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# THE ADJUDICATION OF HISTORICAL EVIDENCE: A COMMENT AND AN ELABORATION ON A PROPOSAL BY JUSTICE LABEL

Shin Imai\*

## 1. Introduction

Both *R. v. Marshall*<sup>1</sup> and *R. v. Bernard*<sup>2</sup> began as relatively minor prosecutions for breaches of regulatory statutes. In this, they were not remarkable as most of the leading cases in this field began from such prosecutions. In *R. v. Sparrow*<sup>3</sup> the fishing net was too long; in *R. v. Badger*<sup>4</sup> the First Nation hunters were on private land; in *R. v. Van der Peet*<sup>5</sup> ten salmon were sold without a licence; in *R. v. Marshall (fishing)*<sup>6</sup> \$700 of eels were sold without a licence; in *R. v. Powley*<sup>7</sup> a Métis person shot a moose for food without a licence. It is rare, outside of the Aboriginal context, for offences such as these to be considered by the Supreme Court of Canada. Convictions usually result in relatively light non-penal penalties and most cases are settled through plea bargains before they go to trial.

Summary prosecutions dealing with Aboriginal and treaty rights are unlike other summary prosecutions because a finding of guilt or innocence requires consideration of larger issues relating to territory, priority for the use of resources and the legal framework for exercising those rights. It is for these reasons that

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<sup>1</sup> [2005] 3 C.N.L.R. 214, 2005 SCC 43 [*Marshall and Bernard* cited to C.N.L.R.], rev'g (2003), 218 N.S.R. (2d) 78, [2004] 1 C.N.L.R. 211 (C.A.) cited to N.S.R.; rev'g (2002), 202 N.S.R. (2d) 42, [2002] 3 C.N.L.R. 176 (S.C.) cited to N.S.R.]; aff'g (2001), 191 N.S.R. (2d) 323, [2001] 2 C.N.L.R. 256 (Prov. Ct.) [*Marshall (logging)* cited to N.S.R.].

<sup>2</sup> [2005] 3 C.N.L.R. 214, 2005 SCC 43 [*Marshall and Bernard* cited to C.N.L.R.], rev'g (2003) 262 N.B.R. (2d) 1, [2003] 4 C.N.L.R. 48 (C.A.) cited to N.B.R.]; rev'g (2001) 239 N.B.R. (2d) 173, [2002] 3 C.N.L.R. 141 (Q.B.) cited to N.B.R.]; aff'g [2000] 3 C.N.L.R. 184, N.B.J. No. 138 (Prov. Ct.) [cited to N.B.R.].

<sup>3</sup> [1990] 1 S.C.R. 1075, 3 C.N.L.R. 160 [*Sparrow* cited to S.C.R.].

<sup>4</sup> [1996] 1 S.C.R. 771, 2 C.N.L.R. 77.

<sup>5</sup> (*sub. nom. R. v. Van der Peet*) [1996] 2 S.C.R. 507, 4 C.N.L.R. 177 [*R. v. Van der Peet* cited to S.C.R.].

<sup>6</sup> [1999] 3 S.C.R. 456, 4 C.N.L.R. 161 [*Marshall (fishing)* cited to S.C.R.].

<sup>7</sup> [2003] 2 S.C.R. 207, 4 C.N.L.R. 321 [*Powley* cited to S.C.R.].

Justice LeBel at the Supreme Court of Canada in *R. v. Marshall*; *R. v. Bernard*<sup>8</sup> and Justice Robertson at the New Brunswick Court of Appeal in *R. v. Bernard*<sup>9</sup> expressed concerns about the appropriateness of adjudicating issues related to Aboriginal and treaty rights in summary conviction proceedings. The two judges pointed out that such proceedings are designed to determine the guilt or innocence of an accused individual; they are not designed to address Aboriginal title to territory that may encompass an entire province nor to determine the ramifications for decisions about resource allocation among individuals and corporations who are not parties to the proceedings.

The complexity of accommodating Aboriginal and treaty rights in a contemporary context where such rights had been ignored for so long leads courts to suggest that negotiations are a more appropriate way forward than litigation. In *Bernard*, Justice Daigle of the New Brunswick Court of Appeal observed:

In my view, the larger question looming behind the issues of the reconciliation of aboriginal title and the interests of other title holders, including issues of extinguishment of aboriginal title by the granting of fee simple titles or entitlement to compensation, should not be addressed in a piecemeal fashion before the courts. The fundamental principle that must guide the resolution of these issues is that the rights asserted must be considered in relation to the competing rights and interests of others. As suggested by several courts in Canada, only subsequent negotiations bringing together all the parties who have a stake in the resolution of these complex issues can be truly fruitful and lead to just settlements.<sup>10</sup>

In spite of the courts' exhortations to the parties to negotiate, judges often find themselves being asked to determine the existence and scope of Aboriginal or treaty rights. This is because the Crown or the Aboriginal party may not be eager to enter into such negotiations without a Court ruling that establishes the existence of a right, or because the parties have been unable to reach agreement in negotiations. Justice LeBel suggests that if an Aboriginal or treaty rights issue comes to trial in the context of a summary conviction prosecution, the Aboriginal accused should "seek a temporary stay of the charges so that the aboriginal claim can be properly litigated in the civil courts."<sup>11</sup> Justice Robertson, in the New Brunswick Court of Appeal, imposed a stay of the effect of the decision recognizing the treaty right, in order to permit the parties to negotiate a resolution.<sup>12</sup>

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<sup>8</sup> *Marshall and Bernard*, *supra* note 1 at paras. 142-44.

<sup>9</sup> *Bernard* (C.A.), *supra* note 2 at paras. 314-24.

<sup>10</sup> *Ibid.* at para. 210. See also Scanlan J. in *Marshall (logging)* (S.C.) *supra* note 1.

<sup>11</sup> *Marshall and Bernard*, *supra* note 1 at para. 144.

<sup>12</sup> *Bernard* (C.A.), *supra* note 2 at para. 552.

This paper considers the suggestions made by Justice LeBel and Justice Robertson with respect to the suggested procedure. Staying a proceeding or the effect of a decision raises immediate issues related to the status of other similar charges, the allocation of the resource while the matter is winding its ways through the courts, and the funding necessary in order to enable the Aboriginal party to participate in the proceedings. As I argue, current jurisprudence from the Supreme Court of Canada could be developed to address these concerns. Justice LeBel's primary concern, however, is not procedure, but rather that "[t]he question of aboriginal title and access to resources in New Brunswick and Nova Scotia is a complex issue that is of great importance to all the residents and communities of the provinces" in which "all interested parties should have the opportunity to participate in any litigation or negotiations."<sup>13</sup> I argue that to meet the concerns of such "interested parties,"<sup>14</sup> there must be a change in the application of the legal test used to determine Aboriginal and treaty rights. In recent cases, courts have been relying on the interpretation of events in the past to determine contemporary allocation of resources. This approach does not do justice either to the reading of history or to the contemporary interests of the parties who will be affected by the decisions. I argue that it is necessary to separate out the exercise of determining the historical bases for Aboriginal and treaty rights from the exercise of determining the nature of contemporary accommodation. I conclude that if this separation occurs, it will open an opportunity to establish a bi-national panel that could develop an approach to history that would incorporate both settler and Aboriginal experiences.

## 2. An "inadequate and inappropriate" process

Justice LeBel in the Supreme Court and Justice Robertson in the New Brunswick Court of Appeal raised several issues related to procedure and evidence which, in the words of Justice LeBel, made summary conviction proceedings "inadequate and inappropriate."<sup>15</sup> Both judges felt that the more fulsome pre-trial requirements of civil proceedings would be more appropriate for adjudicating Aboriginal and treaty rights. Criminal trials require disclosure by the Crown but not by the defence. Justice Robertson expressed

... great sympathy for the Crown's plea that it is simply unfair to permit the defence of Aboriginal title to be raised in summary conviction proceedings where none of the procedural safeguards employed in the civil sphere is available. For example, there has

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<sup>13</sup> *Marshall and Bernard*, *supra* note 1 at para. 146.

<sup>14</sup> I do not believe Justice LeBel contemplated having public hearings where *any* individual could participate in the proceeding. The Aboriginal party and the Crown should have the responsibility for mediating the interests of those they claim to represent. This means that the Crown should as a rule represent the "interested parties." For a discussion of techniques on "chains" and "networks" needed to provide advice to the parties at the table, see Dean G. Pruitt & Peter J. Carnevale, *Negotiation in Social Conflict* (Pacific Grove, CA: Pacific Grove, 1993) at 154-63.

<sup>15</sup> *Marshall and Bernard*, *supra* note 1 at para. 143.

been no exchange of pleadings and an opportunity to cross-examine witnesses before trial.<sup>16</sup>

Both judges also expressed concern about having different levels of proof in a criminal proceeding. In a prosecution, ordinarily the Crown must prove the elements of the offence beyond a reasonable doubt. In the usual course, summary conviction proceedings for breach of a regulatory statute might take half a day or a day. When the accused raise an Aboriginal or treaty rights defence, the process is a little different. Usually, the main elements of the offence are admitted so that the trial is really a different type of proceeding not accounted for in the rules of criminal practice. The accused open their defence by proving the existence of the Aboriginal or treaty right, on the balance of probabilities. They must then show, again on the balance of probabilities, that the legislation under which they were charged infringes the claimed Aboriginal or treaty right. At this point, the burden shifts to the Crown to show that there has been a “clear and plain” intention to extinguish the right.

The problem of different levels or burdens of proof in the same proceeding is exacerbated by the type of evidence needed to establish the existence of Aboriginal and treaty rights. Rather than the forensic or medical evidence commonly introduced in a summary conviction proceeding, Aboriginal and treaty rights cases may require introduction of evidence from voluminous documents, oral histories, archaeology, anthropology, ethno-history and descriptions of cultural practices. In consequence, trials will require more hearing days spread over a longer period. The *Bernard* trial in New Brunswick Provincial Court required 29 hearing days spread over two years, with five expert witnesses and 600 documents. In *Marshall* (logging), there were several interlocutory proceedings; the trial in the Nova Scotia Provincial Court was conducted over eighteen months, with six expert witnesses, 25,000 pages of exhibits and 9,000 pages of transcripts.<sup>17</sup> An application by the Newfoundland government to remove cabins erected by members of the Miawpukek Band on Crown land required 47 days of testimony and generated 150,000 pages of historical material, with seven expert witnesses called by the Crown and five by the respondents, as well as four Mi’kmaq witnesses.<sup>18</sup> The trial in *R. v. Powley* which established the existence of a Métis Aboriginal right, with three expert witnesses, required eleven days of hearings.<sup>19</sup>

The concerns expressed by LeBel J. and Robertson J.A. with respect to summary quasi-criminal proceedings have been noted by courts in summary civil proceedings as well. In *Ontario (Minister of Municipal Affairs and Housing) v.*

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<sup>16</sup> *Bernard* (C.A.), *supra* note 2 at para. 314.

<sup>17</sup> (2001) 191 N.S.R. (2d) 323 (Prov. Ct.); for the interlocutory motions, see [2000] N.S.J. No. 465 (Prov. Ct.) (QL); [2001] N.S.J. No. 487 (Prov. Ct.) (QL); [2002] N.S.J. No. 154 (C.A.) (QL); [2002] N.S.J. No. 449 (Sup. Ct.) (QL).

<sup>18</sup> *Newfoundland (Minister of Government Services and Lands) v. Drew* (2003) 228 Nfld. & P.E.I.R. 1 (N.L.S.C.).

<sup>19</sup> *R. v. Powley*, [1999] 1 C.N.L.R. 153 (Prov. Ct.) per Vaillancourt J.

*TransCanada Pipelines Ltd.*,<sup>20</sup> the Nishnawbe-Aski Nation sought judicial review of a proposal by the Ontario government to extend the boundaries of a northern municipality. The Nishnawbe Aski Nation argued that such an extension would prejudice treaty rights and land claims to the area and that, consequently, they were entitled to be consulted on the decision. They were successful at the Divisional Court<sup>21</sup> but the Ontario Court of Appeal held that it would not enforce consultation until the Aboriginal or treaty rights in question had been established in judicial proceedings. The Court of Appeal declined to send the matter back to the Divisional Court because, in its view, such rights could not be established in proceedings of a summary nature such as judicial review.<sup>22</sup> In another Ontario case, *Keewatin v. Ontario (Ministry of Natural Resources)*,<sup>23</sup> the Grassy Narrows First Nation sought judicial review of a decision to allow clear cutting and the application of herbicides in the Whiskey Jack Forest by Abitibi-Consolidated Inc. Three trappers commenced the action in 2000. The Ontario Divisional Court dismissed the application and required that the First Nation commence a full civil action, citing the complexity of the evidence to be considered.

Whether Aboriginal parties raise Aboriginal or treaty rights in summary civil or quasi-criminal proceedings, generally they do so as a defensive response to some one else's initiative.<sup>24</sup> Two main factors explain Aboriginal peoples' reluctance to initiate an application for a declaration defining their rights: money and time. A full civil trial is very expensive, requiring lawyers to engage in numerous interim proceedings, such as applications for injunctions, motions to strike parts (or all) of the pleadings, motions for particulars, and challenges to the admissibility of

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<sup>20</sup> [2000] 3 C.N.L.R. 153, (*sub nom. TransCanada Pipelines Ltd. v. Beardmore (Township)*) 186 D.L.R. (4th) 403 (Ont. C.A.); leave to appeal refused, [2000] S.C.C.A. No. 264 (19 Oct. 2000) [*TransCanada Pipelines* cited to C.N.L.R.].

<sup>21</sup> *TransCanada Pipeline Ltd. v. Beardmore (Township)*, [1998] 2 C.N.L.R. 240, [1997] O.J. No. 5316 QL (Gen. Div.).

<sup>22</sup> *TransCanada Pipelines (C.A.)*, *supra* note 20 at para. 161.

<sup>23</sup> *Keewatin v. Ontario (Ministry of Natural Resources)* (2003), 66 O.R. (3d) 370, [2003] O.J. No 2937 (QL) at para. 59: "A great deal of evidence, including expert evidence, will be called by the parties on a number of disputed facts and issues, and it is inappropriate to deal with these disputes of material fact by way of summary application... Some of the disputed issues include: (a) the proper interpretation of the applicable provisions of Treaty 3; (b) inferences to be drawn from the applicable legislative history; (c) the adverse effects, if any, of logging operations on wildlife resources; (d) the nature and extent of benefits generated by logging activities in the area in question for both the general public and First Nations members; and (e) the nature and extent of consultations and discussions between the applicants, their First Nations community, and the respondents concerning the conduct of the logging operations in question."

<sup>24</sup> In *Bernard (C.A.)*, *supra* note 2 at para. 315 Robertson J.A. commented that "the defence of Aboriginal title has been converted into a summary proceeding for establishing Aboriginal title." It should be noted that the Aboriginal parties are engaged in the summary proceedings because they are the accused in a prosecution initiated by the Crown. It is not accurate to say that the Aboriginal party is "converting" the summary conviction proceeding into something else merely because that party is raising a legitimate defence to a charge. Rather than prosecuting, the Crown could have sought an injunction based on the claim that the Aboriginal parties have no Aboriginal or treaty rights. Given that the Crown chose to prosecute, it can hardly complain that it is "unfair to permit the defence of Aboriginal title to be raised in summary conviction proceedings." – *Ibid.* at para. 314.

oral evidence. As noted above, these trials can also stretch across years, not just months. In *Delgamuukw v. British Columbia*,<sup>25</sup> a proceeding asking for a declaration of the type contemplated by Justice LeBel, the First Nation parties asserted Aboriginal title over 58,000 sq km of northern British Columbia. The initial trial took almost three years, with 374 hearing days, 61 witnesses, 35,000 pages of transcripts, 50,000 pages of exhibits and a judgment of more than 400 pages. Eleven years elapsed between the beginning of the trial and the decision of the Supreme Court of Canada in 1997, sending the case back to be retried.

There are few sources of funding for such lengthy and expensive proceedings. Current Test Case Funding from the Department of Indian and Northern Affairs is, in practice, restricted to appearances before the Supreme Court of Canada.<sup>26</sup> In 2004-05 there was only \$750,000 available for the ten to fifteen applications that were approved. In 2005-06, an increase of \$250,000 was allocated for Métis claims. To put this amount into perspective, the Aboriginal plaintiffs in *Delgamuukw* were provided a total of \$8 million.<sup>27</sup> The federal Court Challenges Program, another source of funding for litigation, is limited to cases dealing with equality rights; the maximum for a trial is \$20,000.<sup>28</sup> Framing a case to fit within section 15 of the *Charter of Rights and Freedoms* could mean sacrificing crucial aspects of an Aboriginal or treaty rights argument.<sup>29</sup>

<sup>25</sup> The trial judgment by McEachern C.J.B.C. was delivered in 1990: [1991] 5 C.N.L.R. 1, 79 D.L.R. (4th) 185 (B.C.S.C.) [*Delgamuukw* cited to C.N.L.R.]. The British Columbia Court of Appeal overturned the trial decision in 1993: [1993] 5 C.N.L.R. 1, 104 D.L.R. (4th) 470 [*Delgamuukw* cited to C.N.L.R.]. The Supreme Court of Canada sent the case back for trial in 1997: [1997] 3 S.C.R. 1010, 1 C.N.L.R. 14 [*Delgamuukw* cited to S.C.R.].

<sup>26</sup> See Bruce H. Wildsmith, "Vindicating Mi'Kmaq Rights: The Struggle before, During and After Marshall" (2001) 19 Windsor Y.B. Access Just. 203 at 216-17.

<sup>27</sup> The amount provided by the Test Case Funding program for *Delgamuukw* was exceptional in that funding was provided from the trial through to the Supreme Court of Canada hearings. (Personal conversation with Rami Shoucri and Tom Malloch, Test Case Funding Program, Department of Indian and Northern Affairs, 12 January 2006.) To put the costs for *Delgamuukw* into perspective, the prosecution and defence in the Air India trial each spent about \$22 million. (British Columbia Ministry of the Attorney General, Information Bulletin, 2005AG0036-001081, "Statement of Expenditures for the Air India Trial" (23 Nov. 2005) online: Province of British Columbia, <[http://www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2005AG0036-001081.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2005AG0036-001081.htm)>, accessed: 2 Feb. 2006.

<sup>28</sup> Aboriginal Rights Court Challenges Program, online: <<http://www.justice.gov.nt.ca/ARCCP>>.

<sup>29</sup> Larry Chartrand, "Re-Conceptualizing Equality: A Place for Indigenous Political Identity" (2001) 19 Windsor Y.B. Access Just. 243 at 252:

Quite often, lawyers representing Aboriginal peoples are forced, due to lack of financial resources of the client, to pigeon hole their claims into (or tack onto their other substantive claims) a section 15 analysis in order to fall within the criteria of the Court Challenges Program. The implications of this are significant. Resources are spent developing and managing the section 15 aspect of the case, perhaps at the expense of developing legal arguments supporting substantive Aboriginal rights claims. Consequently, the necessary attention needed to promote a thorough case on Aboriginal rights may not be provided. This could result in a failure to secure a just result and perhaps result in the creation of a bad precedent due to the advancement of ineffective argument or evidence to properly support the Aboriginal rights claim.

In New Brunswick, where the *Bernard* case arose, civil legal aid funding is limited to a narrow range of family law cases, while criminal legal aid is not generally available unless incarceration is a likely result of a conviction. When two Mi'kmaq fishers requested state funded counsel to raise a treaty defence to a fishing charge, the Director of the provincial legal aid plan testified that the plan would go bankrupt if it were to fund such cases.<sup>30</sup> The accused were denied a stay of proceedings until the Crown provided funding for counsel, even though the evidence showed that the accused did not have

... the financial resources to fund an extensive legal battle involving treaty rights which could, according to the evidence before the Provincial Court Judge, see legal costs exceed \$1,000,000.00. Some of the Respondents were working, earning in the range of \$300.00 to \$350.00 a week, while others were on Employment Insurance Benefits or Social Assistance. One Respondent has recently retired from the Canadian Armed Forces after twenty years of service.<sup>31</sup>

Currently, then, there are almost no programs to fund a civil action for a declaration of Aboriginal or treaty rights of the kind proposed by Justice LeBel. It is therefore incumbent on courts to ensure that such funding is available. The Supreme Court recognized that Aboriginal parties would be prejudiced by lack of funding to pursue civil proceedings and in *British Columbia (Minister of Forests) v. Okanagan Indian Band*,<sup>32</sup> ordered costs in advance of the cause. The Adams Lake, Spallumcheen, Neskonlith and Okanagan Bands began logging on their traditional territory to harvest timber for housing in their communities. Because they did not have authorization under British Columbia's Forest Practices Code, the province brought proceedings to stop the logging. Sigurdson J. of the British Columbia Supreme Court ordered that the matter go to a full trial, without ordering that the Crown pay costs in advance, even though the Crown did not dispute the First Nations' claim that they could not afford the cost, which their counsel estimated would be \$814,010. The majority of the judges of the Supreme Court of Canada upheld the Court of Appeal's order that the Crown pay interim costs to the Bands. The usual rules on costs were superseded by "other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance."<sup>33</sup> The majority established three criteria for determining when to award interim costs:

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<sup>30</sup> *R. v Bartibogue*, [2002] 4 C.N.L.R. 209; 250 N.B.R. (2d) 73 (Q.B.) [*Bartibogue*, cited to C.N.L.R.] at para. 15.

<sup>31</sup> *Ibid.* at para. 16. In some other provinces, there may be limited funding available for summary conviction cases.

<sup>32</sup> [2003] 3 S.C.R. 371, [2004] 1 C.N.L.R. 7 [*Okanagan* cited to S.C.R.].

<sup>33</sup> *Ibid.* at para. 38.



- (i) The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation could not proceed if the order were not made.
- (ii) The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited because the litigant lacks financial means.
- (iii) The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.<sup>34</sup>

These principles could be applied to situations where the Crown requests a stay in a criminal proceeding so that the Aboriginal party can commence a civil action.

Even if Aboriginal parties could fund a civil action to establish Aboriginal or treaty rights, what would happen in the decade or so that would elapse while the case worked its way through the courts? If the charge against Joshua Bernard had been stayed, and other Aboriginal people had begun cutting logs, would the Crown stay the new charges as well? This would leave the Crown without effective management power. Conversely, if, as Justice Robertson ruled, an acquittal is stayed, would the Crown continue to lay charges against other Aboriginal peoples who exercise their Aboriginal or treaty rights, while non-Aboriginals infringe on their rights? For Aboriginal people like those at Grassy Narrows, waiting a decade while their forests are clear-cut is not an option if they want to preserve trapping rights. The balancing of Aboriginal and non-Aboriginal interests during this period would be very important and very difficult.

The Ontario Court of Appeal and the British Columbia Court of Appeal approached this issue in different ways. The Ontario Court of Appeal in both the *TransCanada Pipelines* case and the *Keewatin* case invoked the prejudice to non-Aboriginal parties to justify quashing the summary judicial review application. In *TransCanada Pipelines* Borins J. noted that the residents of the municipality would suffer “a serious injustice” if there were further delay in extending the boundaries of the municipality.<sup>35</sup> In *Keewatin*, Then J. cited the detrimental effect on the local economy of a finding in favour of the First Nation.<sup>36</sup> In neither case did the judges

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<sup>34</sup> *Ibid.* at para. 40.

<sup>35</sup> *TransCanada Pipelines (C.A.)*, *supra* note 20 at para. 161.

<sup>36</sup> *Keewatin v. Ontario (Ministry of Natural Resources)* (2003), 66 O.R. (3d) 370, [2003] O.J. No 2937 (QL) at para. 60: “Furthermore, the determination of issues, if decided in the applicants’ favour, will have a profound impact on the lives and business of the people living in those areas of Northwestern Ontario subject to Treaty 3, including Abitibi and its employees. The economies of the communities will also be greatly affected. It would also have an impact in forest management units that are located in, or overlap, Treaty 3 or Keewatin lands.”

consider the prejudice to the Aboriginal party with respect to funding or delay. While the decisions to require a fuller hearing for these matters is understandable, ignoring the short-term consequences does not always produce the wanted result. For example, in Grassy Narrows, after the quashing of the judicial review in 2002, members of the First Nation set up and maintained permanent road blockades.<sup>37</sup>

The Court of Appeal in British Columbia, in contrast, ruled in *Haida Nation v. British Columbia*<sup>38</sup> that the Crown must respect asserted Aboriginal rights even before those rights have been judicially determined. The Haida live on Haida Gwaii (the Queen Charlotte Islands) off the coast of British Columbia. They have never signed a treaty or surrendered their lands. The British Columbia government issued logging licences to the area without considering the impact of the licences on Haida rights in their traditional territory and without consulting with the Haida, arguing that it had no obligation to consult or to consider the evidence of Aboriginal rights prior to a judicial determination that such rights existed. The Supreme Court of Canada, affirming the decision of the British Columbia Court of Appeal, found that the Crown has an obligation to consult when it “has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”<sup>39</sup> The nature and extent of the consultation depends on three factors: the strength of the *prima facie* case; the extent of the right claimed; and the potential for harm from the infringement.<sup>40</sup>

The duty to consult is not a requirement to reach an agreement, and so it does not give the Aboriginal objectors a veto over development. However, the Court ruled that:

... the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government’s proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.<sup>41</sup>

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<sup>37</sup> At the time of writing the blockades had been up for three years. Abitibi-Consolidated decided to close its sawmill in 2005 and with the downturn in the lumbering industry it is not clear what will happen. See Mike Aiken, “Grassy blockade members join calls for sanctions against Abitibi” *Miner and News*, 20 December 2005, Kenora, Ontario, online: <<http://www.kenoradailyminerandnews.com/>>

<sup>38</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2002] 2 C.N.L.R. 121 (B.C.C.A.).

<sup>39</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2005] 1 C.N.L.R. 72, 2004 SCC 73 [*Haida Nation* cited to C.N.L.R.] at para. 35. For the application of these principles in the treaty context, see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

<sup>40</sup> *Ibid.* at paras. 42-47.

<sup>41</sup> *Ibid.* at para. 47.

The “accommodation,” however, must also take into account other societal concerns.

Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.<sup>42</sup>

The principles of *Haida Nation* could be applied to achieve a compromise *status quo* during a stay of quasi-criminal prosecutions ordered to allow a civil trial of the Aboriginal and treaty rights questions. Governments can accommodate rights despite the lack of judicial recognition of those rights. In *R. v. Peter Paul*,<sup>43</sup> a New Brunswick case involving charges on illegal logging on Crown land, the provincial government negotiated logging agreements with Aboriginal people while appealing Peter Paul’s acquittal; the government maintained the agreements even after the Court of Appeal substituted a conviction.<sup>44</sup>

In conclusion, if summary proceedings are inappropriate to deal with Aboriginal and treaty rights, courts must ensure that the Aboriginal parties have the wherewithal to participate in a more fulsome and lengthy process. Given the lack of funding programs for this kind of litigation, especially at the trial level, courts will have to extend principles for providing costs in advance first articulated in *British Columbia (Minister of Forests) v. Okanagan Indian Band*. In addition, judges must consider the reality of the prejudice to Aboriginal parties as well as non-Aboriginal parties while the matter is being resolved. This would suggest that the principles developed in *Haida Nation v. British Columbia* should be extended to cover situations where Aboriginal and treaty rights are being litigated in summary criminal or quasi-criminal proceedings.

### 3. The Colour of God’s Shoes

The practical problems of lack of funding and prejudice from delay are thus not insurmountable, but there remains a fundamental problem with the judicial approach to adjudication of Aboriginal and treaty rights. I try to explain this problem to law students using an exercise called “the colour of God’s shoes”. I ask my audience to pretend that I am a judge who needs an answer to a simple question: “What is the colour of God’s shoes?”. Here are some of the answers students have given me: “black, of course; brown; the colours of the rainbow; the colours of compassion; my

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<sup>42</sup> *Ibid.* at para. 50.

<sup>43</sup> *R. v. Peter Paul* (1998), (*sub nom. R. v. Paul*) 196 N.B.R. (2d) 292, [1998] 3 C.N.L.R. 221 (N.B.C.A.) rev’g (1997), (*sub nom. R. v. Paul*) 193 N.B.R. (2d) 321, 153 D.L.R. (4th) 131 (Q.B.), aff’g (1996), (*sub nom. R. v. Paul*) 182 N.B.R. (2d) 270, [1997] 4 C.N.L.R. 221 (Prov. Ct.).

<sup>44</sup> Margaret McCallum, “Rights in the Courts, on the Water and in the Woods: The Aftermath of *R. v. Marshall* in New Brunswick” (2004) 38 *Journal of Canadian Studies* 204 [“Rights”].

God doesn't wear shoes; God wears sandals, unless golfing; She doesn't have shoes; I don't think he has feet." What do these answers tell the judge about the audience? Not very much. First, there is no agreement on the colour of God's shoes, or even on whether God wears shoes, has feet, or is male, female or neither. Second, some of the answers suggest a lack appreciation of the importance of the question itself. The answers would leave the judge with a very poor impression of the audience.

In writing their responses, most of the students realize that an answer is impossible because there is nothing in their culture or background to help them. Yet most of them accept the hypothetical judge's premise that God wears shoes, and try to give an answer based on their reaction to the question. It is ironic that students' efforts to be co-operative and answer the question on the judge's own terms add to the incoherence of the collective response. So the judge does not learn anything from the scores of answers to the question. Yet the audience learns that, in the judge's world, there is a God, God is anthropomorphic, and God wears shoes. They learn as well that the judge assumes that his God is the only God, that the question of the colour of God's shoes is important to his people, and that the judge assumes that it is important for all other people as well.

Now, let us substitute a Canadian judge for the hypothetical judge, turn the audience into Aboriginal peoples, and change the question to "What are your laws on property?" To the mainstream system, land is a commodity that can be owned, bought, and sold. Terms like exclusive possession, trespass and fee simple are terms of art that have developed over hundreds of years in the common law. Some Canadian judges, however, assume that they can take the answers given by Aboriginal peoples to judges' questions about property and make a determination about Aboriginal title on that basis. According to former Chief Justice Lamer:

... the aboriginal group asserting the claim to aboriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation.<sup>45</sup>

First Nations, however, may have different concepts that cannot be accommodated within the confines of common law legal categories. How can the concept of Mother Earth be reconciled with the idea of fee simple?<sup>46</sup> Thus, judges may reject answers as nonsensical or irrelevant when, from the perspective of the person being questioned, it is the question that is nonsensical or irrelevant.

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<sup>45</sup> *Delgamuukw* (S.C.C.), supra note 25 at para. 157, per Lamer C.J.C.

<sup>46</sup> See Royal Commission on Aboriginal Peoples, "Restructuring the Relationship" in *Report*, Vol.2 Part 2, at 421-63.

Chief Justice McEachern, the trial judge in *Delgamuukw*, assumed that his civilization provided the universal standard for determining property relations and the universal standard for hearing evidence on such matters. He apparently was impatient listening to non-conventional forms of evidence such as oral histories and singing.<sup>47</sup> Because First Nations societies did not have the same institutions, governmental structure, or technology, the Chief Justice assumed that they did not have law, social fabric or humanity:

It would not be accurate to assume that even pre-contact existence in the territory was in the least bit idyllic. The plaintiff's ancestors had no written language, no horses or wheeled vehicles, slavery and starvation were not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbes, that aboriginal life in the territory was, at best, "nasty, brutish and short."<sup>48</sup>

Chief Justice McEachern concluded that "[the First Nation people] more likely acted as they did because of survival instincts".<sup>49</sup> So, if being able to identify the colour of God's shoes was central to the definition of civilization for the hypothetical jurist, the answers of the law students, according to Chief Justice McEachern's reasoning, would have revealed them as a lower form of life, loping from class to class, relying on their survival instincts to make it through the next set of exams.

Chief Justice McEachern is not representative of judicial attitudes today and his views were firmly rejected by both the British Columbia Court of Appeal and the Supreme Court of Canada. Nonetheless judges continue to struggle to appreciate what they call the "Aboriginal perspective." The challenges are revealed in *Marshall/Bernard* in the different approaches of the Chief Justice and LeBel J. to defining Aboriginal title. According to Chief Justice McLachlin:

The Court must consider the pre-sovereignty practice [claimed as the basis of the Aboriginal right] from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a

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<sup>47</sup> Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby, BC: Talon Books, 1998) at 123:

... As the Chiefs' testimonies proceeded, [Chief Justice McEachern] became increasingly impatient about having to actually listen to the oral histories. He took exception, particularly, to witnesses singing in court. "This is a trial," he reproached an Elder at one point, "not a performance." Besides, he added, the significance of the music was lost on him as he had "a tin ear."

<sup>48</sup> *Delgamuukw* (S.C.), *supra* note 25 at para. 111.

<sup>49</sup> *Ibid.* at para. 1343.

particular aboriginal practice fits it. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed.<sup>50</sup>

Justice LeBel, on the other hand, recognized that the court must try to understand Aboriginal concepts within their own context, and not as translated into a common law equivalent:

In my view, aboriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches. Otherwise, we might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights.<sup>51</sup>

The difficulty in seeing matters from the “Aboriginal perspective” is exacerbated by the fact that courts are not trying to understand history on its own terms, for what it tells us about how people lived in other times and places, but rather trying to use history to determine the legal rules for making decisions on contemporary resource allocation.

#### 4. The Uses of History

Cases on Aboriginal and treaty rights may turn on evidence of events of three hundred or four hundred years ago. With Aboriginal rights, courts must determine what activities were integral to an Aboriginal society prior to contact with Europeans.<sup>52</sup> When the right claimed is the right to Aboriginal title, courts must determine whether the Aboriginal group had exclusive occupation of the territory claimed at the time of assertion of Crown sovereignty.<sup>53</sup> With Métis rights, courts must determine the nature of the activity at the time that the European sovereign power “effectively established political and legal control” in the area at issue.<sup>54</sup> In interpreting treaty rights, courts must determine what was in the contemplation of the

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<sup>50</sup> *Marshall and Bernard*, *supra* note 1 at para. 48.

<sup>51</sup> *Ibid.* at para. 127.

<sup>52</sup> See *Van der Peet*, *supra* note 5.

<sup>53</sup> See *Delgamuukw* (S.C.C.), *supra* note 25.

<sup>54</sup> See *Powley* (S.C.C.), *supra* note 7 at para 37.

parties when they signed the treaty.<sup>55</sup> In making these determinations, courts depend on evidence of conventionally-trained experts in many disciplines, as well as evidence from expert Aboriginal people who can recount oral history and the laws of the Aboriginal nation. When rights claimants advance more than one claim – Aboriginal title and treaty rights, for example – they must support their claims with evidence from two different time periods.

But Aboriginal and treaty rights cases deal as well with contemporary realities and challenging public policy issues, including the continued viability of Aboriginal peoples, the *de facto* presence of many competing non-Aboriginal interests, and the allocation of resources among them. Effective resolution of these issues requires a balancing of disparate interests as well as government financial obligations. Justice Robertson addressed the issue directly in his reasons for decision in *Bernard*:

Though we are not asked to make declarations as to legal rights, nor could we in the context of quasi-criminal proceedings, any ruling on Mr. Bernard's two defences impacts on both natives and non-natives in this Province; as did the *Marshall* decisions. It is trite to acknowledge that the linchpin of New Brunswick's economy is tied to two of its natural resources: fish and timber.<sup>56</sup>

Resolving complex questions of what happened in the past and of contemporary resource allocation becomes more difficult when courts collapse the two questions into one. The decision of the Supreme Court of Canada in *R. v. Mitchell* illustrates this approach.<sup>57</sup> In *Mitchell*, Grand Chief Mike Mitchell of Akwesasne claimed that the Mohawks had an Aboriginal right to trade with other First Nations, extending throughout the traditional trading territory of the Mohawks in what is now upper New York State and Ontario. Mitchell argued that the requirement to pay duty when crossing the international border was an infringement of the Aboriginal right to trade. The Supreme Court rejected the claim, saying that there was insufficient evidence of trade across the St. Lawrence prior to contact with Europeans to establish the right to that trade as an Aboriginal right. However, in rejecting the Mohawks' argument that they would limit their trading partners to First Nations in Ontario and Quebec, McLachlin C.J. revealed that she was concerned about more than legal principles:

... it is difficult to imagine how limitations on trading partners would operate in practice. If Chief Mitchell trades goods to First Nations in Ontario and Quebec, there is nothing to prevent them from trading the goods with anyone else in Canada, aboriginal or

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<sup>55</sup> See *Marshall (fishing)*, *supra* note 6.

<sup>56</sup> *Bernard (C.A.)*, *supra* note 2 at para. 352.

<sup>57</sup> *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911, 3 C.N.L.R. 122 [*Mitchell*, cited to S.C.R.].

not. Thus, the limitations placed on the trading right by Chief Mitchell and the courts below artificially narrow the claimed right and would, at any rate, prove illusory in practice.<sup>58</sup>

This concern, however valid, is not about the sufficiency of evidence of trade in pre-contact Mohawk society, but about how that trade might be conducted in a contemporary context. In his concurring judgment in *Mitchell*, Binnie J. also expressed concerns about current trading possibilities that were not directly related to the legal principle at issue:

The [intervenor, the] Attorney General for New Brunswick argues that the claimed aboriginal right really amounts to no more than an aboriginal cross-border link to facilitate trade in non-aboriginal goods between non-aboriginal communities. There was, on the evidence, nothing to prevent the Tyendinaga Mohawks from re-selling the goods to non-natives.<sup>59</sup>

The problem in both *Mitchell* and *Marshall and Bernard* is that courts are interpreting history with an eye to the contemporary implications of their interpretation. This approach inhibits full understanding of the historical record and thus is an impediment to achieving a contemporary accommodation of historically acquired rights and modern resource management regimes. It is history which gives context and provides the contours to Aboriginal and treaty rights, and that history should not be burdened with the responsibility of determining the allocation of resources between Aboriginal and non-Aboriginal people three or four hundred years later.

The danger of interpreting history to justify the present is illustrated by the Australian case of *Milirrpum v. Nablaco Pty. Ltd.*,<sup>60</sup> which found, as a matter of law, that Australia was *terra nullius* when the Europeans came. This historical finding was important to ensure that contemporary Australian society would not have to deal with the actual historical presence of the aborigines.<sup>61</sup> Contemporary decisions of Canadian courts do not espouse the doctrine of *terra nullius*, but the use of history in some cases, although more nuanced, is in danger of wandering into the same territory.

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<sup>58</sup> *Ibid.* at para. 20.

<sup>59</sup> *Ibid.* at para. 94. In principle, this problem is no different than allowing Canadians to bring in tax free goods, as such goods could also be re-sold. The problem is not with the principle, then, but rather with issues such as the amount and types of goods that could be brought in. There is no indication in the decision that the Court considered any information on whether it would be possible to establish a workable scheme.

<sup>60</sup> *Milirrpum v. Nablaco Pty. Ltd.*, [1971] 17 F.L.R. 141 (N.T.S.C.).

<sup>61</sup> This case was reversed in *Mabo v. Queensland [No.2]* (1992), 107 A.L.R. 1 (H.C. Aust.), beginning a new era in Australian law in which both courts and legislatures were required to confront the realities of Native Title.



The disconnect between the historical record and the legal meaning of that record can only lead to suspicion and cynicism about the judicial process itself. In *Bernard*, for example, the Supreme Court of Canada rejected Joshua Bernard's claim that his nation had Aboriginal title to the area in New Brunswick where he was harvesting logs, holding that there was insufficient evidence of Aboriginal occupation of the cutting site at the time of the assertion of British sovereignty. Yet the cutting site was only fourteen or fifteen kilometres from the Augustine Mound archaeological site and six or seven kilometres from the Red Bank reserve, in a watershed occupied for at least three thousand years by Aboriginal peoples.<sup>62</sup> With respect to the claim to Aboriginal title raised in the *Marshall* case from Nova Scotia, the Chief Justice suggested that seasonal use of an area for hunting or fishing was not enough to establish Aboriginal title because once the season was over, the Aboriginal peoples "left, and land could be traversed and used by anyone."<sup>63</sup> Thus, Aboriginal people must prove actual intensive year-round use to establish their right to their traditional lands, while the Crown's claim to sovereignty is based on nothing more than an assertion of dominion over large areas that no European had yet traversed. That the European population was sparse and could not enforce exclusive possession has not been a barrier to the recognition of Crown sovereignty whereas it is, apparently, a barrier for the assertion of Aboriginal title.<sup>64</sup>

The problem of a constrained reading of the historical record is compounded by the constraints of the record itself. Courts find their historical "facts" on the basis of evidence presented to them, but new research and new interpretations change the historical "facts." Scanlan J. of the Nova Scotia Supreme Court noted in *Marshall (logging)* that:

[H]istorians and anthropologists are constantly uncovering new materials. ... In cases which involve historical findings of fact the court must be cautious, keeping in mind that the experts then before the court may not have the final word as to the materials available to them and upon which they formulate their opinions. In that sense findings of historical fact must be recognized as being fluid, not frozen in time.<sup>65</sup>

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<sup>62</sup> See comments of Daigle J.A. in *Bernard (C.A.)*, *supra* note 2 at paras. 116-19

<sup>63</sup> *Marshall and Bernard*, *supra* note 1 at para. 58, per McLachlin C.J.C.: "However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court's decisions in *Van der Peet*, *Nikal*, *Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights."

<sup>64</sup> *Bernard (Prov. Ct.)*, *supra* note 2 at para. 110, per Lordon J.: "There was no evidence of capacity to retain exclusive control and, given the vast area of land and the small population, they [the Mi'kmaq] did not have the capacity to exercise exclusive control."

<sup>65</sup> *Marshall (logging) (S.C.)*, *supra* note 1 at para. 16, per Scanlan J.

If the historical record changes, what will happen to the contemporary accommodation? In the *Mitchell* case on duty free transport of goods, would new evidence of trade across the St. Lawrence result in the lifting of duties for Mohawks trading with First Nations in Ontario and Quebec? In *Marshall/Bernard*, would new evidence indicating extensive use of the cutting sites prove Aboriginal title and the right to sell logs?

In conclusion, then, there are fundamental problems with the Supreme Court of Canada's approach to the "Aboriginal perspective" and to history. The Chief Justice and the majority of the Court insist on using common law categories as a filter to understand the "Aboriginal perspective." This tends to refract and splinter Aboriginal reality into western concepts. The fragmentation is made worse by the requirement imposed on history to somehow come up with the "right answer" to justify contemporary allocation of resources. This is manifest in *Marshall/Bernard* in the reluctance of the majority to recognize the existence of Aboriginal title, embedded in part in the Court's concern to ensure that the contemporary interests of third parties are addressed in any adjudication.

## 5. Justifying and Justification

A straightforward way out of this conundrum would distinguish two distinct processes: the inquiry into the meaning of the historical record and the inquiry into the legal framework for contemporary resource allocation. This could be done through a more vigorous use of the justification stage of the *Sparrow* test.<sup>66</sup> Under that test, if a court recognizes the existence of an Aboriginal right, the Crown can still attempt to justify any infringement of that right. The justification stage of the *Sparrow* test gives enormous power to the Crown and the courts. In *R. v. Gladstone*,<sup>67</sup> the Court found that the Heiltsuk First Nation had historically traded in herring spawn on kelp and that the historical record supported a finding of an Aboriginal right to engage in the commercial trade in herring spawn on kelp. However, Lamer CJ held that the Crown could justify an infringement of this right for a wide range of reasons, including, "the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups."<sup>68</sup> In my view, these bases for justifying an infringement are far too wide and the power to rule that an infringement is justified should be exercised with restraint.<sup>69</sup> Nonetheless, their existence demonstrates that courts have the tools necessary to determine the principles for allocating resources based on contemporary realities.

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<sup>66</sup> *Sparrow*, *supra* note 3 at 1119 [cited to S.C.R.].

<sup>67</sup> [1996] 2 S.C.R. 723, 4 C.N.L.R. 65 [*Gladstone*, cited to S.C.R.].

<sup>68</sup> *Ibid.* at para. 75.

<sup>69</sup> See Shin Imai, "Treaty Lands and Crown Obligations: The 'Tracts Taken Up' Provisions" (2001) 27 Queen's L.J. 1 at 18-19.

Some judges, however, seem reluctant to find that a right has been infringed, and so their analysis stops short of the justification stage.<sup>70</sup> This reluctance may result from the unexpected consequences of the earlier Supreme Court decision in *Marshall (fishing)*.<sup>71</sup> After the Supreme Court recognized Donald Marshall's treaty right to sell eels for a moderate livelihood, First Nations in the Maritimes asserted treaty rights to harvest lumber and lobster. Violence followed as some First Nations pursued their right to fish, defying some non-Aboriginal fishers who used violence against Aboriginal fishers, and defying federal Fisheries officials who attempted to define and limit the treaty right without having obtained a judicial determination of whether the limits were justified. Taken aback by these events, and stung by the criticism of its decision, the Supreme Court used the opportunity created by an intervenor's motion to issue an unusual clarifying decision justifying its earlier ruling and providing a more explicit statement of the limits of the treaty right.<sup>72</sup>

There may also be resistance from the Canadian public if the recognition of an Aboriginal or treaty right puts present activities into moral limbo. For example, finding an existing Aboriginal title in all or part of what we now call New Brunswick problematizes the legitimacy of the contemporary framework for resource and property allocation in the province. So the issue is not only one of contemporary accommodations but also of the moral foundations of the present. John Borrows argues that there is some reluctance to accept oral history on its own terms because it too poses a challenge to existing political frameworks:

The mere presentation of Aboriginal oral evidence often questions the very core of the Canadian legal and constitutional structure. In many parts of the country certain oral traditions are most relevant to Aboriginal peoples because they keep alive the memory of their unconscionable mistreatment at the hands of the British and Canadian legal systems. Their evidence records the "fact" that the unjust extension of the common law and constitutional regimes often occurred through dishonesty and deception, and that the loss of Aboriginal land and jurisdiction happened against their will and without their consent.<sup>73</sup>

I believe that, to the extent that the reluctance is based on this conceptual hurdle, it can be overcome. There was a similar reluctance to recognize that there was such a thing as an Aboriginal right to self-government. I remember that, in the

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<sup>70</sup> Deschênes, J.A. in his dissenting judgment in *Bernard (C.A.)*, *supra* note 2 at para. 472 and Saunders J.A. in the concurring judgment in *Marshall (logging) (C.A.)*, *supra* note 1 at para. 305 explicitly state that limitations on the asserted rights must be incorporated in the definition of the right itself, as opposed to being introduced at the justification stage.

<sup>71</sup> McCallum, "Rights", *supra* note 44.

<sup>72</sup> *Marshall (fishing)*, [1999] 3 S.C.R. 533.

<sup>73</sup> John Borrows, "Listening for a Change: The Courts and Oral Traditions" (2001) 39 Osgoode Hall L.J. 1 at 25 ("Listening for a Change").

early eighties when the Constitution was patriated, Aboriginal self-government was a subject that invited derision from many of the lawyers and politicians speaking for the Crown. Today, of course, the federal government has recognized (in principle at least) that Aboriginal peoples in Canada have an inherent right to self-government and courts have moved from a complete denial<sup>74</sup> to a recognition of that right.<sup>75</sup> While the Supreme Court of Canada has not yet found that a right of self-government is recognized in section 35(1) of the *Constitution Act, 1982*,<sup>76</sup> some judicial statements have begun to explore how such a right might be accommodated within the Canadian constitutional structure.<sup>77</sup>

If it were possible to recognize and overcome the resistance to finding Aboriginal title or other Aboriginal or treaty rights, and to focus instead on the justification question, it would be easier to distinguish between the task of historical inquiry and the task of finding contemporary accommodations. In doing so, courts could make appropriate space for direct submissions on the interests of third parties as well as the contemporary interests of the Aboriginal parties.

## 6. Addressing Contemporary Interests

The decisions in *Marshall/Bernard* and *Mitchell* are based on the historical and archaeological information presented as evidence at trial. Third parties could add to the list of historians, linguists, archaeologists, anthropologists, paleobotanists and others who offer expert evidence, but technically speaking, their contemporary interests in the resource are irrelevant to a judicial determination of whether the evidence provides the factual basis for a finding of Aboriginal or treaty rights. Third party interests, of course, are relevant, and can be addressed, in negotiations. In *Bernard*, Daigle J.A. suggested that negotiations could bring together “all the parties who have a stake in the resolution.”<sup>78</sup> In *Marshall (logging)*, Scanlan J. urged the parties to enter into comprehensive negotiations:

This adversarial approach does nothing to further the process of reconciliation. Surely after waiting 240 years it is time to move on

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<sup>74</sup> McEachern C.J.B.C. found at trial in *Delgamuukw* that Aboriginal nations did not have law making power: “... at the time of Union of the colony with Canada in 1871, all legislative jurisdiction was divided between Canada and the province and there was no room for aboriginal jurisdiction or sovereignty which would be recognized by the law or the courts.” *Delgamuukw* (S.C.), *supra* note 25 at para. 1397.

<sup>75</sup> Williamson J. upheld the law-making powers set out in the Nisga’a Agreement: “... aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten “underlying values” of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867.” *Campbell v. British Columbia (Attorney General)*, (2000) 79 B.C.L.R. (3d) 122, [2000] 4 C.N.L.R. 1 at para. 81 (S.C.) [Campbell cited to C.N.L.R.].

<sup>76</sup> *Rights of the Aboriginal Peoples of Canada*, Part II of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11., s. 35(1): “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

<sup>77</sup> *Mitchell*, *supra* note 57 at paras. 66-174, per Binnie J.

<sup>78</sup> *Bernard* (C.A.), *supra* note 2 at para. 210.

and resolve the outstanding issues in a comprehensive way. The process of reconciliation must begin if native and non-native communities in this province are to move forward and prosper together. There are limitations in what can be done after 240 years but it is best to address the issues before another century goes by.<sup>79</sup>

The Supreme Court's use of history to determine the scope of the Aboriginal or treaty right, however, actually discourages negotiations because it shifts the focus of negotiations from reaching an accommodation to establishing the historical and anthropological evidence that will yield the desired legal conclusion.<sup>80</sup> Rather than focussing on contemporary interests and arrangements, the parties focus on profiling the evidence of experts who may, if negotiations fail, eventually appear as party witnesses in a Court that will make its decision on fact and law based on their testimony. In other words, to use the language popular among ADR practitioners, negotiations will be about positions, not interests.

The solution is to separate the process of establishing and analyzing the historical record from the inquiry on justification. If that is done, and the parties know that the courts will expect to be presented with information that could justify infringements, negotiations will turn toward an exchange of views on potential contemporary accommodations regarding the allocation of natural resources. At the same time, courts will be able to fulfill an adjudicative role in which judges determine disputes if necessary, but also supervise negotiations in order to ensure good faith, address power imbalances, and provide for fair participation in a collaborative process.<sup>81</sup>

## 7. A Bi-national Tribunal to Adjudicate History

If the exercise of determining history is separated from the exercise of determining contemporary accommodation, what will happen to the history? At the present time, it appears that historical Aboriginal practices are only relevant to the extent that they provide evidence for the existence, many years ago, of a "legal" arrangement which corresponds to a twentieth century legal category. But Courts have also spoken of the need to take both Aboriginal law and common law into account, so that the finding and evaluation of historical fact needs to address both Aboriginal understandings as well as conventional sources of evidence.<sup>82</sup> This task is not easily

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<sup>79</sup> *Marshall (logging)* (S.C.), *supra* note 1 at para. 151.

<sup>80</sup> The points made here are discussed in more detail in Shin Imai, "Sound Science, Careful Policy Analysis and On-going Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes" (2003) 41 *Osgoode Hall L.J.* 587 ["Sound Science"] and Shin Imai, "Creating Disincentives to Negotiate: *Mitchell v. M.N.R.*'s Potential Effect on Dispute Resolution" (2003) 22 *Windsor Y.B.* Access Just. 309.

<sup>81</sup> See Imai, "Sound Science", *ibid.* at 611-25.

<sup>82</sup> *Marshall and Bernard*, *supra* note 1 at para. 48, per McLachlin C.J.C.:

The Court must consider the pre-sovereignty practice from the perspective of the

accomplished without a conscious effort to bridge cultural gaps. John Borrows describes the various uses of Aboriginal oral history – both for recounting historical events as well as providing a normative framework for human activity – and the subtlety needed to appreciate the difference.<sup>83</sup> He then suggests that ambiguity in the recounting of past events is not unknown to other cultures:

If there is any hope for a more nuanced response to the presentation and reception of oral history, aside from key structural changes and/or a deeper knowledge of Aboriginal legal traditions and culture on the part of the judiciary, it may come from the observation that Canadians are somewhat familiar with the need to treat written histories with different lenses depending on their particular contexts. Most readers of documentary evidence do not interpret written history in a homogeneous and undifferentiated manner. For example, people are generally used to reading the Iliad, the Bible, Ramayana, Norse Sagas, and Mayan Codexes, and other great texts of history, as containing a mixture of literal and psychological facts. In analyzing these written documents from an historical perspective, people have long known that not every fact can be treated in the same manner. These texts have been described as polyfunctional: containing a plurality of factual insights and conveying a multiplicity of truths from different methodological perspectives. The acquaintance with the cultural contexts of these books allows readers almost unconsciously to sift through these books' various factual elements. It is easier to analyze their different "truths" with a knowledge of the customs and values of the societies (or their successors) from which these books draw their meanings. This familiarity enables readers to evaluate those instances in which the literal occurrence of a past event is of importance for understanding the text, and when it is a psychological fact that the authors are attempting to convey.<sup>84</sup>

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aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed.

See also comments of Lamer C.J.C. in *Delgamuukw* (S.C.C.), *supra* note 25 at paras. 82-83.

<sup>83</sup> Lamer C.J.C. referred to the description of the uses of oral history from the *Report of the Royal Commission on Aboriginal Peoples*: "In the Aboriginal tradition the purposes of repeating oral accounts from the past is broader than the role of written history in the western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige ..." *Delgamuukw* (S.C.C.), *supra* note 25 at para. 85.

<sup>84</sup> Borrows, "Listening for a Change", *supra* note 73 at 34-35.

Freeing history from the responsibility of determining the present would open up a wonderful opportunity for an inquiry into history and anthropology. Instead of suspicious interrogation of documents and memory, there would be room for generous expression of cultures, practices, aspirations and beliefs. This exercise would be important for its own sake to correct terrible distortions of history and culture that have continued until very recently. In 1982, even as Canadians adopted constitutional amendments recognizing and affirming existing Aboriginal and treaty rights, a new edition of a widely-used history text celebrated the “extermination” of the Indians.<sup>85</sup> In 1991, the Chief Justice of the Supreme Court of British Columbia, as noted above, rejected the idea that Aboriginal people had law before the coming of Europeans.<sup>86</sup> Overturning these historical falsehoods is a good thing in itself and necessary to establish a common basis for negotiations, accommodation, and reconciliation.

A new approach would also address another of the distortions inherent in the current judicial process of finding historical facts – that of freezing the fluidity and ambiguity of everyday existence into a snapshot of a particular moment: the scintilla before contact, the moment of effective control, the instant before the treaty signing. These historical freeze frames are identified and appreciated not for themselves but because they can be manipulated into the legal framework for guiding contemporary policy decisions. But given a different purpose, the evidence produced could incorporate the ambiguity necessary to appreciate the past and accommodate change over time.<sup>87</sup> The “dynamic right” approach described by Justice L’Heureux-Dubé in her dissent in *Van der Peet* could help “maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live.”<sup>88</sup> The process could then become an exercise in reconciliation where different perspectives could be valued for the contribution they could make to the understanding of both the past and the present.

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<sup>85</sup> Edgar McInnis, *Canada: A Political and Social History* (Toronto: Holt Rinehart and Winston, 1969) at 10-11, stated that “The aborigines made no major contribution to the culture that developed in the settled communities of Canada. ... They remained a primitive remnant clinging to their tribal organization long after it had become obsolete. ... In the United States, where agricultural settlement was the primary aim, the Indian was not only useless but an active menace whose speedy extermination would be an unqualified boon.” MacInnis was honoured by being appointed a member of the Royal Society. The current generation of judges and politicians could have been at university when this text was published; in the 4th edition, published after McInnis’s death, these passages are repeated without change. See Edgar McInnis & Michiel Horn, *Canada: A Political and Social History*, 4th ed., (Toronto: Holt, Rinehart and Winston of Canada, 1982) at 11.

<sup>86</sup> *Delgamuukw* (S.C.), *supra* note 1 at para. 1343, McEachern C.J.B.C.

<sup>87</sup> *Van der Peet*, *supra* note 5 at para. 113, per L’Heureux-Dubé J., dissenting: “Aboriginal people’s occupation and use of North American territory was not static, nor, as a general principle, should be the aboriginal rights flowing from it. ... Accordingly, the notion of aboriginal rights must be open to fluctuation, change and evolution, not only from one native group to another, but also over time.”

<sup>88</sup> *Ibid.* at para. 172, L’Heureux-Dubé J., dissenting.

Borrows argues that “Aboriginal elders, judges, amicus curiae, or skilled counsel knowledgeable in the traditions, laws, and cultures of Canadian and Indigenous legal systems” must share in the process of establishing and interpreting the historical record.<sup>89</sup> The federal, provincial and territorial governments have already created some fora in which Aboriginal evidence and non-Aboriginal evidence is heard and evaluated by a bi-national panel. Currently, the Indian Claims Commission hears specific land claims made by First Nations against the federal Crown. While the terms of reference do not require the appointment of Aboriginal people, in practice, there are both Aboriginal and non-Aboriginal commissioners and the chair at one time was Phil Fontaine, now the head of the Assembly of First Nations. On a broader policy level, the Royal Commission on Aboriginal Peoples, appointed in 1991, held hearings throughout Canada, and produced background documents and a report that recommended an ambitious program of reforms. A majority of the seven commissioners were Aboriginal people.<sup>90</sup> Bi-national bodies such as the British Columbia Treaty Commission are mandated to facilitate negotiations;<sup>91</sup> other bi-national bodies address disputes arising under land claims agreements<sup>92</sup> or with respect to Métis Settlements in Alberta.<sup>93</sup>

In New Zealand, land and resource disputes between the Maori and the *pakeha* (non-Maori) have been mediated through the Waitangi Tribunal, established in 1975 and now an important institution in New Zealand society. The legislation creating the Tribunal does not specify that members, who are appointed by Cabinet, must include a certain number of Maori, but it recognizes the importance of the partnership of the two parties, and in practice there has been approximately equal representation of Maori and *pakeha*.<sup>94</sup> The panel hearing a particular case will consist of three to seven members with at least one of the members being Maori,

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<sup>89</sup> Borrows, “Listening for a Change”, *supra* note 73 at 32.

<sup>90</sup> Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services, 1996).

<sup>91</sup> The B.C. Treaty Commission is made up of representatives of First Nations and the Crown and is mandated to facilitate negotiations over modern day treaties; see: <<http://www.bctreaty.net/>>.

<sup>92</sup> See Nigel Bankes, “Dispute Resolution Provisions of Three Northern Land Claims Agreements” in Catherine Bell & David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 298. (*Intercultural Dispute Resolution*).

<sup>93</sup> Catherine Bell, “Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada” *Ibid.* at 264-273.

<sup>94</sup> *Treaty of Waitangi Act 1975* (N.Z.), 1975/114 (available online: Public Access to Legislation Project <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>), accessed: 9 Feb. 2006.

s. 4(2A): In considering the suitability of persons for appointment to the Tribunal, the Minister of Maori Affairs

(a) Shall have regard to the partnership between the 2 parties to the Treaty; and

(b) Shall have regard not only to a person’s personal attributes but also to a person’s knowledge of and experience in the different aspects of matters likely to come before the Tribunal.



although usually the numbers are roughly equivalent. Hearings are held in the communities and procedures are adapted to respect Maori protocols.<sup>95</sup> The description of the process speaks to the way in which the Tribunal operates “partly in the Maori world”:

By holding hearings on marae, participating in powhiri, listening to karanga, whaikorero and waiata, and immersing itself in a Maori environment, the Tribunal develops context within which to interpret oral and written evidence.<sup>96</sup>

The members of the Tribunal feel that this contextualization of the information is needed in order to approach understanding the evidence on its own terms.

Admittedly, creating a process for adjudicating historical evidence by a bi-national panel would be more complicated in Canada than in New Zealand. In New Zealand, the task is simplified because there are many iwi (tribes) but they all identify as Maori and share a common language. In Canada, on the other hand, there are at least three Aboriginal peoples (Indians, Inuit and Métis) and many nations within those three peoples. Having an Inuk sit on a panel hearing evidence from the Haudenosaunee in southern Ontario may add nothing to the proceedings. The situation may be no better even if the evidence of the Haudenosaunee was being heard by a person from a different First Nation, such as the Haida. Nonetheless, it is important to note that the Royal Commission on Aboriginal Peoples recommended the establishment of an Aboriginal Lands and Treaties Tribunal which would have equal, or almost equal, numbers of Aboriginal and non-Aboriginal members on decision-making panels.<sup>97</sup>

There may be concerns, even if not overtly expressed, about the impartiality of a tribunal which included Aboriginal people, as there were with the Royal

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<sup>95</sup> *Ibid.* Schedule 2, ss. 5(6)(c) and 5(9). Section 5(9) reads:

Except as expressly provided in this Act, the Tribunal may regulate its procedure in such manner as it thinks fit, and in doing so may have regard to and adopt such aspects of te kawa o te marae as the Tribunal thinks appropriate in the particular case, but shall not deny any person the right to speak during the proceedings of the Tribunal on the ground of that person’s sex.

The Maori process goes “far beyond mere trappings.” Richard Boast, “Waitangi Tribunal Procedure” in J. Hayward & N.R. Whéen eds., *The Waitangi Tribunal* (New Zealand: Bridget Williams Books, 2004) at 54.

<sup>96</sup> Grant Phillipson, “Talking and Writing History: Evidence to the Waitangi Tribunal” in J. Hayward & N.R. Whéen eds., *The Waitangi Tribunal* (New Zealand: Bridget Williams Books, 2004) at 41. The translations of the Maori terms: *marae* – ceremonial centre of a particular descent group used for public business; *powhiri* – beckoning forward, welcome; *karanga* – call or summons; *whaikorero* – ceremonial speech; *waiata* – song.

<sup>97</sup> Royal Commission on Aboriginal Peoples, “Restructuring the Relationship” in *Report*, vol. 2, part 2 (Ottawa: Canada Communications Group, 1996) at 610.

Commission on Aboriginal Peoples.<sup>98</sup> Such concerns may limit the extent to which the Crown would be willing to be bound by decisions of the panel. The Waitangi Tribunal, while very effective in addressing and resolving conflicts, can only make recommendations to the Crown; it does not have binding authority. In Canada, the Indian Claims Commission suffers from the same limitation on its authority; it can only recommend resolution of specific claims to the Minister of Indian Affairs, and the reluctance of the Minister to implement the Commission's recommendations is a major source of friction. The Aboriginal Lands and Treaties Tribunal recommended by the Royal Commission would have had binding authority, but the Crown has yet to fully embrace this notion. Instead, legislation enacted in 2003 but not yet proclaimed in force would provide for the creation of a Specific Claims Tribunal that would have binding authority but only for awards of up to ten million dollars.<sup>99</sup> There is no requirement that Aboriginal people be appointed to the Tribunal, although claimants would be given 30 days to make representations with respect to the appointments.<sup>100</sup>

To the extent that the courts have painted themselves into a corner in merging their historical analysis with contemporary accommodations, a separate a bi-national panel to address historical and cultural issue may offer a way out. The report of the bi-national panel would record the factual basis for the existence of an Aboriginal or treaty right, leaving the issue of justification with the courts. Such a process could ensure an appropriate role for third parties and encourage negotiations rather than litigation.

## 8. Conclusion

I began by outlining the steps necessary for implementing Justice LeBel's suggestion for staying quasi-criminal prosecutions. I suggested that, if matters are to be moved out of summary proceedings into full actions, the courts and the Crown must accept the responsibility for ensuring that Aboriginal parties have the funds necessary to proceed. This could be accomplished through expanded government funding programs and the award of costs in advance of the cause. Related to the issue of costs is the issue of balancing interests during the many years it will take to resolve the dispute. Depending on the issue, delay in finding a resolution could prejudice the Aboriginal party, the Crown or an interested third party, such as a municipality

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<sup>98</sup> Alan Cairns, for example, says that an anti-Canadian "parallelism" is elaborated in the Royal Commission report because "more than half of the commissioners were Aboriginal, and the Commission's task was to give expression to Aboriginal constitutional ambitions." Alan C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 84. Comments such as this have prompted variations of a cartoon to appear in native newspapers that depicts an exasperated Crown attorney complaining about the bias of the judge and jury, who are all Indians in braids.

<sup>99</sup> While this may seem to be a high limit, there are examples of egregious breaches of fiduciary duty involving valuable land in which the claim would exceed this limit. In *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, the First Nations claimants were awarded \$147 million.

<sup>100</sup> *Specific Claims Resolution Act*, S.C. 2003, c. 23, s. 76.1.

wanting to expand its boundaries or an entrepreneur with a natural resource development plan. While the Crown cannot ignore these third party interests, the courts and the Crown need to consider interim arrangements to maintain and accommodate asserted Aboriginal and treaty rights.

In order to encourage negotiations and address concerns of third parties and Aboriginal parties appropriately, I suggested that there must be a change in the application of the *Sparrow* test. Courts must modify their current approach to adjudicating Aboriginal and treaty rights, so that they do not, under the guise of finding historical facts, rely on history to do the job of finding contemporary accommodations between Aboriginal people and the rest of Canada. If the courts are simply stating the consequences of historical fact, there is no meaningful role for third parties in the litigation. A greater judicial willingness to move to the justification stage of the *Sparrow* test would likely encourage more diligent attempts to negotiate a working arrangement with regard to access to land and resources. If negotiations fail, and the parties turn to litigation, courts will have better information on which to determine whether an infringement of an Aboriginal or treaty right is justified.

Finally, I ended with what may seem to be a more ambitious proposal for separating out the review of history through creation of a bi-national panel to make determinations of historical fact. I believe that this proposal is a logical evolution from a commitment to ensuring that Aboriginal parties have fair and full hearings. It is important that Aboriginal history and culture be expressed and allowed to thrive on its own terms. The Waitangi Tribunal in New Zealand provides a good example of an explicitly bi-national body which can hear and appreciate both cultures. There are many issues to be thought through before such a body could be created in Canada. Would the decisions be binding, and if so, would there be an appeal? Should the bi-national tribunal also handle the justification stage or should that remain with the regular courts? While the idea may seem utopian today, we have come some way since 1969 and then Prime Minister Pierre Trudeau's "White Paper" which urged the abolition of Indian status and the termination of Indian-specific rights.<sup>101</sup> Recent efforts to address the abuse at residential schools, recognize treaties and settle land claims show a willingness to re-evaluate the past. If Canada continues to take serious steps toward providing social, political, cultural and economic space to Aboriginal peoples, the idea of a bi-national panel may yet come to be.

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<sup>101</sup> See the Statement of the Government of Canada on Indian policy (The White Paper, 1969) online: <[http://www.ainc-inac.gc.ca/pr/lib/phi/histlws/cp1969\\_e.pdf](http://www.ainc-inac.gc.ca/pr/lib/phi/histlws/cp1969_e.pdf)>.