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Fairweather, Joan G.

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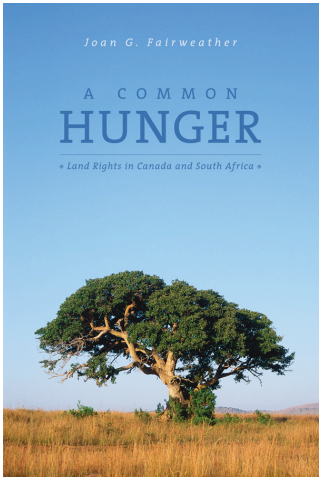

A COMMON HUNGER:
LAND RIGHTS IN CANADA AND SOUTH AFRICA
by Joan G. Fairweather
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Chapter Five

Negotiating Restitution

> A restitution process that is simply aimed at getting claims "off the books" is likely to sow the seeds of poverty and conflict.
>
> *Surplus People Project Report, 2001.*[1]

INTRODUCTION

The term "restitution" is defined in Webster's dictionary as the act of restoring to a person [or community] some thing or right of which they have been unjustly deprived. In post-apartheid South Africa, a special Restitution Commission was set up to ensure that as many people as possible who had been unjustly evicted from their ancestral lands were appropriately compensated. However, this has not proved to be easy. Africans have constitutional rights in the new democracy but have lost their previous leverage as an essential workforce to bring them into effect. Good farmland and the resources to make it productive are scarce. Finally, the current landholders, a predominantly conservative white community, have not yet bought into the concept that "South Africa belongs to all who live in it."

The Canadian government has established its own mechanisms to redress the injustices of the past towards aboriginal peoples. But as a minority population, North American Indians have always negotiated for their rights from a position of weakness. Special agencies within the Department of Indian Affairs dealing with land claims and residential schools, royal commissions and other "restitution" mechanisms have had a limited impact on the lives of most aboriginal communities. The most significant changes have been won through court rulings – notably those made by the Supreme Court of Canada. With their constitutional rights affirmed by the courts, aboriginal communities have gained confidence in negotiating the implementation of those rights with the federal and provincial governments. Since the 1990s, a number of indigenous communities have bypassed the difficult and costly process of litigation and

have chosen to negotiate political acceptance of their demands for land rights and access to natural resources with provincial and federal governments. The final hurdle is convincing the Canadian public – particularly those with commercial interests in the claimed land – to participate in the restitution process.

RECLAIMING THE LAND IN SOUTH AFRICA

Of all the negotiated settlements between indigenous populations and the world's ruling powers that took place during the twentieth century, South Africa's was certainly the most dramatic and far-reaching. On the tenth anniversary of its first democratic elections on 27 April 2004, South Africans looked back on an incredible journey from the brink of civil war to a relatively peaceful, stable democracy.

The process began in the 1980s with negotiations between the ruling National Party under President F. W. de Klerk and the liberation movements, most notably the African National Congress led by Nelson Mandela. The meetings were fraught with conflict and uncertainty. When the negotiation process (known as Codesa) ended in March 1994 with the promise of a general election, white South Africans prepared themselves for massive retaliations by the previously disenfranchised majority. But the elections, declared "free and fair" by an international team of monitors, resulted in one of the most peaceful transfers of power in history. The final settlement revoked the iniquitous Native Land Act of 1913, which dispossessed the African peoples of South Africa of their land and dignity, and paved the way for a Constitution which would ensure the basic human rights of all South Africans.

When the land claims process was set up in the early 1990s, the apartheid government assumed there would be enormous resistance from current landholders. For this reason, it decided to set up a strong rights-based process with a special court established to resolve issues relating to the conflicting rights of claimants and current owners. At first the "willing buyer–willing seller" model chosen by the government seemed to work well. South African landholders (almost all white) were happy to divest themselves of their interests in farmland at a time when high interest rates and soaring debts made farming an expensive proposition.

In some respects, land restoration has turned out to be relatively simple. The major challenge facing the African National Congress government is to ensure that black farmers are able to prosper on their restored land. Writing in 1999, Andries du Toit, professor of agriculture at the University of the Western Cape, foresaw the problems that lay ahead. The restitution process, he declared, is "nothing more than a farce, paying lip

service to land reform while granting minimal resources to the claimants.… The whole process constitutes merely symbolic restitution for public relations purposes."[2] The danger of restoring farmland to claimants without providing adequate resources to develop it continues to be a serious flaw of the restitution program.

THE RESTITUTION PROCESS IN SOUTH AFRICA

The Restitution of Land Rights Act provided five different ways to deal with land claims by people whose land had been taken from them after 1913: restoring the land from which they had been dispossessed; providing them with alternate land; compensating them with money; and giving them preferential access to government housing and the land development program. The Act has undergone several amendments. In 1999, the government did away with the need for a claim to be referred to the Court in cases where the interested parties had not reached an agreement as to how the claim should be finalized. The shift from judicial to administrative process meant that the Minister of Land Affairs was granted the power to settle claims through negotiation between the various parties. The result was a substantial increase in the number of claims resolved. Although the process was still painfully slow, 12,500 of the 67,000 claims registered were settled by June 2001. Two years later, on the ninetieth anniversary of the imposition of the 1913 Native Land Act, almost half of the registered claims were settled.

As in every area of administration in the new South Africa, apartheid has left a distinctive stamp on the land claim process. Because of the highly segregated nature of apartheid, there is no central office where land claims can be processed. The Commission on Restitution of Land Rights evaluates the claim and then passes it to specialists located in Commission offices throughout South Africa, who then do the work of validating claims. Regional offices are essential because of the segmented structure of apartheid administration (provincial and "homeland" departments kept separate records). Their task is to verify claims against government records to show which individuals and communities were moved, where they were resettled and what laws were in place at that time.

Moreover, the restitution process does not reach all South Africans who have suffered relocation and dispossession since 1913. Jacob Tshabangu, Project Officer in the Northern Province Land Claims Commission Office in Pietersberg, noted that the most prevalent class of landless people in his region are farmworkers and their families who were evicted from their land by white farmers. But because they continued to occupy the

land under verbal agreements with the farm owners, and their eviction did not take place under any apartheid law, their claims are not eligible for consideration under the Restitution Act. As Tshabangu observed, the Constitutional recognition of property rights protects the rights of white landowners while failing to redress the injustice perpetrated on the African people as a whole.

CHALLENGES TO RESTITUTION IN SOUTH AFRICA

The scarcity of high quality farmland in South Africa is one of the major challenges to restitution. In Mpumalanga, one of South Africa's most fertile farming regions, more than 41 per cent of the commercial land is under claim. In February 2000, a group of white farmers under the leadership of the Transvaal Agricultural Union banded together to fight these land claims. Having appealed (unsuccessfully) to the Constitutional Court in 1996 to have the Land Restitution Act repealed, on the grounds that it infringed on their constitutional rights as landowners, the union has used every means at its disposal to maintain the status quo.[3] Claiming that the land reform program bars them from either improving their farms or conducting land transactions without the permission of a Land Claims Commissioner, the farmers established a defence fund and trained a team of lawyers and technical advisers to prepare legal responses to all potential claims.

In March 2001, the process of land redistribution was further challenged when a white farmer, Willem Pretorius, refused to sell his property, Boomplaats farm, for the price offered by the government and was subsequently served with an expropriation order. The land was to be returned to the original owners, the Dinkwanyane community, which had been forcibly removed between 1957 and 1961. But the controversy was finally resolved when Pretorius and the Land Claims Commission negotiated a settlement at a slightly higher figure. By that time, the case had become a *cause célèbre*. In response to the media attention, the Land Commission issued a press release announcing the successful resolution of the Dinkwanyane land claim. About three thousand people attended the "singing ceremony" to celebrate the return of the land to its original owners.[4]

However, for many white landowners, Boomplaats set an unwelcome precedent. The government was accused of using Zimbabwe-style tactics to obtain land, of being "anti-white," and of failing to protect the property rights of individuals in terms of the Constitution.[5] The conflict illustrated one of the major challenges in negotiating restitution: overcoming the racial prejudices of the past.

In addition to the competition for arable land, competition between indigenous communities also poses problems for the land claims process. Competition between urban and rural claims, between individual and communal claims, and between reforms that favour men and those that favour women represent fiercely contested areas and highlight the inherent danger of quick fixes. Another divisive factor within communities is the issue of women's right to the land and the problems of traditional social structures. Despite laws aimed at providing secure land tenure to farm workers, for example, women still rely on their husbands and fathers for access to housing and employment and have little security in their own right.[6] In their study on the relationship between women and land tenure, Catherine Cross and Michelle Friedman explain how women are disadvantaged by social assumptions and informal land practices not controlled by law. These become particularly important when land systems are under pressure from either overcrowding or economic change.[7]

At the root of these internal conflicts is the competition for limited resources. Urban claims have been dealt with more promptly than rural ones, mainly because rural claims tend to be advanced by a community and are therefore generally more complex (and more time-consuming to resolve) than claims by individuals. However, the downside of this bias towards individuals is that less money is available for rural communities to support development, and pay for education, housing, and health care for the most disadvantaged members of South African society.

In response to public pressure from black communities, the Minister of Land and Agriculture, Thoko Ndiza announced in February 2005 that the government had decided to extend the deadline for registering land claims to 2007. Although over two-thirds of the seventy-nine thousand registered claims had been settled, these were mainly in urban areas. The complexities of rural claims and the rising price of farmland in South Africa were the reasons given for the change in time line.[8]

CASE STUDY: MOGOPA COMMUNITY, NORTH WEST PROVINCE

The Mogopa land claim is an example of the complexity of the restitution program in rural South Africa. (Map 2, *xvii*.) It also illustrates how the return of land is only a partial solution to poverty. Situated in fertile farming country in South Africa's North West Province (formerly Transvaal), Mogopa was once a thriving agricultural community. The *Bakwena ba Mogopa* (the people of Mogopa) were a self-sufficient community that had purchased two farms in the Ventersdorp region in 1912 and 1934. Numbering about five thousand people, they not only lived off the land which they owned communally but also sold surplus

crops through marketing cooperatives in town. Residents had well-built houses, churches and three schools, all built by the local people. But in 1983, the apartheid government moved in. Under Section 5 of the Native Administration Act of 1927, Mogopa was declared a "black spot" and slated for removal. The government's rationale for forcibly uprooting settled African communities which were surrounded by white farms was two-fold: their removal would swell the populations of the so-called African homelands and also create the illusion of a "white" South Africa.

When the Mogopa community was told that they were to be moved to Pachsdraai in the Bophuthatswana homeland, they refused to go. Assisted by local and international agencies, they launched a well-publicized resistance campaign. On 29 November 1983, church leaders, political groups, students, the Black Sash women's organization and journalists arrived at the village to witness the removal.[9] Because of the publicity, the removal date was postponed. Finally, on 14 February 1984, the farm was cordoned off and no outsiders were allowed into the area. The people of Mogopa were then ordered by the police to demolish their homes and pack their belongings. They were then loaded onto trucks and taken to Pachsdraai, near the Botswana border.[10] In 1987, while South Africa was still under apartheid rule, the Mogopa community took its land claim case to court. They won their case on a technicality. In an historic judgment, the Appeal Court ruled that the government should not have moved the residents without parliamentary approval. When one of their leaders, John More heard the court's decision, he was ecstatic: "This is the beginning of our struggle to get back our land."[11] But before the community could return to Mogopa, the government expropriated their land. The then-minister of Land Affairs, Hendrik Templar, defended the government's actions by declaring: "It is not government policy to allow black people to resettle or live in areas earmarked for white settlement.… Secondly, it would cause problems for the government in that other black communities would demand to be resettled on central government territory."[12]

In early 1988, some members of the community began to return to their land without government permission. They were charged with trespassing, and an eviction order was passed against them. But the Mogopa people were not to be deterred. They wrote to the Minister of Co-operation and Development stating that they wished to return to their original farms, and that they wanted reinstatement and damages for forced removal and for the expropriation of their land.[13] When they received no reply, they resorted once again to the courts. The Appeal Court ordered the government to negotiate with the current landowners for the sale of their land. Eventually the government was able to obtain an agreement

that allowed the people who had returned to Mogopa to stay. In 1991, the government offered to return one of the farms to the Mogopa people, but only for residential purposes. The second farm, Hartebeeslaagte, which had previously been the breadbasket of the Mogopa community, remained leased out to white farmers as grazing land. The community then lodged a claim for the return of Hartebeeslaagte with the Advisory Commission on Land Allocation established by the apartheid regime. They received no response.

In 1994, Derek Hanekom, the new minister of Land Affairs under the Government of National Unity, received an urgent request from the people of Mogopa, reclaiming their second farm: "We urgently need Hartebeeslaagte back. We want to plough the land before the rain, so that it can be ready for the growing season. This is important, as we have no other means of support, and without its return stand in danger of being starved off our land." A member of the community, Daniel Molefe, later told the minister, "The government took my trousers, and now it has given back one leg. But how can I walk with just one leg?"[14] Hanekom managed to work out a deal with the tenant farmers of Hartebeeslaagte to allow the Mogopa community to return to their land. When the community heard the news they were overjoyed: "people shouted out loud, some began to ululate, other broke down and wept."[15]

However, after all this, the Mogopa community faces a massive task of rebuilding their village and making their land productive with minimal resources. Their homes, schools and churches were all destroyed the day the government bulldozers came to tear them down. Their cattle, cultural symbols of wealth and prosperity but also an essential source of food, were sold to neighbouring white farmers. Now the people have returned with small herds of goats, a few chickens and one or two horses to pull their hand-driven ploughs.

REBUILDING COMMUNITIES

There are hundreds of communities across South Africa in similar situations. However, some communities have fared better than others once their land was restored to them. Targeted for removal as a "black spot" in the early 1970s, African landowners in Cremin (near Ladysmith, KwaZulu-Natal) were expropriated in 1977; and a total of 2,856 people were removed to designated townships in the region. (Map 2, *xvii*.) The land was eventually sold to a white farmer. Although the people of Cremin were scattered across the province and lost touch with each other over the years, they never lost hope of returning to their own land one day. When the government announced its restitution policy following

the 1994 elections, some of the Cremin people decided to submit a claim. Much to their delight, the claim was accepted four years later and settled under the Restitution of Land Claims Act. However, before the land could be returned to the community, the KwaZulu Natal Land Claims Commission had to negotiate the purchase of their claimed land from the current owner. A price, acceptable to both the Commission and the owner, was negotiated and the claim was settled. As the first land claim to be settled in KwaZulu Natal, the Cremin case was hailed as a landmark case. The official ceremony marking the handover of title deeds to the claimants was attended by both Prime Minister Nelson Mandela and Zulu King Goodwill Zwelethini.

In 2002, six years after this historic event, Cherryl Walker, former Land Claims Commissioner of KwaZulu Natal, visited the Cremin community farm. Cattle were grazing in the fields, small patches of mealies (corn, a staple of African diet) were growing, and a new brick school had been built on the site of the old one torn down by government bulldozers in 1978. Reconstruction of Cremin is taking place in a profoundly different era from the one in which it was founded. Building relationships with their white neighbours is a new experience for black communities, but one that is essential to the development and prosperity of the region. The greatest challenge of all is to rebuild a thriving, productive community with so few resources. The chairperson of the Cremin Trust told Walker:

> We are starting from scratch. What we are saying is that you cannot go back to your real cultures. Ja, because if you are old and want to bring back what you had, the time is too short. And if you are young, you might not get exactly what prevailed before.… It does not mean that we are back on our feet, but we are consoled.[16]

Many of the former members of the Cremin community have chosen not to return to their reclaimed land. The younger members, especially those who were born and have grown up in the relocation township of Ezakheni, stand in a different relationship to the land from their parents and grandparents who experienced the removal and fought for its return. Moreover, they are reluctant to exchange the relative comforts of township life for a rural one (without electricity or running water), where subsistence farming is the economic mainstay.

South African historian Rodney Davenport sees the restoration of land in rural areas as a production-based issue. In his view, the general

condition of land in South Africa in terms of access to water and soil fertility demands that modern (as opposed to traditional) agricultural methods be used. The serious erosion of land in the former bantustans due to overcrowding demands particular attention. Davenport argues that government has an obligation to improve – or at least not to disturb – the potential of land to produce food and to do its utmost to prevent the intrusion of desert conditions. While conceding that rights should be respected, especially those deriving from ancient occupation where communities were moved because of apartheid government policy, dealing with rights without applying any form of restriction is a mistake.[17]

The Surplus People Project, an organization that strongly supports land claims, agrees that the resolution of claims could lead to either the development or deterioration of reclaimed land. However, other factors contribute to the continuing poverty of people when land is returned to them. If the land claimed is degraded through unsustainable use, then the future of successive generations will be in question. For claims to be successful, they argue, communities must drive the process. The successful completion of land claims depends largely on the involvement of all interest groups in the community to resolve conflicting claims and to propose participatory development for their areas.[18]

In her introduction to *Back to the Land*, a book about ten communities recently reconnected to their ancestral lands, Marlene Winberg writes: "Of course, inefficient farming methods will very quickly degrade land in a subcontinent where drought is endemic, and the ecology fragile. It would be tragic if those who returned to the land revert from landless poverty to landed poverty." But she goes on to remind us that massive state intervention was required to destroy efficient black farmers early in the century and then to subsidize the "efficient" farming empires that characterize white agriculture today. While it may not be feasible or even desirable to transfer the kind of "grand patronage" that underpinned apartheid land policies from white to black beneficiaries, it is vital for the government to provide meaningful support to those who are returning to the land, often after many decades. However, as so many returning communities clearly demonstrate, land represents much more than economic commodities to be managed and exploited. It is "a cultural anchor, a place of living, the core around which displaced people can begin to rebuild their interrupted sense of belonging."[19]

THE CONSERVATION FACTOR

A second factor in the provision of effective land restitution in South Africa is its constitutional obligation to protect and conserve the envi-

ronment. Moreover, South Africa is a signatory to several international and regional environmental agreements, which compel it to prioritize bio-diversity conservation and sustainable resource use. This double commitment to land reform and bio-diversity represents a major challenge to the new government, especially in the overcrowded and environmentally sensitive rural areas. The following case study in northern KwaZulu-Natal illustrates this ongoing dilemma.

THE CASE OF KOSI BAY, MAPUTALAND (KWAZULU-NATAL)

Like aboriginal societies across North America, the people of Maputaland have always lived "off the land." For the past seven hundred years, the inhabitants of this beautiful coastal region close to South Africa's border with Mozambique have tried to conserve its natural resources as part of their way of life but this has not been easy. (Map 2, *xvii*.) Throughout its history, Maputaland's rich natural resources have attracted outsiders. As the result of a series of intertribal wars in the eighteenth century, the local Thonga people were incorporated into an expanding Zulu empire. Early European explorers were followed by elephant hunters. In 1917, an anti-nagana campaign (nagana was a cattle disease wrongfully believed to be carried by wild animals) led to the slaughter of thousands of head of game in this region. In the twentieth century, many acres of bush were destroyed to make way for sugar plantations and commercial forests. Then a dam was built on the nearby Pongola River, partially disrupting the finely tuned ecosystem.

Despite these intrusions, the fertile dunes that lie close to the coast, sustain a variety of exotic plants, and during the summer they become the nesting site for the rare leatherback and loggerhead turtles that migrate here from the east coast of Africa. The grasslands attract large herds of zebra and impala and the larger carnivores that followed them. The rich resources of the ocean yield a varied diet of fish and other seafood providing sustenance for the local people. The women weave mats and baskets from the reeds, and grasses provide thatching for their homes. They make wine from the palms and beer from the morula trees, a traditional African beverage.

In 1988, the entire area was declared a nature reserve, and the inhabitants were ordered to leave. About half the community did as they were instructed. But many stayed behind to fight for their ancestral lands. Today, three hundred thousand people are squeezed onto land surrounded by the scenic conservation areas of northern KwaZulu-Natal. Along the coastal region stretching south from Kosi Bay to Lake St. Lucia, eighty thousand people survive on a hundred square kilometres

of land. Paradoxically, even though apartheid has been abolished, the community remains under threat of eviction from the provincial government's conservation officials – or "Nature" as the local people call them with some irony. Having initially formed part of the European colonial invasion and later of the apartheid dispensation, conservation officials are now agents of the democratically elected KwaZulu-Natal provincial government. Like their predecessors under the apartheid regime, who served eviction notices on the inhabitants of Kosi Bay in 1988, the conservation authorities continue to threaten the local people with removals, bans on hunting and snaring, and limits on the traditional use of game and fish stocks. The difference is that now the community is able to negotiate joint control over these resources through the Department of Land Affairs and the Land Claim Commission. It has the constitutional right to do so.

In the early years of democracy, the minister of Land Affairs became personally involved in hearing the claimants' case, assessing how restitution could best be achieved, and finally in making it happen. Derek Hanekom, South Africa's first ANC Minister of Land Affairs, criss-crossed the country meeting with dispossessed communities determined to regain control over their lands and lives. When Hanekom arrived at Kosi Bay in July 1994 in response to an appeal from the community, he was confronted by the stark contrast between the overcrowded and impoverished area allocated to the Kosi Bay community and the conservation area – a tourists' paradise. Journalist Marlene Winberg described what happened at the minister's first meeting with the community. The words of one of the local induna (headman) reveal the actual and psychological impact of its long struggle:

> We are grateful, minister, that you are relieving us of our sorrows. We are in fear of removal from our place. We need advice as to how to become real people, so that it will be even more beautiful than it is today. But we do not know how to achieve our goals.… We want to come up with a program to address our problems in partnership with the new government.[20]

A woman also spoke up, explaining the predicament experienced by women faced with the responsibility of feeding their families:

> We women are no longer working – we're just sitting. We eat wild pig. Mostly our children are hungry, and we have no one to support us. If I send a man to the forest to cut thatch or poles,

> the conservation police will threaten him with guns or arrest him. We have no proper house. I need poles. The trees they found here were preserved by our forefathers. When we visit our graves, they point at us with firearms.[21]

After Hanekom had conducted further consultations, this time with the dreaded conservation people, a deal was struck which made the Kosi Bay community shared custodians of the nature reserve. With government support, the community opened up its own locally run ecotourism business. In 1995, the first group of tourists arrived at the small KwaDhapha camp.

The restoration of land and involvement of the Kosi Bay community in eco-tourism has only partially addressed the problem of poverty. Jobs inside the park have provided incomes for a limited number of people, but most local households (often headed by women) continue to rely on subsistence farming to feed their families. A study conducted in 2004 by Dr. Donovan Kotze of the Centre for Environment and Development at the University of KwaZulu-Natal, found that since most natural forest vegetation has very little direct value to local people, large sections of Kosi Bay swamp forests are being cleared for agriculture with detrimental ecological consequences. Although traditional methods of farming are generally protective of the environment, the study concluded that the cumulative effects of the cultivation of swamp forests by large and medium-scale farmers, as well as hundreds of individual plots for local consumption, is considerable. The solutions suggested by Dr. Kotze include the promotion of better management practices among farmers in the swamp forests and revisiting the issue of compensation in lieu of land restoration.[22]

Thembela Kepe of the University of the Western Cape argued in a paper written in 2004 that despite impressive land reform policies and legislation, conservation tends to receive preferential treatment over human rights and poverty alleviation. Her solutions approach the problem from a different perspective from those of Dr Kotze. First, the current "weak and fuzzy land tenure rights" of people who have succeeded in claiming conservation land need to be revisited and rectified, as they are hardly sustainable. Secondly, the overall approach to land restitution should be seriously reconsidered and strategies for alternative land use – other than eco-tourism – put in place to effectively address the high levels of poverty that exist in communities claiming conservation land.[23]

NEGOTIATING LAND RESTITUTION IN CANADA

Legislation to establish an Indian Claims Commission in Canada came under serious consideration in 1961, after the Diefenbaker government introduced the Bill of Rights. Three years later, the National Indian Council of Canada organized a conference to study the question of land claims, funded by the Department of Indian Affairs. But nothing came of either initiative until the Liberal Party government issued its 1969 White Paper. Dr. Lloyd Barber (Vice President of the University of Saskatchewan) was appointed Indian Claims Commissioner, with the mandate to receive and study grievances and recommend a process for dealing with land claims. The mandate initially excluded the recognition of aboriginal rights (a matter that was deemed to be beyond its jurisdiction) but was later widened to include treaty rights. Although the Commission was short-lived (it lasted until 1977), it raised the profile of land claims and drew attention to the major difficulty in reconciling the interests of Indians and the provinces.

Then in 1973, a land claim process was established that is still in use today. It divides claims into two categories: "Comprehensive Claims" and "Specific Claims." The former applies to claimants who have never entered into treaties; the latter to treaty Indians who claim that their existing treaties have not been fully honoured, or that Indian reserves or moneys have been misappropriated, usually in violation of the Indian Act. The Department of Indian Affairs handles both Comprehensive and Specific Claims. After reviewing the documentation, the Claims Branch prepares a "statement of fact," which is then passed on to the Department of Justice to establish the legal merits of the claim. The court's main task is to interpret the extent of the government's lawful obligation in the case. The final decision on the validity of the claim is made by the Department of Indian Affairs, which also controls the amount of compensation to be paid (if any). Although Indian bands have gained more leverage in the bargaining process over the past decade (due at least in part to the wealth-producing resources in their territories), the process still requires the federal government to act as "judge and jury" in claims against itself, and is extremely slow.

Because land and resource management is a provincial rather than federal responsibility, each province has developed its own mechanisms for handling aboriginal land claims. The three prairie provinces have agreed to transfer unoccupied Crown land to the federal government in order to meet unfulfilled treaty promises. However, since the federal government has fiduciary responsibility for Indians and their lands, both Ottawa and the provincial governments are involved in final settlements.

Under Saskatchewan's Treaty Entitlement Agreement, the federal government provides compensation to Treaty Indians who were promised land under treaty, but for whom reserves were never set aside. In British Columbia, Quebec, the Northwest Territories and the Maritime provinces, where no colonial treaties were made involving land, provincial and territorial governments are required to negotiate the settlement of land claims.

The story of negotiated settlements in Canada varies across the country. The settlement of aboriginal land claims has been quicker and relatively simpler in the high Arctic and remote northern regions of Canada, where there was little outside interest in the land. Where competition for land and natural resources is part of the bargaining process, reaching agreements acceptable to all parties takes much longer. Satisfactory resolution depends on a number of factors, the margin of profit anticipated from the exploitation of resources being one of the most significant.

Between 1976 and 2005, a number of land claims across Canada have been settled, and native participation in the planning of major industrial projects is now considered part of the process. The people of the Mackenzie Valley are a good example. The Dene and Inuit peoples of the Northwest Territories and Yukon have found a way to reach a compromise with an industry that thirty years ago was believed to pose a serious threat to their people's cultural and economic survival. In 1976, the Canadian government placed a ten-year moratorium on a proposed pipeline along the Mackenzie Valley that was to carry oil and natural gas reserves from the Arctic Ocean to southern Canada. The decision not to proceed with the project was based on the report of a public inquiry led by Justice Thomas Berger. The report recommended that the government first settle outstanding land claims in the region before considering the pros and cons of the pipeline project. In 2003, having successfully negotiated most of their land claims, the people of the Mackenzie Valley were active participants in a new pipeline proposal involving a number of large Canadian oil companies, including Imperial Oil Resources, ConocoPhillips Canada, and Shell Canada Limited, as well as their own Aboriginal Pipeline Group.

By the end of the 1990s, the estimated value of High Arctic gas reserves exceeded $200 billion. Media reports indicate that dramatic increases in oil prices were instrumental in the renewed interest in the Mackenzie Valley, which helped to push forward both the resolution of land claims and the native peoples' willingness to participate in a new pipeline project. The Inuvialuit of the western Arctic, whose land claim was settled in 1984, also lost no time in taking advantage of this favourable turn in the

market and negotiated four oil and gas concessions worth $75.5 million. (Map 4, *xix*.) Despite the market influences, these successful negotiations show that Indian groups gain bargaining power through each other's successes. Expectations, norms and precedents create an atmosphere favourable to Indian stewardship of the land they once lost.

THE LUBICON CREE, ALBERTA

There are also many examples of highly contentious cases where the outcome for aboriginal claimants has been far less encouraging. The case of the Lubicon Cree of Alberta falls into this category. This is a case that has attracted a lot of international attention but little government support. It illustrates the conflicts that can occur when no formal treaty rights apply. In these cases, native groups are forced to negotiate directly with provincial agencies (as the holders of Crown Land), rather than with the federal government with whom treaties were originally made.

The Lubicon Cree had been living between the Peace and Athabasca rivers and north of Lesser Slave Lake for thousands of years before the arrival of Europeans in North America. In 1899, when the Canadian government signed Treaty Eight with several other groups in the region, the Lubicon Cree were somehow missed out. For years, members of the Lubicon band made annual visits to Ottawa asking to be included in Treaty Eight. In 1933, when the Great Depression was driving hundreds of white immigrants into northern Alberta, the Lubicon Cree applied to the government for a land settlement. Finally, in 1939, the government responded and promised the band a reserve. The following year, a site was selected at the western end of Lubicon Lake and approved by both provincial and federal governments. The size of the site (25.4 square miles) was based on the band count of 127 members according to the terms of Treaty Eight from which the band had been excluded in 1899. However, the site was never surveyed. Disputes arose over the size of the band and their entitlements under the terms of Treaty Eight, and no settlement was made.

Then, in the 1950s, when mining and oil exploration companies entered the Lubicon territory, the prospect of securing a land base under treaty rights dwindled. The government allowed a village with close ties to the Lubicon band to be bulldozed and burned down to make way for exploration. In the 1970s, the Alberta government passed a retroactive law to stop the Lubicon people from declaring an aboriginal interest in the region. In 1979, oil development in the region reached its peak. Without an environmental study or investigation into the social impact on local communities (as had happened during the Mackenzie Valley

oil pipeline dispute in 1976), resource companies had free rein to enter the claimed territory. Northern Alberta became the most active exploration and drilling field in the country. Over the next five years, more than four hundred wells were drilled within a fifteen-mile radius of the Lubicon band community.

The impact on the environment and on the Lubicon's traditional hunting economy was profound. Seismic crews set up "no trespassing" signs on their hunting grounds. Bulldozers ripped up trap lines and blocked animal trails. Fires, a perennial hazard in this wooded region, raged out of control. In 1980 alone, bush fires destroyed as much of Lubicon hunting territory as in the previous twenty years. Haying fields, berry patches and fishing streams were blocked off. Fur-bearing animals were driven from the area, as were moose and smaller game animals. The average income from trapping between 1979 and 1983 dropped from over $5,000 per trapper to less than $400.[24] While the oil companies produced revenues of billions (an estimated $1.2m per day), the Lubicon people were forced to live, in John Goddard's words, as "landless squatters dependent on welfare."[25] In response to the rapid social changes within their communities, the Lubicon Cree saw the settlement of their land claim as a gleam of light at the end of a tunnel. In their view, the restoration of control over their land and resources would enable the whole community to re-establish their connection to the land, even if it was on a different basis from the past. (Map 4, *xix*.)

In 1978, a new young chief, Bernard Ominayak, took over the band's leadership and a vigorous public relations campaign to force government action followed. The Lubicon erected barricades to stop construction when the provincial government proposed a road to provide easy access to the previously remote region. But the road was built anyway. However, by this time international human rights groups had started to take notice. The World Council of Churches meeting in Geneva in 1983 warned: "In the last couple of years, the Alberta government and dozens of multi-national oil companies have taken actions which could have genocidal consequences." In 1988, international attention was drawn to the plight of the Lubicon when the band campaigned for a boycott of the "Spirit Sings" exhibition at Calgary's Glenbow Museum in conjunction with the Fifteenth Winter Olympic Games. Partly in response to international pressure, the Alberta government under Premier Don Getty made some concessions relating to land and resources to the Lubicon in the "Grimshaw Agreement."

At this point, the federal government also began to take the Lubicon demands more seriously. Formal negotiations on Lubicon land rights

began in 1988 with the Mulroney government. Derek Burney was appointed Chief of Staff to oversee negotiations between the band and Ottawa. The Lubicon agreed to a number of points, including the land area negotiated in the Grimshaw formula of ninety-five square miles to be set aside for a Lubicon reserve, seventy-nine square miles of which was to include full surface rights. The only concession the federal government made towards the economic development of the Lubicon was a trust fund of $5 million from which the band could draw "seed capital" to lever grants from existing federal programs. The main bone of contention for the Lubicon was their demand for compensation for what they claimed to be irreparable damage to their way of life. The band, once a self-sustaining hunting community, had become dependent on wage labour and transfer payments to supplement the limited hunting available. Although there was a marked increase in alcohol abuse and domestic violence in their communities, the Lubicon managed to maintain their cultural identity and retained Cree as their first language.

In 1989, the federal government offered the Lubicon a take-it-or-leave-it deal. Compensation was not included. The wording of the agreement obliged the Lubicon to "cede, release and surrender" all aboriginal rights to current and future legal actions related to aboriginal rights. The band also had to agree to withdraw its complaints from the United Nations Human Rights Committee and "to acknowledge the settlement of its grievances against Canada" before the compensation issue could be settled. But ultimately nothing in the offer was binding on the government. The Lubicon rejected the offer. When asked by a radio reporter what the Lubicon wanted, Ominayak replied: "Well, basically what we're looking at is to try and build a community that is going to be viable, both economically and as a community.… We've got people whose livelihood has been destroyed by the oil development. We don't want to just build a community where people are going to have nice houses but remain on welfare. We want to get out of that system. We don't want to get into it deeper."[26]

What happened after the Lubicon had rejected the proposed agreement underlines the competing interests of aboriginal societies in Canada and the government's willingness to play one group against the other. In order to secure its own interests and bring down the Lubicon, the federal government approached a dissident group with an offer it could not refuse. Henry Loubican, a resident of Grouard on Lesser Slave Lake, met with federal officials shortly after Ominayak turned down the deal in 1989. Soon afterwards, a separate band was formed of about 350 members – many believe it was created by the Department of Indian Affairs.

The "Woodland Cree," which was registered within weeks of its application for band status, accepted a settlement offer from Ottawa which Ominayak called "a formula to put welfare Indians in nicer houses."[27] The Loon Lake agreement followed, with a Woodland Cree–type land settlement.

Thus Lubicon society was slowly being torn apart. In some Lubicon communities families were divided, one family member joining the Woodland group, others crossing over to Loon Lake. Other factors were at work as well. Suicide, especially among the young people, as well as alcohol addiction and domestic violence were part of the destructive spiral endemic to many native communities. As Goddard noted, more and more people began channeling their frustration into drinking, fighting or joining evangelical congregations.[28] When the moderator of the United Church of Canada, Rt. Reverend Stan McKay visited the Lubicon community of Little Buffalo Lake in 1993, he described the conditions as "third world" and "totally unacceptable in Canada."[29]

During this period, a Japanese conglomerate, Daishowa Incorporated, completed a $5 million pulp mill north of Peace River and was preparing to move into Lubicon territory. A Toronto-based group called the Friends of the Lubicon took up the cause of the community. In 2000, as a result of the adverse publicity generated by a seven-year-long boycott of Daishowa products (organized by the Friends of the Lubicon), Daishowa finally agreed not to conduct logging operations on Lubicon territory until their land claim was settled. Shortly before this agreement was finalized, Ominayak reached an agreement with Petro-Canada that allowed oil exploration under certain conditions on lands claimed by the band. But still the federal government did nothing.

In January 2003, Amnesty International entreated Prime Minister Jean Chrétien to fulfill his election promise made over ten years before to bring a "swift resolution" to the Lubicon situation. But Chrétien retired from politics later that year, and the Lubicon continue to face pressure from ongoing resource extraction on their disputed land.[30]

THE B.C. TREATY COMMISSION

While most First Nations favour negotiation over court actions as a means to regain control over their lands and lives, the negotiation process with provincial and federal governments has been largely unsuccessful. The work of the British Columbia Treaty Commission is a case in point. Established under the B.C. Treaty Commission Act in 1995, the mandate of the Commission was to facilitate the negotiation of treaties in British Columbia among one or more First Nations. Its duties included

the allocation of funds to enable First Nations to participate and to assist in conflict resolutions. After ten years (and an expenditure of $300 million), the Commission has failed to produce a single settlement. In the year 2000, all of the five settlements offered from a total of fifty claims were refused by the First Nation claimants.

Perhaps even more significantly, one quarter of aboriginal groups in British Columbia are entirely absent from the B.C. process. Government negotiators are perceived by aboriginal groups to be working hand in glove with the resource industries. The resource industries, in turn, regard the uncertainty engendered by aboriginal land claims as extremely damaging to their interests. For this reason, many of the large forest products companies are pushing the B.C. government to negotiate settlements that will convert existing reserve lands into treaty settlement lands. This is the format known as the "land selection model," which includes cash and resources as components of the package. Initially the proposed package offered cash in lieu of land – in other words the extinguishment of aboriginal title – which was fiercely rejected by aboriginal groups.

The revised formula of the B.C. government offers a percentage of land relating to the size of the aboriginal population in the claimed territory. This is unacceptable to the First Nation claimants on a number of grounds. First of all, it ignores their inherent aboriginal rights in the land and, secondly, with inadequate land bases the economic viability of their communities is at stake. The "co-management model," favoured (or, more accurately, insisted upon) by British Columbia's First Nations as the only sound basis on which to negotiate settlements, is rejected by governments and industries alike because (in their view) it perpetuates the "economic uncertainty" of undefined land rights. Hence the apparent impasse that currently exists.

CONCLUSION

In both Canada and South Africa, negotiating restitution involves reaching compromises with governments and industries. Some Canadian First Nations have been more successful than others in reaching agreements that are acceptable to all parties and that seem to offer long-term benefits for native communities. Almost all modern treaties or land claims – whether they are negotiated in the courts or through government – involve a conflict over natural resources. In some cases, aboriginal nations have taken advantage of development possibilities and established thriving business enterprises. But much more needs to be done to raise aboriginal employment and income levels.

Although agreements between federal, provincial and territorial governments and aboriginal groups may include benefits, the uneven negotiating power tends to tilt the balance in favour of government interests – and those of industries. This is especially true when the long-term release or extinguishment of aboriginal rights to land and resources is involved, rights which are affirmed in the Constitution. In recent years these issues have been brought before the Supreme Court for legal interpretation with some positive results. However, court decisions are only effective when governments comply with their rulings; having to resort repeatedly to litigation is a costly process. A possible alternative, suggested in a recent United Nations report, would be legislation on aboriginal treaty and constitutional issues. A step in this direction was taken in October 2004 with the introduction in the Senate of the First Nations Government Recognition Act (Bill S-16).[31]

The pattern of competition over scarce resources is repeated in South Africa, where the issue is further complicated by the legacies of apartheid. In reclaiming their land, indigenous South Africans confront the competing interests of white vs. black, rural vs. urban, and women vs. men. One of the major challenges facing the new government is balancing its constitutional commitments to reduce poverty, take care of the environment and make land available to all South Africans. Meanwhile, the vast majority of African people still live in poverty. Land is a central issue in the ongoing struggle for some measure of economic revival for the landless majority.

While the ANC government is committed to land reform and redistribution, without the active cooperation and participation of the current landholders, the prospects for meaningful restitution are disappointingly slight. What is needed is a realistic but uncompromising land policy that will encourage the generosity (and foresight) of the present landholders and provide mechanisms to enable the individuals and communities, that are reunited with their lands through the land claim process, to flourish.