beneficiaries associated with these sites.[66] She decided that they constituted 'the community' according to the terms of the act, because they had previously lived in the claim area and had used the land according to 'customary practices.' Walker then polled this group to determine what kind of a restitution agreement they wanted. With this information her office helped

negotiate a compensation package that all parties accepted. In this remarkable way Commissioner Walker brokered a settlement without having to hold endless claims hearings or involving the courts. Both could have had a very divisive impact on the local community.[67]

Canadian rights litigation

The extra- and quasi-judicial processes described above were intended to eliminate, or at least minimize, litigation as the means to resolve title and rights claims. The courts have remained involved, however, especially in Canada, the United States after 1978, and in Australia beyond the Northern Territory. I will highlight the changing nature of this approach to dispute resolution/reconciliation by focusing on Canada and highlighting some of the cases in which I have been involved.

Prior to the late 1960s, Canadian courtrooms were remote, mostly off limits places, for aboriginal rights claimants. In 1888, for example, the British Privy Council made a ruling about the source of aboriginal title in Canada without receiving any input from Aboriginal people. The ruling stood as the definitive statement until the Supreme Court of Canada's [CSC] *Calder* decision of 1973. The Privy Council's decision, which is remembered as *St. Catherine's Milling v. Regina*, resulted from a dispute between the province of Ontario and the Federal Government over who held the right to administer off-reserve lands that Indians had surrendered to Canada in a treaty in 1873 (Treaty 3).[68] Although this issue raised questions about the nature of aboriginal title, aboriginal people were not represented. One of the reasons the decision had remained unchallenged for so long was that Canada barred Indians from hiring lawyers for the purpose of taking title claims to court from 1928 to 1951. After the ban ended, the Nisga'a of

Canada's Pacific Coast were the first to go to court to gain legal recognition of their aboriginal title. They achieved partial success in the landmark decision of *Calder v. Regina* (1973). This split decision of the CSC raised the probability that aboriginal title existed on unsurrendered lands.

Lawyers and the courts were slow to revise their procedures after *Calder* to accommodate the new aboriginal presence, however. The courtroom remained a highly adversarial place where non-native voices, especially those of anthropologists, were the ones that carried weight in the eyes of the court. This had happened in *Calder*, for example.[69] Subsequently the Gitxsan-Wet'suet'en, who are eastern neighbors of the Nisga'a, challenged this practice beginning in May of 1987, when they launched their title challenge in the Supreme Court of British Columbia as *Delgammukw v. Regina.* In their opening statement to Chief Justice Alan McEachern, the Elders asked him to set aside any cultural-evolutionary notions he might have held, which placed their society and that of their ancestors on a lower scale than those of Euro-Canadian settlers and their descendants. The Gitxsan-Wet'suet'en then proceeded to lead off with oral history evidence presented by their Elders. Scholars, myself among them, followed as supporting expert witnesses.

After 374 trial days (mostly held in Vancouver) spread over three years (1987-90), British Columbia SC Chief Justice Alan McEachern, who had obtained his university education in the 1940s (BA 1949 and LLB 1950), ignored the opening appeal of the Gitxsan-Wet'suet'en Elders in his 400-page decision. Instead, his outdated evolutionary perspective of the plaintiffs'' history and society, to which crown counsel appealed, provided him with a key rationale for rejecting their claim.[70] Justice McEachern's

rejection also resulted from his refusal to give weight to the months of oral testimony that the elders struggled to deliver in his extremely adversarial (hostile) courtroom.

On appeal the SCC faulted him for not giving the oral histories proper consideration. Specifically, the SCC set aside McEachern's judgment and ordered a new trial (which never took place) because he: 'gave no independent weight to these oral histories and then concluded that the appellants had not demonstrated the requisite degree of occupation for "ownership". Had the oral histories been correctly assessed, the conclusions on these issues of fact might have been very different.'[71] In coming to this ruling, the SCC noted that, while the appeal was underway, it had already ruled in another case (*Regina v. Van der Peet)* that: 'the common law rules of evidence should be adapted to take into account the *sui generis* nature of aboriginal rights.'[72] The court explained that in practice: 'this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past.' The SC noted further that Canada's *Constitution Act* of 1982 had affirmed that aboriginal rights 'are defined by reference to pre-contact practices … or …in the case of title, pre-sovereignty occupation.' As a result, oral histories and oral traditions 'play a crucial role in the litigation of aboriginal rights.'[73]

Although the SCC's *Delgamuukw* judgment signalled a fundamental adjustment of the rules of evidence to make room for the oral histories of Elders, evaluating and weighing this line of evidence continues to be hotly contested in trials,[74] where masses of other types of evidence about aboriginal pasts (archaeology, ethnology, ethnohistory, history, and historical geography) are presented by opposing expert witnesses having

wide ranging expertise. Some the latter specialize in attacking oral history evidence.[75] Battles over the qualifications of Elders and experts and the testing of evidence by the adversarial method, with all the court rituals and posturing that are associated with it, means that trials drag on as long or longer than the *Delgamuukw* trial. As a result, trial justices often have to assess masses of evidence and testimony that often exceeds what the USICC or the WT have had to confront in cases they adjudicated. This also means that now it is commonplace for Canadian judgments to be several hundred pages or more in length.

Perhaps of even greater importance, the highly ritualized adversarial method used to test evidence remains at variance with the ways most aboriginal societies present and evaluate oral history and traditions. It is very difficult, for example, to carry forward with traditional storey-telling practices when witnesses are only permitted to answer questions put to them by lawyers. Since *Calder* and *Delgamuukw* Canadian courts have taken important steps toward making the trial process less alien and formidable for aboriginal plaintiffs/defendants and the experts who support and oppose them. Sometimes this involves adopting practices similar to those of the ALRC, RLC and the WT by holding at least some of the court proceedings in aboriginal communities. For instance, in the Samson Cree's suit of the federal government for alleged breaches of Treaty 6 (1876) and residual title issues, Federal Court of Canada trial justice Max Teitelbaum moved the hearings from Calgary, Alberta to the plaintiff's community to take the oral evidence of the elders.'[76] When the court reconvened in Calgary for the presentation of my testimony and that of other experts, the judge allowed the plaintiffs to perform a traditional ceremony in the courtroom and place a

sacred object (medicine bundle) there for the duration of the trial to bless the proceedings. Other courts have followed suit.[77]

More recently, the Federal Court of Canada has amended its procedural rules to allow for pre-trial meetings of experts in order to expedite trials where multiple experts have submitted conflicting evidence and opinions.[78] This innovation was pioneered in Australia where the practice is known as 'hot-tubbing. In Canada the procedure is referred to as 'conferencing.' In an ongoing litigation, *Alderville Indian Band et. Al. v. Regina*, Federal Court of Canada justice J. Mandamin ordered conferencing to expedite the handling of the evidence that is to be presented by twenty-two experts.[79]

Similar to the commissioners engaged in extra- and quasi-judicial processes, when rendering their decisions judges are mindful of the need retain public confidence in the courts. Accordingly, judges normally avoid making sweeping rulings that are too disruptive of the current economic order even if the evidence seems to warrant doing so. The Supreme Court of Canada was reminded of this need in its *Marshall v. Regina* decision of 17 September 1999 regarding Micmac eel harvesting rights in Atlantic Canada (New Brunswick). When it ruled that this First Nation held previously unrecognized treaty rights to this fishery non-aboriginal fishermen rioted and there were public outcries that the justices were being judicial activists. In response to this acute political pressure the court backtracked. Two months (17 November) later it issued an 'elaboration' of the September ruling.[80]

Conclusion

So, which scheme is best? Commonly this is one of the first questions that I am asked after discussing these various aboriginal claims regimes. There is no ready answer to this question even if it is considered solely from the

perspective of claimants. A key reason why it is difficult to make such an assessment is that petitioners often have multiple objectives when they file a claim. The Gitxsan and Wet'suet'en of Canada are good examples. They pursued their aboriginal title claim partly as an important first step toward gaining some control over the direction of future economic developments in their traditional territories and to obtain a fair share of any economic benefits that arose from them. Their claim also was intended to address another very different concern. They wanted to use the court as public forum where they could tell outsiders about their experience with colonialism. In effect, they wanted to share their history with the outside world as they customarily had done among themselves through community feasting ceremonies (*potlatches*). In the latter settings the hereditary chiefs often related the histories and traditions (known as *adaawk* and *kungax*) of their houses at feasts to resolve internal conflicts over a wide range of issues, including land disputes, and to provide public witnessing of the changing socio-political order, such as the passing on of titles and responsibilities from one generation to another. Although the other plaintiffs that I have supported as an expert witness did not have this particular institution, recitations of oral histories in community gatherings served similar purposes.

Delgamuukw made it clear to the Gitxsan-Wet'suet'en and the larger aboriginal community that Canadian courts were not 'Native friendly' in the 1980s, however. This meant that they were poor forums in which to relate alternative histories to those generated by settler societies. Key among the problems were the fact that courts were neither receptive to native voices, nor native modes of presentation, nor aboriginal legal perspectives. In these respects, Canadian trials of the 1970 and 1980s recalled the hearings of the USICC of the 1950s and 1960s, where natives voices were largely silent. An

additional problem, most Canadian courtrooms are physically remote from claimants' communities. The cost of litigation is another barrier. This problem has increased with time. Trials and appeals have become ever more costly, with the some of the major Canadian cases costing as much as $50 to $100 million.[81] Two of the trials I was involved in, *Delgamuukw* and Samson Cree, collectively cost almost $1.5 million (1.35 billion rand at current exchange rates).[82]

The legislation that created the WT, the ALRC, and the RLC enabled these institutions to be more flexible and petitioner friendly than the USICC was in the 1950s and 1960s or Canadian courts have been until very recently. Accordingly, commissioners and tribunal members have pioneered reaching out to claimant communities. Also, they led the way in relaxing time-honoured western rules of evidence, particularly the hearsay rule. This has enabled them to be more open to non-western lines of evidence, to provide more appropriate venues to receive it, to have a willingness to accept various modes of presentation, and to allow for different methods of evaluation. Although Canadian and other courts are making concerted efforts to follow suit, they still have a long way to go and many obstacles to overcome.[83]

[1] My focus is directed at the schemes used to evaluate claims. Derick Fay and Deborah James discuss the larger theoretical issues that land restitution schemes raise in 'Giving land back or righting wrongs: Comparative Issues in the Study of Land Restitution,' in Cherryl Walker, Anna Bohlin, Ruth Hall, and Thembela Kepe,' *Land Memory, Reconstruction, and Justice: Perspectives on Land Claims in South Africa.* Scotsville: University of KwaZulu-Natal Press, 2011: 41-60.

[2] The examples are: the *Indian Claims Commission Act* [ICCA] (1946), the *Treaty of Waitangi Act* [TWA] (1975), the *Aboriginal Land Rights Act* [ALRA] *(Northern Territories)* 1976, and the *Restitution Land Rights Act* [RLRA] (1994).

[3] *Public Law 726*, 13 August 1946, Section 2. Reprinted in Imre Sutton, editor, *Irredeemable America: The Indians' Estate and Land Claims, Appendix A.* Albuquerque: University of New Mexico Press, 1985. Prior to the passage of this act an Indian tribe had had to obtain a special act of congress in order gain the right to sue the United States government.

[4] A. L. Kroeber, who was the leading Americanist anthropologist of the day and expert for Indian plaintiffs, talked about the problematic nature of these terms. A. L., Kroeber, 'Nature of the Land-holding Group,' *Ethnohistory* 1955 2 (4): 303-14. See also, Julian Steward, 'Theory and Application in a Social Science,' *Ethnohistory 1955 2 (4):* 292-301.

[5] *United States v. Santa Fe Pacific R*. Co., 314 U.S. 339 (1941).

[6] Geoff Melvin, 'The Jurisdiction of the Waitangi Tribunal,' in Janine Hayward and Nicola R. Wheen, *The Waitangi Tribunal: Te Roopu Whakamana I te Tirti o Waitangi.* Wellington: Bridget Williams Books Limited, 2004,15

[7] Interview with Ann Parsonson, Member of Waitangi Tribunal, June 2002.

[8] http://www.legislation.govt.nz/act/public/1975/0114/latest/DLM435368.html

[9]Available at: http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html (accessed 5 Feb 2013)

[10] The legislation incorporated most of the recommendations of Sir Edward Woodward, who headed the Woodward Royal Commission. In my interview with Sir Edward Woodward, 21 October 2002, he commented that it had been a political necessity to devise a set of standards that claimants would have to meet. Otherwise, Woodward thought that the rest of the population would not accept the plan.

[11] *Aboriginal Land Rights (Northern Territory) Act 1976.* Available at: http://www.austlii.edu.au/au/legis/cth/consol_act/alrta1976444/. (Accessed 5 February 2013).

[12] Woodward told me that he intentionally did not define 'local descent group' so that it would be open to interpretation. Woodward interview, 21 October 2002.

[13] Ibid.

[14] This was because after marriage women moved to their husband's territory (patrilocal residence), but retained rights in their father's territory. Also, although men held the rights to sacred sites, women were responsible for making sure that appropriate rituals were conducted.

[15] In *Alexkor v Richtersveld* (2001) claimants did raise this issue. Available at: http://www.saflii.org/za/cases/ZACC/2003/18.html. The Constitutional Court cited Australian and Canadian case law on Indigenous title.

[16]The *Native Trust and Land Act* of 1936 consolidated this dispossession legislation. Cherryl Walker, *Land-marked: Land Claims and land Restitution in South Africa.* Athens: Ohio University Press, 2008: 67 and 113.

[17] RLRA, Part 2, 'Entitlement to restitution.' http://www.bloemfontein.co.za/docs/Restitution%20of%20Land.pdf

[18] For example, the act specified that: '"right in land" means any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.' Chapter 1, Section 1.

[19] In addition disputes arising from treaty obligations, these claims also included disputes about the federal government's management of various First Nations funds or assets.

[20] In 2008 the federal government created the Specific Claims Tribunal comprised of six full time federal judges appointed from Provincial Superior Courts from across the country.

[21] In 1997, twenty-four years after the program had been implemented, only twelve of over 200 claims had been settled. Office of the Auditor general of Canada, 1998 September Report, page 3. http://www.oag-bvg.gc.ca/internet/english/parl_oag_199809_14_e_9320.html.

[22] The tribunal was composed of six federal judges. Hearings could be held by any one of them according to procedures determined by the full tribunal. Rules of the Federal Court of Canada applied. http://laws-lois.justice.gc.ca/eng/acts/S-15.36/page-1.html#docCont.

[23] This is a legal category that includes 'status' and 'non-status' Indians. The former are included in a federal registry and the latter are not. Many of the former signed historic treaties with Canada

[24] These are people of mixed aboriginal and European heritage who developed a distinctive culture prior to the local assertion of effective British or Canadian control locally.

[25] See, for example, *Regina v Powley* (2002). http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2076/index.do?r=AAAAAQAGcG93bGV5AAAAAAAAAAQ. (Accessed 5 February 2002)

[26] The key Canadian case law on the issue of 'organized society, is: *Baker Lake (Hamlet) v. Canada (Minister of Indians Affairs and Northern Development)* (1980, Federal Court Trial Division). Regarding exclusive use and occupation, Canadian case law refers to American jurisprudence, particularly *United States v. Santa Fe Pacific R*. Co.

[27] In *R. v. Sparrow*, [1990] 1 S.C.R. 1075 the Supreme Court of Canada ruled that traditional practices can exist in a modern form and in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 the court held: 'A practice, custom or tradition, to be recognized as an aboriginal right need not be distinct, meaning "unique", to the aboriginal culture in question. The aboriginal claimants must simply demonstrate that the custom or tradition is a defining characteristic of their culture. held that aboriginal practice warranting legal protection are limited to those that are culturally defining.'

[28]Sutton, Appendix A, Lurie, 1957: 62 and Barney 1955: 316.

[29] *ICCA, Section 2.*

[30] It should be noted that initially only 45 Maori chiefs signed the treaty. By the end of 1840 over 500 had done so.

[31]Hayward and Wheen, xv.

[32] Initially claims could only be brought forward that concerned government actions following the passage of the *Treaty of Waitangi Act.* The 1985 amendment allowed for historical claims that included actions taken after the signing of the treaty in 1840.

[33] Hayward and Wheen, 16-19. When making its assessment, the tribunal is required to take into account the English and Maori version of the treaty that are appended to the *Act.*

[34] RLRA (1994): Section 10. This clause was inserted as Section 6 of Act 63 when the act was revised in 1997.

[35] Ibid. In the 1997 revision of the act this clause was inserted as Section 2 (f).

[36] Cherryl Walker, *Land-Marked,* 54 and 66-7.

[37] The most common of these are so-called 'SSO's,' or Standard Settlement Offers of 40,000 Rand for urban properties.

[38] The act defines this as: 'all land owned by any organ of state, and includes land owned by the Land Bank and any institution in which the State is the majority or controlling shareholder.' RLRA, section 1.

[39] Examples are, Walker, 215-16; Steven Robins and kees van der Waal, '"Model Tribes" and Iconic Conservationists?' Tracking the Makuleke Restitution Case in Kruger National Park,' in Land, Memory, Reconstruction, and Justice: Perspectives on Land Claims in south Africa, edited by Cherryl Walker, Anna Bohlin, Ruth Hall, and Thembela Kepe, Scottsville: University of KwaZulu-Natal Press, 2011: 163-80; and Thembela Kepe, 'Land Claims and Comanagement of Protected Areas in South Africa: Exploring Challenges,' in Walker et. al., 235-54..

[40] *Public Law 726*, 13 August 1946, Section 13 (b): Sutton, 386.

[41] They were Assistant Commissioner Louis J. O'Marr, who was former Attorney General of Wyoming, William Holt, who was a lawyer from Nebraska, and Chief Commissioner Edgar E. Witt, a former Lieutenant Governor of Texas and previous chairman of two Mexican Claims Commissions. None of these men were experienced with Indian history or claims.H.D. Rosenthal, *Their Day in Court: A History of the Indian Claims Commission.*New York: Garland Publishing, 1990: 112-13.

[42] As anthropologist and expert witness in USICC hearings Nancy Lurie noted, the act permitted Indians to retain lawyers, it did not require them to do so. Nancy Lurie, 'Epilogue,' Sutton, 377 and *Public Law,* Section Section 15.

[43] A.J. Ray, "Kroeber and the California Claims: Historical Particularism and Cultural Ecology in Court,' in Richard Handler, ed., *Central Sites, Peripheral Visions: Cultural and Institutional Crossings in the History of Anthropology.* History of Anthropology Volume 11, University of Wisconsin Press. Madison: University of Wisconsin Press, 2006: 248-74 and A. J. Ray, 2006, "Anthropology, History, and Aboriginal Rights: Politics and the Rise of Ethnohistory in North America in the 1950s,' in Arif Dirlik, ed., *Pedagogies of the Global: Knowledge in the Human Interest.* Boulder: Paradigm Publishers: 89-112.

[44] Nancy Lurie, 'A reply to Land Claims Cases: Anthropologists in conflict,' *Ethnohistory* 1956 3 (3): 256-79 and A. J. Ray, 'From the United States Indian Claims Commission Cases to *Delgamuukw*: Facts, Theories and Evidence in North America Claims Cases,' in L. Knafla and H. Westra, editors, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand.* Vancouver: University of British Columbia Press, 2010: 37-52.

[45] Geoff Melvin, 'The Jurisdiction of the Waitangi Tribunal,' in Hayward and Ween, 23.

[46] *Ibid.*, 25.

[47] Richard Boast, 'Waitangi Tribunal Procedure,' in Hayward and Ween, 55.

[48] The 'Taranaki Report - Kaupapa Tuatahi' involved 12 hearings from 1990-1996. http://www.waitangi-tribunal.govt.nz/reports/viewchapter.asp?reportID=3FECC540-D049-4DE6-A7F0-C26BCCDAB345&chapter=15. It dealt with 21 related claims.

[49] http://www.waitangi-tribunal.govt.nz/reports/summary.asp?reportid={D5D84302-EB22-4A52-BE78-16AF39F71D91}. The tribunal web site provides a map of the major claim areas.

[50] John Toohey, *Borroloola Land Claim: Report by the Aboriginal Land Commissioner to the Minister for Aboriginal Affairs and to the Minister for the Northern Territory*, Canberra: Australian Government Publishing Service, 1979: 3.

[51] *Ibid.*, 12.

[52] John Toohey, 'Yingawunarri (Old Top Springs) Mudbura Land Claim,' Report 6, Australian government Publishing service, 1980.

[53] Ibid., 4, paragraph 20.

[54] Justice John Toohey, *Yingawunarri (Old Top Springs) Mudbura Land Claim: Report by the Aboriginal Land Commissioner.* Canberra: Australian Government Publishing Services, Report 5 1979, paragraph 20.

[55] Ibid, 4, paragraphs 21 and 22.

[56] The Department of Land Affairs appointed the commissioners and his department supplied back-up staff and logistical support for the commissioners. The problem with this arrangement was that under the NP this department had carried out the apartheid land dispossession policies. When the ANC was elected personnel of this department were protected by a five-year grandfather clause. So, these staff no were involved in a program aimed at redressing injustices that arose from programs they had administered previously. In 1999 the CRLR was absorbed into the Department of Land Affairs.

[57] RLRA provided for this possibility according to Chapter IIIA.

[58] Walker, Unpublished, 2.

[59] *Ibid., 22.*

[60] *RLRA, Chapter II, Section 6 (b).* This paragraph states that the commission shall 'take reasonable steps to ensure that claimants are assisted in the preparation and submission of claims.

[61] *Ibid*., 6 (cA)

[62] Ibid., 6 (cB)

[63] Walker, 107-44.

[64] Their positions had been grandfathered following the transition to democracy

[65] Walker, 132-35.

[66] *Ibid*., 130-31.

[67] The agreement provided cash payments of R30,000 for each of the families and established a community levy on tourists for seventy-five years that paid the income to: the Bhangazi Community Trust (75%), Mpukonyoni Tribal Authority (2%) and Kwa-Zulu Natal Conservation board (5%). *Ibid.*

[68] In its decision the Privy Council held that aboriginal title existed at the pleasure of the Crown and was not a pre-existing right.

[69] Anthropologist Wilson Duff, who was a specialist on Pacific Northwest Coast societies, appeared as the key expert.

[70] The Crown appealed to his evolutionary bias at trial. A. J. Ray, "Creating the Image of the Savage in Defense of the Crown: The Ethnohistorian in Court," Special Issue, *Native Studies Review* 1993 6 (2): 13-28.

[71] http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1569/index.do?r=AAAAAQAKZGVsZ2FtdXVrdwAAAAAAAAE

[72] *Ibid*., paragraph 3. The ruling was *Regina v. Van der Peet* [1996] 2 S.C.R. 507, which the court had handed down while *Delgamuukw* was on appeal.

[73] *Ibid.,* 84

[74] For example, in the 339-day (spread over a five-year period) aboriginal title suit recorded as *William v. British Columbia,* British Columbia Supreme Court Justice J. Vickers devoted considerable attention to the issue of assessing oral history and oral tradition as evidence. He noted that the SC had ruled that it can stand independently from any other historical, archaeological or anthropological evidence. See, 2007 BCSC 1700 and 2006 BCSC 1427. The procedures for recording this line of evidence are also subject to dispute. For example, recently (December 2012) I was cross-examined Federal Court in Toronto on an affidavit I submitted supporting a petition by the plaintiffs *Alderville Band et.al. v. Regina* (Federal Court Record T-195-92) to have videos of Elders testimony included as part of the official court transcript. The Crown opposed the motion contending that the written transcripts were sufficient.

[75] An example is archaeologist Alexander von Gernet. In *William v. British Columbia*, BCSC Justice Vickers observed: 'I was left with the impression that Dr. von Gernet would be inclined to give no weight to oral tradition evidence in the absence of some corroboration. His preferred approach, following Vansina, involves the testing of oral tradition evidence produced in court by reference to external sources such as archaeology and documentary history. In the absence of such testing, he would not be prepared to offer an opinion on the weight to be given any

particular oral tradition evidence. If such testing did not reveal some corroborative evidence, it is highly unlikely that he would give any weight to the particular oral tradition evidence. This approach is not legally sound. Trial judges have received specific directions that oral tradition evidence, where appropriate, can be given independent weight. If a court were to follow the path suggested by Dr. von Gernet, it would fall into legal error on the strength of the current jurisprudence.' Vickers, *William v. British Columbia,* Reasons for Judgment (Ruling on Admissibility of Dr. von Gernet's Reports) 22 September 2006, 2007 BCSC 1700: 59.

[76] Albeit in the end he gave little weight to that evidence in spite of the *Delgamuukw* judgment. M. Teitelbaum, *Reasons for Judgment, Victor Buffalo v. Regina,* 2005 Federal Court of Canada (FC) 1622.

[77] In *William v. Regina,* for example, British Columbia Supreme Court Justice Vickers held portions of the trial in Victoria and in the plaintiffs' territory.

[78] Section 52.6 of the revised rules (2012) states: 52.6 (1) The Court may order expert witnesses to confer with one another in advance of the hearing of the proceeding in order to narrow the issues and identify the points on which their views differ. http://laws-lois.justice.gc.ca/eng/regulations/SOR-98-106/page-11.html#docCont. (accessed 9 February 2013). In spite of this provision, efforts to hold these hearings can still be the subject of time consuming opposing motions requiring that require trial judges to make rulings on the matter. A recent example is the ongoing litigation in Federal Court of *Alderville Indian Band et. Al. v. Regina* (Docket T-195-92), where presiding Justice J. Manamin held a hearing on this issue on 14 August 2012 before ordering on 30 august 2012 that the conferencing to go forward.

[79] Justice Mandamin noted that the litigation already had been underway for ten years and the statement of claim was now the 'fifth further amendment.' Ibid.

[80] *Regina v. Marshall (No. 1)* [1999] 3 S.C.R. 456 and *Regina v. Marshall (No. 2)* [1999] 3 S.C.R. 53. The court made its second ruling, or rather 'elaboration,' while turning down a motion by fishermen's associations for a rehearing.

[81] A. Ray, 'History Wars' and Treaty Rights in Canada,' in A. Harmon, *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest.* Seattle: University of Washington Press, 2008: 279.

[82] That is the equivalent of 1.35 billion rand at current exchange rates, or 33,825 SSOs.

[83] For example, in Australia the government amended the *Native Title* Act to address the issue of oral evidence of Aborigines trumping other more traditional sources. Section 82 of the amended act stated regarding: '*Rules of evidence:* (1) The Federal Court is bound by the rules of evidence,

except to the extent that the Court otherwise orders… (2) In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings [emphasis added]. http://www.alrc.gov.au/publications/19.%20Aboriginal%20and%20Torres%20Strait%20Islander%20Traditional%20Laws%20and%20Customs/evidence-tradition.

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