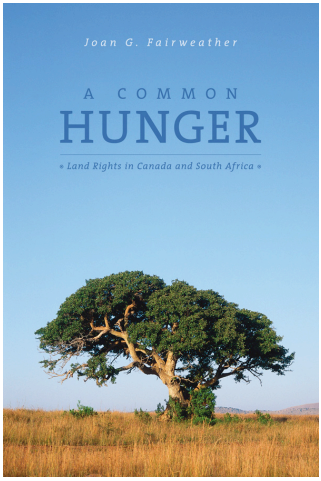
2006

# A common hunger: land rights in Canada and South Africa

Fairweather, Joan G.

University of Calgary Press

University of Calgary Press
www.uofcpress.com




**A COMMON HUNGER:**
**LAND RIGHTS IN CANADA AND SOUTH AFRICA**
by Joan G. Fairweather
ISBN 978-1-55238-573-9

**THIS BOOK IS AN OPEN ACCESS E-BOOK.** It is an electronic version of a book that can be purchased in physical form through any bookseller or on-line retailer, or from our distributors. Please support this open access publication by requesting that your university purchase a print copy of this book, or by purchasing a copy yourself. If you have any questions, please contact us at ucpress@ucalgary.ca

**Cover Art:** The artwork on the cover of this book is not open access and falls under traditional copyright provisions; it cannot be reproduced in any way without written permission of the artists and their agents. The cover can be displayed as a complete cover image for the purposes of publicizing this work, but the artwork cannot be extracted from the context of the cover of this specific work without breaching the artist's copyright.



Making a difference.
Making you think.

**Acknowledgement:** *We acknowledge the wording around open access used by Australian publisher,* **re.press**, *and thank them for giving us permission to adapt their wording to our policy* http://www.re-press.org/content/view/17/33/

Part Two

# *Reclaiming the Land*

Chapter Four

# *Litigation*

> The fact is that when the settlers came, the Indians were there, organized in societies and occupying land as their forefathers had done for centuries. This is what Indian title means.
>
> *Justice J. Judson: Calder v. The Attorney General of British Columbia (1973)*[1]

## INTRODUCTION

In both Canada and South Africa, indigenous peoples have to prove their legal rights to ancestral lands through litigation – that is, through an adversarial legal system established by their colonizers. Like most other former British colonies, both Canada and South Africa have adopted the British system of common law (also known as case law), a body of law that has evolved from decisions made by English royal courts since the time of Norman conquest in 1066. However, the legal systems of these two countries reflect their distinctive histories.

Canada inherited three strands of law when it was created in 1867: the laws and social structures of aboriginal peoples, English common law, and French Civil Law (based on the Napoleonic Code). The English common law tradition was imposed first on the aboriginal peoples and then, less thoroughly, on the French-speaking inhabitants of what became British North America. Each of Canada's provinces and territories has its own court system, including a court of appeal. The Supreme Court of Canada is the final court of appeal and has the power of ultimate interpretation of the Constitution including the Charter of Rights and Freedoms. Aboriginal land claims are generally heard in provincial courts first. If their case is rejected by the lower court, plaintiffs may take their case to the provincial court of appeal (if deemed eligible) or directly to the Supreme Court of Canada.

South Africa's legal system, like the rest of its political system, was radically transformed after the collapse of apartheid. However, the principles embodied in its legal system before 1994 (which were derived from

both Roman Dutch law and English law) remain in place. The only differences lie in the abolition of parliamentary supremacy and the creation of a Constitutional Court as the highest court of the land. Unlike other lower courts in the South African system, the Land Claims Court is on the same level as, but independent of, the High Court of South Africa (formerly the Supreme Court of South Africa in the apartheid era). Cases not involving the Constitution are taken to the Supreme Court of Appeal; those that involve constitutional rights can be taken to the Constitutional Court. The role of the Constitutional Court is to safeguard the human rights of all South Africans and to review and abolish racially discriminatory legislation inconsistent with the Constitution.

### ABORIGINAL COURT CASES IN CANADA

Canada's land claim history began with the first Indians who were persuaded to relinquish their land for European settlement through treaties or other agreements. In British Columbia, where First Nations began campaigning for land rights in the 1880s, the notion of aboriginal rights was dismissed as nonsense. In 1887, when a delegation of Nisga'a and Tsimshian chiefs met with Premier William Smithe, he refused to even discuss the issue of land rights or self-government, claiming that aboriginal people had no more right to land than the birds or the bears. In 1916, the Allied Tribes of British Columbia appealed again to the provincial government to hear their case but were immediately rebuffed. These actions must have created some fears about possible litigation, because in 1927, the Federal government passed an amendment to the Indian Act making it illegal for First Nations to raise funds for legal action. The law remained in effect until 1951.

The turning point in the recognition of aboriginal land rights came in 1969, when Frank Calder, a hereditary Chief of the Nisga'a Tribal Council (now the Nisga'a nation), challenged the validity of provincial land legislation which ignored Nisga'a land claims. In *Calder v. The Attorney General of British Columbia* (*1973*), the Nisga'a argued that they had never signed a treaty nor had their sovereignty over their ancient tribal lands ever been lawfully extinguished. The British Columbia Supreme Court ruled against the Nisga'a, on the grounds that whatever rights Indians might have possessed at the time of contact had been extinguished when British Columbia joined Confederation in 1871. On 30 January 1973, the Supreme Court of Canada upheld the ruling (on a vote of four to three) against the Nisga'a. But the case also made legal history by recognizing the existence of aboriginal title in Canada. In his ruling, Justice J. Judson deviated from previous court decisions by defining aboriginal title as a

right grounded in original occupancy. As a result of the Calder ruling, Prime Minister Pierre Trudeau conceded that First Nations had more rights than he had recognized in the 1969 White Paper. These existing rights were subsequently entrenched in the Constitution of 1982, despite strong opposition from the provincial premiers.

However, this partial constitutional victory for aboriginal rights has not always received the unequivocal acceptance of the courts. For example, in *Attorney General of Ontario v. Bear Island Foundation* (*1984*), the legal nature of the rights of the Teme-agama Anishnabay (Bear Island people) to their ancestral lands in and around Lake Temagami was pitched against those of the provincial government, which wanted to open up the area for resource and tourist development. Justice Donald Steele of the Ontario Supreme Court ruled against the Bear Island people, arguing that the primitive level of Indian social organization meant that "the Indian occupation could not be considered true and legal, and that Europeans were lawfully entitled to take possession of the land and settle it with colonies."[2] But clearly, there is a conflict of interest when the province's responsibilities are decided by the province's own courts. That same year, 1984, the Supreme Court of Canada took an important step towards recognizing aboriginal title as an established legal right in another British Columbia case, *Guerin v. The Queen* (*1984*). Unlike the Bear Island decision, which argued that whatever rights Indians possess stem from the Royal Proclamation of 1763, the Court's majority ruled in *Guerin* that aboriginal title in Canada was derived from the historic occupation and possession of the aboriginal people of their tribal lands. Consequently, the Court ruled that pre-existing aboriginal title remained a valid legal right on reserve lands in British Columbia and on traditional tribal lands not alienated in treaties with the Crown.[3]

A third case that made a significant contribution towards the recognition of aboriginal title in Canadian law was *R. v. Van Der Peet* (*1996*). Reiterating the words of Justice J. Judson in the 1973 *Calder* case in British Columbia, Justice Antonio Lamer wrote in *Van Der Peet* that the doctrine of aboriginal rights (one aspect of which is aboriginal title) arises from one simple fact that "when the Europeans arrived in North America aboriginal people *were already here,* living in communities on the land, and participating in distinctive cultures, as they had done for centuries." (emphasis in original).[4]

### THE GITXSAN AND WET'SUWET'EN OF BRITISH COLUMBIA

The struggle for recognition of aboriginal rights by the west coast Gitxsan and Wet'suwet'en goes back at least a hundred years. In 1884, the Gitxsan

Chiefs of Gitwangak protested against the intrusion of miners to Lorne Creek without their consent. As they told the provincial government,

> From time immemorial the limits of the district in which our hunting grounds are have been well defined. This district extends from a rocky point called "Andemane," some two and a half or three miles above our village on the Skeena River to a creek called "She-quin-khaat," which empties into the Skeena about two miles below Lorne Creek. We claim the ground on both sides of the river, as well as the river within these limits, and as all our hunting, fruit gathering and fishing operations are carried on in this district, we can truly say we are occupying it.[5]

Until 1984, when they brought their case before the British Columbia Supreme Court, the Gitxsan and Wet'suwet'en had tried every avenue at their disposal to protest against their dispossession. For example, in 1909, when Wet'suwet'en lands were given as "South African scrip" for Canadian war veterans who fought in the Anglo-Boer War of 1899–1902, the Wet'suwet'en appealed to the Federal government. In his letter to the Department of Indian Affairs, Chief James Yami described the brutal effects of his peoples' eviction from their traditional territory and the subsequent destruction of their homes:

> The Bulkley River is our river and we get our living therefrom. On the lakes are located some of our houses. They are small and crude of pattern but we cannot do without them. In those houses we have many articles such as hunting, trapping and fishing implements. A white man comes along and sets fire to the houses, and on remonstration we are told by the settler, "You get away from here. I bought this land and if I catch you here again I will have you jailed."[6]

In almost every case, the key issues at stake were the territories' natural resources (mining, logging and fisheries) and the question of sovereignty. Large parts of Gitxsan and Wet'suwet'en territories were being taken over by logging operations. Extensive areas of forested lands were stripped bare as large corporations built faster and more sophisticated, computer-operated sawmills to process the trees into lumber for export. Fishing sites and spawning grounds were also affected, threatening valuable salmon stocks. The Gisksan-Carrier Declaration in 1977 was adamant on the sovereignty issue, insisting that the government "recognize

our sovereignty, recognize our rights, so that we might fully recognize yours."[7] However, their appeal fell on deaf ears. The federal and provincial governments refused to recognize the authority of the hereditary Chiefs or to negotiate as equal partners in the management of the fisheries. Their only recourse was to take the matter to court.

In 1984, the Gitxsan and Wet'suwet'en people (who together numbered around 10,000 people) filed a claim to separate portions of fifty-eight thousand square kilometres of land along the Skeena, Nass, Babine and Bulkley waterways in British Columbia in the landmark case *Delgamuukw v. British Columbia.* (Map 3, *xviii*.) The appellants in the case were fifty-one hereditary Chiefs, suing on their own behalf and on behalf of thirty-eight Gitxsan Houses and twelve Wet'suwet'en Houses. Delgamuukw, the hereditary Chief of the Houses of Delgamuukw and Haaxw, was the first appellant listed: hence the name of the case.[8] Meanwhile, despite injunctions to keep logging companies away from Gitxsan and Wet'suwet'en land until the court had made its decision, the clearcut logging continued.

Three years after filing their claim, the case came to trial under Justice Allan McEachern of the British Columbia Supreme Court. The opening sessions of the trial were held in Smithers, B.C., on 11 May 1987, a sawmill town in the heart of the appellants' territory and also a government service centre.[9] Over sixty witnesses gave evidence over the four-year period of the trial. What was exceptional about the trial was that the Gitxsan and Wet'suwet'en claimants chose to lead off with their oral histories told in traditional ways. Expert witnesses in genealogy, linguistics, archaeology, anthropology and geography were called in to support their claim of occupancy on the claimed land prior to 1871, when the colony of British Columbia became part of Confederation. In his introduction, Chief Delgamuukw explained the spiritual and symbolic significance of ancestral lands in Gitxsan and Wet'suwet'en culture:

> For us, the ownership of territory is a marriage of the Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life of the land. From such encounters came power. The land, the plants, the animals and the people all have spirit – they all must be shown respect. That is the basis of our law.… My power is carried in my House's histories, songs, dances and crests. It is created at the Feast when the histories are told, the songs and dances performed, and the crests displayed.… By following the law, the power flows from the land to the people through the Chiefs; by using the wealth of

> the territory, the House feasts its Chief so he can properly fulfil the law. This cycle has been repeated on my land for thousands of years. Through the witnessing of all our history, century after century, we have exercised our jurisdiction.[10]

Traditional crests, an integral part of Gitxsan and Wet'suwet'en culture, were presented to the court as visual representations of the history of the House and its people and territories. As one witness testified, "the Gitxsan crests and totem poles are memory devices which are like a map. Their existence on the blankets, house fronts and totem poles call up the history and the rights and authority of the Chief and his or her House. They are evidence, metaphorical and physical, of the root title of the House."[11] In her testimony, Chief Joan Ryan (also known as Hanamuxw) said: "It's like a history book of your House, it's evidence that Hanamuxw's House did exist, does exist and will continue to exist."

In seeking recognition of their ownership and jurisdiction over the land, the appellants' first concern was for the integrity of the land.

> We ask that the court not only acknowledge our ownership and jurisdiction over the land, but also to restore it to a form adequate for nature to heal in terms of restoration. We would like to see clear cuts and plantations returned to forests, contaminated rivers and lakes returned to their original pristine state, reservoirs of drowned forests returned to living lakes, and life-sustaining flows to diverted rivers.[12]

In order to fulfill their sacred obligation to take care of the land as their ancestors had done before them, the hereditary Chiefs explained the specific areas in which the federal and provincial governments would need to "pull back." First, the Chiefs needed to have the power to manage all human activity that affected changes to the land, air and water on all their territories. Secondly, they needed to have control over the economy by managing local resource allocations within the territories – including licensing, leasing and permitting. Also, they insisted that royalties and taxation payments from resource use be paid to the tribes. The Chiefs foresaw that the "layering of responsibilities" among the Gitxsan and Wet'suwet'en and the provincial and federal governments would be resolved through ongoing negotiations. As the Chiefs pointed out, "this case is about learning from the past so we can repair the present and pass on a healthier land to our grandchildren. It is not about retrieving frozen rights from a nineteenth century ice-box."[13]

The judgment passed down by Justice McEachern on 8 March 1991 was a bitter disappointment to the Gitxsan and Wet'suwet'en plaintiffs and indeed to the entire Indian community. While conceding that, at the date of British sovereignty the appellants' ancestors were living in their villages on the great rivers as they had testified, McEachern was not prepared to concede that they owned the territory in its entirety in any sense that would be recognized by Canadian law. The fact that there had been numerous intrusions into the area of other peoples over the years, and that there were overlapping claims to the territory, contributed to his rejection of the Gitxsan and Wet'suwet'en claim. Despite allowing the plaintiffs the right to submit non-written evidence (or "hearsay"), Justice McEachern refused to give full weight to the oral evidence presented to the court. In his view, the oral histories, totem poles and crests were not sufficiently reliable or site specific to discharge the plaintiff's burden of proof.

The Gitxsan and Wet'suwet'en claim to joint sovereignty was similarly rejected. Having heard the Chiefs' arguments and the detailed evidence of the devastating effects of government resource management on the forests and fisheries of Gitxsan and Wet'suwet'en lands, McEachern still maintained that, under Common Law, there was only one kind of sovereignty, and that sovereignty rested solely in the Crown. According to his judgment, when British Columbia joined Confederation in 1871, 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." In making this judgment, he further dismissed the legal system of the Gitxsan and Wet'suwet'en as "a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves."[14]

### DELGAMUUKW V. BRITISH COLUMBIA: THE SUPREME COURT DECISION (1997)

In 1997, the Gitxsan and Wet'suwet'en took their appeal to the Supreme Court of Canada. They decided to drop the claim for joint sovereignty and concentrate on the issue of title. The decision reached by Chief Justice Antonio Lamer, with Justices Cory and Major agreeing, effectively reversed the ruling of the British Columbia Supreme Court and called for a retrial. The judgment was a landmark case in affirming that Canada's first people had a unique claim to their traditional lands and must receive "fair compensation"; that provinces do not have the power to extinguish aboriginal title; and that, in future, oral history ought to carry equal weight with written Canadian history in proving such claims. Finally,

Lamer made a strong plea for the use of negotiation rather than litigation in the resolution of land claims: "Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgements of this Court, that we will achieve … 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.' Let us face it, we are all here to stay."[15]

One of the most far-reaching elements of Chief Justice Lamer's ruling related to his remarks about the specific content of aboriginal title, a question which had received very little previous attention. Insisting that aboriginal title is *sui generis*, or "in a class of its own," Lamer argued that it involved much more than the right to engage in specific activities related to the distinctive cultures of aboriginal societies. "The practices and customs that are included in the exercise of aboriginal title are, to put it colloquially, a lot more than singing, dancing, hunting and hanging out. They may well include considerable rights to the resources of the territory covered by title."[16]

Another important element of the Supreme Court's decision was that oral testimony must be given significant weight in any subsequent legal proceedings by aboriginal claimants: that "stories matter." In his statement, Lamer argued that "unless oral evidence was placed on an equal footing" with the types of evidence courts are familiar with (which largely consist of historical documents), an "impossible burden of proof" would be put on aboriginal peoples who did not have written records. Furthermore, this would "render nugatory" any rights that they might have.[17] First Nations groups and legal commentators recognized this ruling as a major breakthrough for aboriginal justice. As Stan Persky points out, the Court's decision on oral history is a "profound effort to reconcile how different peoples with different cultural traditions see the world."[18]

After the decision was handed down in December 1997, the Gitxsan and Wet'suwet'en tried to re-enter the negotiation process with the B.C. government. Some progress was made in bilateral agreements with the province in 1999. However, soon after the province returned to the treaty table in 2001, there was a change in government. The new Liberal government held a referendum on treaty rights – the results of which have yet to be published – which brought the entire treaty process in British Columbia to a standstill. A breakthrough occurred in June 2003 when the Gitxsan and B.C.'s Forestry Minister signed a short-term agreement that included sharing up to $2.6 million in annual forestry revenues. Gitxsan chief negotiator, Elmer Derrick commented that although the framework agreement was "not a perfect document," it finally "gets our

people into the game." But Geoff Plant, the minister responsible for treaty negotiations, was delighted: "Interim measures with First Nations create certainty over the land base and provide long-term benefits for the provincial economy."[19] Thus, as with most negotiated settlements with aboriginal peoples, native justice was a secondary consideration to the province's primary objective: to improve British Columbia's investment climate.

## ABORIGINAL LITIGATION IN SOUTH AFRICA

In South Africa, the people of the Richtersveld reserve in Namaqualand, primarily of Nama ancestry, made a land claim similar to that of the Gitxsan and Wet'suwet'en. Like the British Columbian case, a long-established community claimed aboriginal title over territories that had sustained their people for hundreds if not thousands of years. Both were seeking not only the right to some measure of self-government but also a role in the management of the wealth-producing resources of their region (lumber, minerals and fisheries in British Columbia, and minerals and grazing lands in the Northern Cape) and an equitable share in the profits. Their adversaries were the governments and corporations that controlled the management and extraction of resources.

However, the legal contexts in which Delgamuukw and the Richtersveld cases were fought were very different. While the assertion of aboriginal rights has a long history in Canada, the concept of aboriginal title and rights has almost no history in South African jurisprudence and law. In post-apartheid South Africa (where the Constitution of 1996 ensures all South Africans the right to own land), only those individuals and communities whose lands were taken from them between 1913 (when the Native Land Act was enforced) and 1994 (when the laws of apartheid were annulled) were eligible to apply to the Land Claims Commission for land restitution. The Richtersveld community in Namaqualand (Northern Cape), who were initially dispossessed in the colonial era, was the first to reclaim ancestral land on the basis of aboriginal rights as well as racial discrimination.

## THE RICHTERSVELD CASE: BACKGROUND

In 2000, the Richtersveld was the largest of the so-called Coloured Reserves in Namaqualand, extending over half a million hectares.[20] The population of about three thousand people was concentrated mainly around the settlements of Lekkersing and Eksteenfontein in the south and Kuboes and Sanddrif in the north. Located in the vast semi-desert area on the west coast of Southern Africa, the Richtersveld has been

home to the Nama people for at least two thousand years. As in other parts of Namaqualand, the people were primarily pastoralists (mainly of goats and sheep) and fishermen. They were a nomadic community with shared norms, culture and political system. Village settlements were established close to secure water sources and were often close knit tribal units governed under the leadership of a headman or Chief. The function of the Chief was to manage the community's grazing rights and extract grazing fees from outsiders. Land was communally owned and held in trust for the community by the Chief. There was a clear understanding that land could neither be owned individually (even by the Chief) nor be alienated from the community. The members of each village had the right to all natural resources within the territory it owned, including water, grazing, firewood, game, fruit and medicinal plants.

As the indigenous people of the Cape were driven from their hunting grounds and pasturelands by the colonists further south, the population of Namaqualand increased and became more cosmopolitan. In the late 1700s, the Dutch East India Company granted loan farms in Namaqualand to registered Dutch farmers (known as trekboers) for 24 Riksdollars a year. The extent of the land grants was determined by the distance covered in a half-hour walk in any direction from a specified point. A few farms were registered by Basters (a kindred group to the Griquas), but much of the well-watered land was allocated to the trekboers. Although their territorial base decreased as a result of these allocations, the Richtersveld people maintained control of a large portion of their lands and refused to permit the settlement of outsiders without their permission.

When the Rhenish Mission Society established itself among the Nama-speaking herders and Basters in the nineteenth century, they found a cohesive community led by the Orlams leader Paul (Bierkaptein) Links. The leader, Paul Links and his Raad (council) made the laws, enforced them and took judiciary action against offenders as required. The allocation and enforcement of grazing rights were among their most important functions. Links and the Raad provided internal cohesion within the community and represented the community to the outside world. Even after the Cape Colony expanded its boundaries to the Orange River under British rule in 1847, and Namaqualand was formally regarded as Crown land, the Richtersveld people functioned as an autonomous community under the Links family dynasty. When Paul Links, the council leader, was offered the position of field cornet by the Cape authorities in 1857 in an effort to incorporate the community, he refused, saying he would not become a "paid officer of the government."[21]

When the region came under British control, the missionaries at Richtersveld did not initially claim formal allocation of their station from the authorities in Cape Town. It was only when high grade copper was found in the region that this omission became significant.[22] When a survey was undertaken in 1889, the Richtersveld community decided the time had come to apply for a reserve. However, their application was turned down. According to the surveyor's report, the area of around seven hundred thousand morgen claimed by the community was "much too large" – and also much too valuable – to be left under local control.[23] In 1909, just prior to Union, Coloured reserves were secularized under the Mission Station and Reserves Act but the Richtersveld was again overlooked. According to an inquiry into "Coloured Mission Stations, Reserves and Settlements" in 1945, the reason for this was that these communities were deemed to be "insufficiently advanced to be able to manage their own affairs as envisaged by the 1909 Act."[24]

With the discovery of alluvial diamonds at Port Nolloth and Alexander Bay in the 1920s, the situation of the Richtersveld community changed dramatically. The South African government's response to the discoveries of diamonds was to issue a series of proclamations (such as the Precious Stones Act 44 of 1927) which prohibited prospecting for diamonds on the Richtersveld and elsewhere. At the same time, the government moved swiftly to create reserves in Namaqualand. A commission recommended that 143,000 hectares of land traditionally occupied by the local community be cut off and given to white stock farmers and that the community be compensated for the loss of revenue previously generated through the lease of this land to white farmers.

The establishment of the Richtersveld reserve in 1930 was touted by the government as fair compensation for the lands taken over by the state. The Commission investigating the position of the Richtersveld stated in 1925:

> Although the inhabitants were not legally entitled to any compensation … the Commission recommends, bearing in mind the entire liberty which the Government has conceded to the people since the annexation of the country in 1847 to control and administer the reserve, that the sum of 2,000 pounds should be paid in compensation in respect of the area to be cut off.[25]

This was small consolation for the people of the Richtersveld. The loss of their land coincided with severe droughts in the region and the Great Depression. Residents of the Coloured Reserves were forced to find work

on the diamond mines owned by De Beers diamond corporation. As anthropologist Peter Carstens points out in his book *In The Company of Diamonds*, preferential hiring for whites meant that Coloured workers were restricted to menial jobs at wages well below those paid to white workers. As in mines across the country, workers were required to live on the mine premises in residential compounds.[26] The socio-economic ramifications of the migrant labour system were as disastrous for the Richtersvelders as they were in other parts of South Africa, and indeed for indigenous labourers throughout sub-Saharan Africa.

The Coloured Rural Areas Act of 1963 was another watershed for the Richtersveld community. It provided for the privatization and subdivision of the reserves allocated to people classified as "Coloured" under apartheid laws. Even though colonial governments had stipulated that in most cases these areas were to be held in trust (by mission stations) for the indigenous inhabitants, the reserves were legally held by the Crown. The subdivision of the land carried out in the Richtersveld and other reserves (including Leliefontein and Steinkopf) caused widespread dissatisfaction and deprivation to the inhabitants. Because of the sparse annual rainfall in the area, which varies from place to place, having access to grazing lands in more than one area was essential to these pastoral communities. The majority of peasant farmers, who traditionally had grazing and sowing rights, were forced to live in the residential areas without access to land. The only people who benefitted from the scheme were those with other sources of income, such as the owners of shops or businesses. The residents of the reserves responded to the Act by taking their grievances to court to have the "economic units" scheme overturned. They won the case in 1988 on technical grounds – the department had not followed its own regulations in implementing the scheme – but the policy of privatization remained in place, and new enforcement regulations were introduced following the court case. A few years later, in 1993, the government transferred its alluvial diggings, including the land claimed by the Richtersveld people, to the Alexander Bay Development Corporation (Alexkor).[27]

The final straw for the Richtersveld people came in 1996 when the Minister of Public Enterprises announced the government's intention to privatize the state-owned diamond company Alexkor. The community's demands to be included in the discussions on the privatization bid were ignored. Anticipating that their situation would worsen if the changes went through, the community decided to launch court proceedings. The Richtersveld Community's claim for restitution of rights in land was submitted to both the Land Claims Court and South Africa's High Court in 1998.

### THE RICHTERSVELD COMMUNITY V. ALEXKOR LIMITED & THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA (2000)

The plaintiffs in the Richtersveld case were the approximately 3,500 inhabitants of four villages in the Richtersveld reserve located in the Northern Cape Province. The entire reserve community was listed as the first plaintiff in the case, and the villages of Kuboes, Sanddrif, Lekkersing and Eksteenfontein were each listed separately as additional plaintiffs.[28] The territory they claimed is situated in the northwest corner of the province along the Atlantic coast from White Point (just south of Port Nolloth) to Alexander Bay at the mouth of the Orange River and east along the river valley contiguous to the Namibian border. (Map 2, *xvii*.) In addition to the restitution of their land, the community claimed rights to a new form of communal tenure of land within the reserve and to the mineral wealth in the area of their traditional lands or at least funds generated from the mineral wealth.[29] Their claims were based on both the provisions of the Restitution of Land Rights Act (Section 2 [1]) for dispossession after 1913 as a result of racial discrimination as well as aboriginal title. The Richtersveld plaintiffs argued that the failure to recognize aboriginal interest in the land in South African law was a reflection of the racial discrimination which had characterized every aspect of its social and political structure for almost a century.

The Richtersveld case opened in September in the village of Kuboes and was later transferred to Cape Town in October of 2000. The case was heard by Judge Anthonie Gildenhuys and Wieshorn (Assessor) of the Land Claims Court. The community was represented by legal counsel with expert witnesses (anthropologists, sociologists and historians) as well as three lay witnesses, Willem Cloete, Elias Links and Paul Phillips. Along with the oral evidence and personal affidavits were "bundles" of documents, including maps, which were presented as evidence of the occupation and use of the territory in question by Richtersveld people for many generations. The claim was challenged by Alexkor, the state-owned diamond company, and the government, represented by the Department of Land Affairs and the Minister of Public Enterprises.

Like the hereditary Chiefs in the Delgamuukw case, who relied on oral traditions and history to prove their continuous occupation of claimed lands, members of the Richtersveld community brought their textual evidence to life with stories of their cultural and spiritual heritage. Although the Land Claims Court is specifically authorized under the Restitution of Land Rights Act (Section 30 [2]) to receive hearsay evidence, the Richtersveld plaintiffs had considerable difficulty establish-

ing their eligibility for land restitution as a community. The requirement of the Restitution Act that claimant communities had to be the same as or part of the dispossessed community raised particular difficulties. For communities that had been forcibly removed (by colonial or subsequent white supremacist governments) to show that they were the same people that had been uprooted and resettled elsewhere was unrealistic at best. All that should be required of claimants, the Richtersvelders argued, was to prove that they possessed many elements of commonality with the dispossessed community.[30]

The diverse composition of the Richtersveld population was relevant to the case, because as the plaintiffs set out to prove, the community developed as a direct result of the apartheid system of racial segregation. For example, in 1949, a group of coloured people was moved from Calvinia, a few hundred kilometres south of the Richtersveld, and relocated to the Richtersveld village of Eksteenfontein. These people became known as the Bosluisbasters (Bush-tick Basters) – an unflattering title which reflected their neighbours' initial hostility towards them. The Eksteenfontein people were industrious and well organized, however, and they prospered in their new environment. While tensions remained between the newcomers and the Nama communities, they were united in their claim for land and had come to regard themselves as a single "community." Other more recent arrivals to the community were approximately 150 Xhosas who moved into the area in the early 1990s and settled in Sanddrif. They had all applied to become taxpayers and were included as plaintiffs in the land claim.

Expert witness S.M. Berzborn, a researcher from the University of Cologne, Germany, defined the term community as "a group of people who have a shared set of values and interact with one another, who define themselves as a community and refer to themselves as a group, and who are generally regarded by others as a community."[31] In her view, the Richtersveld community complied with all of these criteria. Based on eighteen months living in the region and on oral history interviews she had conducted with residents of the four villages, Berzborn cited the many social relationships between them, the extent of family ties and intermarriages, and social activities between the villages.[32]

Oral history, which in the Canadian Delgamuukw case had involved a visual display of crests and pageantry, also played an important part in the Richtersveld case. Paul Phillips, the grandson of Captain Paul Swartbooi Links, gave evidence to the court from his own experience and "on matters related to him by his elders." Phillips' paternal grandparents,

who were of San descent, had settled in the Richtersveld with the permission of the Raad. His maternal great-grandfather was Petrus Cupido, a poor man without livestock who had had to live off fish and game in the vicinity of Dunvlei. He had died while hunting on the island in the Orange River mouth. When Phillips was born in 1941, his family lived in the small community of Brandbos, a grazing post for the Richtersveld community on the banks of the Orange River. His father was buried not far from Brandbos; but according to Phillips' testimony, his grave was no longer there because it was "cleared by the [diamond] mine in 1951 for the construction of irrigation works, chicken runs and pigsties."[33]

University of Toronto professor Peter Carstens, a social anthropologist who grew up in Namaqualand, confirmed that the Richtersveld today showed significant continuity with the past. As he told the court, when he had done fieldwork in the region in 1960, everyone in Kuboes and the surrounding hamlets lived in traditional mat houses, with the exception of the schoolteachers. The women of the community retained the high status they had enjoyed traditionally amongst the Nama and still controlled the milk supply. Most people still believed in traditional magic and sorcery and shared in the rich folklore traditions of the community. From an elderly local historian, Carstens learned the history of the struggles for power within the Richtersveld community through the nineteenth century. As Carstens stated, "If one examines the kinship system, the rules regarding marriage, the legends and mythology and also the perception of ownership of land (which strengthens the coherence of the community) the Richtersveld is still a predominantly Khoikhoi culture."[34]

The Richtersveld claim to aboriginal title followed similar lines to the Gitxsan and Wet'suwet'en claim with important variations. The Namaqualanders argued that they had "right in the land" by virtue of the fact that they "owned the land" and that they and their forebears had exclusive beneficial occupation and use of the land before it was annexed under colonial rule in 1847.[35] The ownership claim derived from the rule that a change in sovereignty does not affect the private property rights of its local inhabitants. Citing the Canadian cases of *Calder v. Attorney General of British Columbia* (*1973*) and *Guerin v. The Queen* (*1984*), the Richtersveld plaintiffs argued that their title to land was preserved and protected under this international convention.[36] The plaintiffs further argued that their right to the subject land was a special right which applied to them in the same way that it applied to the indigenous people of other nations. Here the plaintiffs drew clear parallels with Canada and other former British colonies:

> It is a *sui generis* right recognized and protected in the United States, Canada, Australia and New Zealand by the development of their common law. They call the right by different names. In Canada they call it aboriginal title. We will also call it by that name. Our law has been or should be developed to recognize the same *sui generis* right.[37]

In anticipation that their case might be dismissed on the grounds that they could not prove "exclusive occupation of the land," since their communities were largely nomadic, the plaintiffs cited a Canadian case which addressed this specific problem, *Regina v. Adams* (*1996*). In this case, the Canadian Supreme Court had stated:

> To understand why aboriginal rights cannot be inexorably linked to aboriginal title, it is only necessary to recall that some aboriginal peoples were nomadic varying the location of their settlements with the season and changing circumstances. That this was the case does not alter the fact that nomadic people survived through reliance on the land prior to contact with Europeans and, further, that many of the customs, practices and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures.[38]

The Richtersveld case diverged from Canadian and other international cases in one important respect. The "right in land" on which the Richtersvelders based their case was not grounded in any existing recognition of aboriginal rights (as it was in Canada under the 1982 Constitution), but relied on the terms of South Africa's Restitution of Land Rights Act (1996), which supported the notion of aboriginal rights in spirit but not in words. As the plaintiffs stated in their submission, Section 25 (6) of the South African Constitution of 1996 placed an obligation on the government to address the issue of land dispossession despite the lack of specific legal or constitutional backing:

> It is clear that the definition of a "right in land" gives effect to a broader purpose underlying the Act as a whole and the constitutional provisions pursuant to which it was enacted. It is to afford redress to those people who were deprived of their rights and interests in land by the discriminatory laws and practices of the past, precisely because those rights and interests did not enjoy any or sufficient recognition and protection in law.[39]

Noting that aboriginal claimants have been refused recognition of aboriginal rights on grounds of being "insufficiently civilized" from a European perspective (as happened in a case in Southern Rhodesia in 1919 and in Justice McEachern's ruling in the *Delgamuukw* case), the plaintiffs argued that South Africa should instead follow more progressive precedents such as the *Mabo* case in Australia.[40] The new South Africa, the Richtersvelders claimed, stood at a legal crossroad similar to that of Australia (see Appendix).

But Judge Gildenhuys dismissed the case, explaining that even if the Richtersvelders had been able to prove that they had occupied the claimed territory for a continuous period before annexation, and that their dispossession had occurred after 1913, they had failed to establish their claim under the Restitution of Land Act on two counts. First of all, the claim did not fall under the Restitution Act since their dispossession did not occur under any law or practice designed to bring about spatial apartheid. Secondly, the plaintiffs had not convinced the court that their dispossession had resulted from racially discriminatory laws or practices. The court argued that the physical ouster experienced by the Richtersveld people in the early twentieth century was not racially motivated. When the state took over the alluvial diggings along the Atlantic coast and later erected fences to protect their property, the entire local population (including white farmers) was excluded from the area.

The Richtersveld community then took their case to the Supreme Court of Appeal. Although the Appeal court did not uphold their claim to aboriginal title in the claimed land, it found that their claim was permissible under the terms of the Constitution. Under Section 25 (7) of the South African Constitution (1996), "a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws and practices are entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress." In the case of the Richtersvelders, the court found that dispossession by the state had occurred in the 1920s after diamonds were discovered, and that this dispossession was the result of racially discriminatory laws or practices.

The defendants, Alexkor and the Department of Land Affairs, were granted leave to appeal to the Constitutional Court, mandated by the Constitution to interpret legislation deemed to be a "constitutional matter." In their joint appeal, Alexkor and the government contended that the Supreme Court of Appeal had erred in three findings: that the Community's land rights had not survived annexation by the British Crown in 1847; that the Richtersveld Community did not have right in

the land in 1913; and that the community was not dispossessed of land through racially discriminatory laws or practices.

However, on 14 October 2003, the Constitutional Court in Johannesburg rejected the appeal with costs and confirmed the Supreme Court of Appeal's decision on all three issues. In *Alexkor Ltd v. Richtersveld Community and Others*, the Constitutional Court ruled that the Richtersveld Community had indeed been cleared from the land under racist laws and therefore had a legitimate claim to ownership, including rights to the diamond mines at Alexander Bay.[41]

## CONCLUSION

As these two case studies show, litigation has proved to be a hopeful avenue for the dispossessed peoples of both Canada and South Africa in reclaiming ancestral lands. But despite their significance as groundbreaking cases, neither case has produced the kind of sea change in jurisprudence that might have been expected – nor have the demands of the aboriginal plaintiffs been fully met.

The Court's ruling in the case of the Richtersveld community against Alexkor and the South African government is a good example of the Constitutional Court's critical role in the new democracy. Although South Africa's Constitutional Court has the capacity to provide leadership and direction to government departments and agencies, it does not have the mandate to oversee the implementation of its decisions. The powers of the Constitutional Court need to be strengthened to ensure that right-holders are indeed lifted from the bondage of poverty that propelled them into the legal arena in the first place. Although the Constitutional Court has ruled in its favour, the Richtersveld community must now find a way to translate the court's ruling into reality, either by filing a claim for the restoration of ownership and financial compensation with the Land Claims Court or negotiating a deal with the Department of Land Affairs and Alexkor Corporation.[42]

The *Delgamuukw* ruling produced similar mixed results. The question of aboriginal title remains contentious in Canadian courts. At the heart of the matter is the need to reconcile the rights of aboriginal people with those of the Crown or state. Justice Lamer's ruling, which held that the source of aboriginal title was grounded in both common law and the aboriginal perspective on land, leaves open the question of how aboriginal sovereignty can co-exist within the modern Canadian state. By placing the onus of proving title on First Nations, rather than on the Crown, Lamer has perpetuated what Brian Slatterly has called the "Myth of the Crown." Many First Nations have never assented to the proposition that

the ultimate title to their lands resides in the Crown; the assertion has always been and remains the vestige of a purely "European" perspective of Canadian history.[43]

In his analysis of the significance of the Delgamuukw decision, Brent Olthuis challenges the "frozen rights" approach to aboriginal title imbedded in Justice Lamer's ruling and argues that Lamer should have been unequivocal in stating that these rights flowed directly from the traditional laws and customs of indigenous peoples and not from an estate held from the Crown. As Olthuis points out, "aboriginal laws are highly developed and quite capable of ensuring the appropriate respect for the land. Ignoring this fact in order to impose an 'outsider's' view of aboriginal law is a misguided initiative … when it comes to reconstructing legal history, courts cannot take refuge in acts of state doctrine without forfeiting their moral authority and acting as passive agents of colonial rule."[44]

The ruling on the admissibility of oral testimony in Canada is also being questioned by the legal community. There needs to be a framework for assessing the weight of oral testimony, David W. Elliot argues in the *Manitoba Law Journal* in 2000. Claims derived from a hundred years ago, relating to very different societies, are not good material for our adversarial trial process. Elliot suggests that an alternative could be the establishment of an independent administrative tribunal with expert members, including aboriginal members. But this has been tried without much success. In the final analysis, no matter how progressive Canadian courts become with respect to aboriginal justice, unless government structures and attitudes change dramatically, the situation for many First Nations remains unchanged.[45]

However, many First Nations in British Columbia believe that Justice Lamer's ruling has greatly strengthened their political position. They believe that the new significance that the Court attributed to oral testimony will make it easier for them to prove their rights to specific areas. Moreover, the court's observation that aboriginal title includes minerals and other resources, and that infringements of this title requires compensation, suggests that their title has considerably higher value than they had previously expected.[46]

Given the controversial outcomes of both the Delgamuukw and Richersveld cases, two questions remain. To what extent have the First Nations of Canada benefited from the Supreme Court's qualified recognition of aboriginal rights? Secondly, would the inclusion of indigenous or "pre-existing" rights in the South African legal system enhance the restitution process in that country in any significant way?

In Canada, the constitutional rights of aboriginal peoples will probably remain in limbo until Canadian courts can find a way to "unfreeze" the current colonial notion of inalienability – that land held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown. In South Africa, the significance of aboriginal title is largely symbolic, since both the Constitution and the political agenda of the new democracy support land restitution. Although the sheer volume of claims and financial limitations make this a slow and unreliable process, mechanisms are in place to ensure that restitution in some form does take place.