

The Right to Compensation for Cultural Damage

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Introduction

Indigenous communities in Canada share a history of a systematic loss of land over time. The loss of land, in turn, has left the people with an enduring sense of bereavement.¹ Part of the loss can be calculated in economic terms – the loss of crops and benefits from the land, or the loss of rent. But there are other kinds of loss, and those other kinds are what we are about to consider.

The Government of Canada has acknowledged responsibility for having wrongfully deprived many Indigenous peoples of a substantial territory.²

This paper considers whether that responsibility extends to an obligation to compensate for the *culture loss* that accompanies the loss of land and the practices, customs and rights that are inseparable from the land. I have concluded that there are two distinct approaches to be taken in Canadian law to this issue. First, compensation for land must include compensation for a unique “cultural component” of aboriginal land, linked to the land’s significance in the exercise of the culture. Second, where there are losses of culture that are a consequence of the loss of the land – loss of linguistic or ceremonial knowledge, for example – that is a separate matter for compensation.

I am a lawyer. Canada’s “specific claims policy” asserts that compensation will be made according to legal principles. The same policy then seeks to define and limit the nature of

¹ In the apology that is part of the *Waikato-Tainui Raupatu Claims Settlement Act* in Aotearoa (New Zealand), the Crown acknowledges that the confiscations of land that followed its unjust war against the Waikato “have caused Waikato to the present time to suffer feelings in relation to their lost lands akin to those of orphans, and have had a crippling effect on the welfare, economy and development of Waikato.”

² The Government of Canada has formally accepted both “specific” and “comprehensive” claims. In doing so, Canada has received advice from the Department of Justice that, if the claim were litigated, the Crown would probably lose. However, the acceptance of claims is “without prejudice to any position Canada may take” in court, and involves no acceptance of any facts or liability. While informally federal officials will say that the claim is “valid”, that word will not appear in any federal correspondence. To some extent, the federal government’s refusal to accept responsibility is itself an obstacle to a final settlement. In using the word “wrongfully,” the writer is deliberately choosing the word in its *legal* rather than *moral* sense.

the compensation, and in doing so it seems to exclude some of the legal principles of compensation in Canadian law. The obligation to compensate for the unique cultural component of land is not “special value to the owner”, but rather an integral aspect of the nature of the title being taken. Aboriginal rights and title to land, said the courts, are unique – *sui generis* – and it ought not to be surprising that the nature of that title contains elements not present in other people’s rights. Both kinds of compensation for cultural damage resulting from land loss are within the legal principles of Canadian common law.

The law of compensation in Canada is based on legal principles. Canadian law is based on the principles contained in the Common Law of England (though in the Province of Quebec, the principles of Civil Law, descended from Roman codes, is also relevant).

There is no federal statute setting out general principles of compensation. Instead, in the common-law provinces of Canada, “legal principles” of compensation flow from a long and evolving series of court cases. Canadian federal law generally reflects the some principles. In the province of Québec, the civil law system operates quite differently from the common law: there is no corresponding body of customary law, and instead all civil law is said to flow from the Civil Code. This is a significant difference between the two legal systems: where the common law may build bridges of logic and consistency between its past practices and apparently new situations, the civil law is relatively less agile.

Oddly, perhaps, the practice of the Government of Canada in dealing with compensation for the loss of Indian land has been to seek and apply some common law principles, and not to use the civil law. This may be because of a desire for consistency. It may simply be because the great majority of lawyers and policy-makers making recommendations and decisions about compensation are familiar with the common law, not the civil law. It is common law principles and decisions that seem to guide Canada.

The common law, in theory, is a body of customary law that flows through society, and is revealed not through statutes made by Parliaments and legislatures, but rather through an explanation of that law as cases arise that allow courts to examine and clarify the principles. That is how aboriginal rights can become part of the common law, though the English had no knowledge of any aboriginal people³ in the days of the common law's origins.⁴ Recently, Canadian courts have suggested that the legal systems of aboriginal nations must be part of any court's analysis of aboriginal rights and title of those nations. At least, that is what the Supreme Court of Canada said in 1997.⁵ Since then, the courts have retreated from that language, referring instead to seeking to understand and take into account the "aboriginal perspective" on matters. It is increasingly unclear how much the principles of aboriginal legal systems must be taken into account or respected by Canadian courts in their decisions.

"The common law" having a single source – mediaeval England – has allowed courts in "common law jurisdictions", like Canada, Britain, the United States, Australia, New Zealand and South Africa, to borrow from one another, asserting that their common roots create commonly shared principles.⁶ Where an explanation of common law principles applying to a situation is lacking in one jurisdiction, courts will look to explanations of the principles in others.

³ The statement is not necessarily true. It depends how you define "aboriginal". The English were busy at the time taking control over the lands of the Welsh, Irish and Scots, who were at least more aboriginal than the English. "The English" were the descendants of Saxon invaders, themselves conquered by the Normans, and briefly by Danes. In some ways, the common law is the product of a succession of invasions and conquests, and its approach to aboriginal rights and title reflects that without saying so explicitly.

⁴ It took until 1985 and the *Guerin* decision for the Supreme Court of Canada to acknowledge that aboriginal rights and title have no clear equivalent in medieval England, and are forms of title that are *sui generis* – unique unto themselves. However, in the 2006 *Bernard and Marshall* decision, the same court decided that, to be recognized and protected in Canadian law, an aboriginal nation's land title had to conform with the basic principles of fee simple title in the "modern common law" of Canada.

⁵ *Delgam'ukw v. British Columbia*, [1997] 1 SCR.

⁶ These countries – with the exception of South Africa – were the only ones to fail to vote for the adoption of the International Declaration of the Rights of Indigenous Peoples. Part of their fear of the Declaration was the way in which matters become law in common-law countries.

The legal systems of common law countries have considered aspects of cultural loss. Most of these countries share the experience of colonization – of claiming Crown sovereignty by right of discovery or conquest and taking land from indigenous peoples.⁷ Colonization, either on the basis of consent or under the banner of conquest, affected the property, rights and cultures of the indigenous peoples of the lands. In most cases, the result was a loss of land and culture. In Canada, Australia and New Zealand, indigenous “minorities” have had a long struggle to secure any rights to land, and then to secure compensation for land taken unfairly or improperly.

The principle that the taking or loss of land should be accompanied by fair compensation has become a part of the common law of Canada. It is also part of the statute law: the *Expropriation Act* sets processes, principles and standards that substantially reflect many aspects of the common law that preceded it. The rule that injury to aboriginal rights is also compensable is also a modern legal principle. Aboriginal rights are now constitutionally recognized and protected – but the courts have recognized that this protection is not absolute. When the infringement on aboriginal rights is accompanied by “justification”, the courts have said that appropriate compensation should be made.⁸

While this is a paper about law and loss, it is necessary to understand that the courts and their interpretation of the laws have inflicted their own damage on indigenous peoples and that law is often a blunt instrument of conquest and not at all an impartial arbiter of rights. In *Wi Parata v. Bishop of Wellington*, the Chief Justice of New Zealand declared that at the founding of the colony the Maori had no kind of civil government or settled system of law, but were “primitive barbarians” whose treaties with the Crown were a

⁷ In October, 2009, Prime Minister Stephen Harper announced at a G20 meeting that Canada was the envy of the developed world, because of its economic stability, its stable government, its natural resources...and the fact that it has no history of colonization.

⁸ The recognition and affirmation of “existing” aboriginal rights and title occurred with the “patriation” of the Canadian constitution in 1982. It is not clear, therefore, what recognition and affirmation extends to aboriginal rights and title before that date – or to compensation for injuries to rights and title that occurred before that date. The first comprehensive articulation of the path from justification to infringement to compensation was in *R. v. Sparrow*, [1990] 2 SCR. The path also includes the obligation to avoid infringement as much as possible; and to consult with the aboriginal people affected.

“simple nullity”.⁹ In the 1920’s, in *Sero v. Gault*, the Ontario Supreme Court, quoting an 1824 letter, stated:

To talk of treaties with the Mohawk Indians, residing in the heart of one of the most populous districts of Upper Canada...is much the same, in my opinion, as to talk of making a treaty of alliance with the Jews in Duke Street or with the French emigrants who have settled in England.¹⁰

In *R. v. Syliboy*, the Grand Chief of the Mi’kmaq Nation was charged in 1928 with violations of the provincial game laws. The County Court ruled that:

Treaties are unconstrained acts of independent powers. But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages’ rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession, and the Indians passed with it.¹¹

Colonialism required racist justification. There was no other way to validate taking other people’s land. The attitudes persisted in political circles and the courts well into the 20th century. Winston Churchill, who often maintained that he had Mohawk ancestry, stated:

I do not agree that the dog in a manger has the final right to the manger even though he may have lain there for a very long time. I do not admit that right.

⁹ (1877) 3 N.XZ.Jur. (N.S.) S.C. 72, 78.

¹⁰ (1921) 50 O.R. 27, 20 OWN 16, 64 DLR 327.

¹¹ (1929) 1 DLR 307. The trial judge in *Delgam’uukw* suggested that colonization, including a loss of land rights, was actually good for the Gitk’san and Wetsuwelthen, whose lives before the arrival of the British had been “nasty, brutish and short” and who had not invented the wheel or acquired any beats of burden.

I do not admit, for instance, that a great wrong has been done to the Red Indians of America or the black people of Australia.

I do not admit that a wrong has been done to these people by the fact that a stronger race, a higher-grade race, a more worldly-wise race to put it that way, has come in and taken their place.¹²

Even as the great colonial empires were spreading, changes in attitude were occurring. The abolition of slavery came in Britain in the late 1700s, and in the United States after the Civil War. The end of the First World War saw the creation of the League of Nations, and the League began to face the issue of self-determination for smaller peoples. As the counsel for the Haudenosaunee in the 1920s, George Decker traveled to the seat of the League of Nations in Geneva with the Cayuga Chief Deskahe. Decker wrote:

The courts may follow the flag of conquest however unjustly the army marches forward, but to carry that flag is not a judicial function.¹³

Common law courts have retreated from earlier racist and embarrassing positions. In *Queensland v. Mabo*, the Australian High Court stated that:

...it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.¹⁴

The Supreme Court of Canada has also retreated from the bare-faced racism of the *Syliboy* case and its denial of the capacity of indigenous peoples to hold land, have laws, or make treaties. It has said that Canada cannot take much pride in its history of treatment

¹² Winston Churchill, to the Peel Commission, 1937.

¹³ George Decker, *Must the Peaceful Iroquois Go?* Researches and Transactions of the New York State Archaeological Association, Rochester 1923.

¹⁴ (1992) 175 C.L.R. 1., at 41-2. While the statement is bold and explicit and led to change in Australian law, the rest of the decision seems to acknowledge that, where racism forms the backbone of the Australian system of land law, the court should not overturn it.

of aboriginal peoples. Why mention these cases, then? Because the common law is a creature of precedent.¹⁵ Modern courts follow the decisions and principles of their predecessors. The law of compensation has evolved over centuries during which colonialism and racism were cornerstones of the British common law system, though many of the principles of the modern law often reflect, however unwittingly, the assumptions of historic laws. The presumption that only the Crown's laws are part of the "rule of law" was reiterated by the Minister of Justice, Kim Campbell, during the "Oka crisis" of 1990.¹⁶ It was not until the 1997 *Delgam'uumkw* decision that the Supreme Court of Canada conceded that indigenous nations might have laws and legal systems of their own. The refusal to recognize rights goes hand in hand with the refusal to recognize laws and governments. The refusal to see differences as respectable rather than as evidence of incapacity is a failure of respect. Legal systems evolve. Ways of thinking about law and rights evolve.

The recognition of aboriginal laws and legal systems in *Delgam'uumkw* transformed the laws of Canada in ways that have not yet been fully appreciated, explored or exploited. The Supreme Court of Canada stated that "aboriginal title arises out of...the relationship between the common-law and pre-existing systems of aboriginal law," and "the common law should develop to recognize aboriginal rights as they were recognized...by aboriginal systems of governance;" and that "aboriginal rights must be understood by reference to both common law and aboriginal perspectives." "The relationship between common law and pre-existing systems of aboriginal law...is a second source for aboriginal title." The

¹⁵ In *Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation* (unpublished), Catherine Bell and Michael Asch point out how the Canadian court decisions of the early 1970s were based on the state of anthropology and sociology at that time, and how those two disciplines have evolved, while the cases of the 1970s set precedents that have continued to be followed even as the principles upon which they are based (like the "organized society" requirement set out in the 1970 *Baker Lake* case) have come to be seen as obsolete.

¹⁶ The same line of thought appeared in the 2007 Ontario provincial election, when Conservative leader John Tory declared that he would show "zero tolerance for illegal occupations." Ironically, the impetus for the dubious land transactions in the Six Nations Grand River Territory that lay at the root of the "occupations" or "reclamations" (depending on one's point of view) was the flood of trespassers, squatters and fraudulent lessee/patentees of the 1820s and 1830s – the Crown had indicated to the Six Nations Chiefs that it would do nothing to address these "illegal occupations".

need to take the aboriginal legal perspective into account has been affirmed in other, later cases as an integral aspect of any attempt at “reconciliation.”

In effect, this means that indigenous ways of addressing the resolution of issues of rights, including ways of making appropriate compensation, are now part of Canadian law. If the path to resolving claims is governed by “legal principles,” those principles, since 1997, include, when dealing with indigenous nations, the principles governing the legal systems of those nations.

A review of the compensation principles of the “common law,” as it now exists in Canada, will have to take into account not only how that system of law has developed in Canada, Britain, the United States, and other common-law countries (Australia, New Zealand, South Africa) – but also how those developments can be reconciled with, and can coexist with, the principles of the legal systems of indigenous nations directly involved.

In the 2007 decision in *Mikisew Cree First Nation v. Canada*, the Supreme Court made another finding that will have increasingly broad implications: it recognized that there are not only substantive treaty rights, but also “procedural” ones. In that case, the procedural rights amounted to a right to be consulted before the Crown built a road through the Crees’ hunting and trapping territory. In Haudenosaunee terms, though, the process of making treaties and maintaining relations is inseparable from the substance of the agreements, and the Crown followed that process, accepted it and promised to live by it, for over two centuries. “Procedural treaty rights” include dispute resolution mechanisms and the right to have disputes resolved; government-to-government relations at the highest level; and a right to have injuries addressed sincerely and effectively. The many treaty councils include many descriptions of injuries – from the killing of settlers’ pigs by Oneida warriors to the illegal flow of rum into Cayuga towns – that required redress. A careful review of the kinds of matters that required attention and redress as part of “procedural treaty rights” in a relationship of reciprocity and mutual respect would be a fruitful source of evidence of obligations. At no point in these discussions did the Crown

take the position that it would only redress injuries that it considered legally actionable according to its own laws. Nevertheless, it became clear afterwards that the Crown would protect its people's interests. Sir William Johnson, Superintendent General of Indian Affairs, wrote:

...I perceive that the Common Law is not at all calculated for enquiries between White people & Indians, where we are confined by Acts of Parliament framed & solely adapted for ourselves, & therefore in the plainest Case, & Even allowing no interested or powerfull Opposition, an uncivilized people must fail thro' the Want of necessary Evidences, Records, & proofs of facts, which the Common Law requires.¹⁷

Over the past three centuries, as well, the common law has become increasingly focused on the rights of individuals, and on rights in terms of commerce and development. The principles of "the commons"¹⁸ have receded in the face of the presumptive priorities of progress and development. This evolution has been chronicled in Morton Horwitz' *The Transformation of American Law, 1780-1860*.¹⁹ The jurisprudence on principles of compensation has been developed in an atmosphere that serves business and individuals, not collectivities and non-commercial entities.²⁰ "Culture" has not even been on the courts' horizon in the development of principles of compensation.

¹⁷ Sir William Johnson Papers 4:863-64.

¹⁸ Every English village and town had a "common," owned by nobody and everybody, which was the place fairs were held; where cattle could graze; where the Gypsies would park their caravans; where public outdoor meetings would be held. Many of these "commons" still exist.

¹⁹ Harvard University Press, 1976.

²⁰ An important example of how the "commons" has been transformed into a matter that is at the service of individual commercial rights is that of the fisheries of Canada's east coast. Once it became clear that room had to be made for Mi'kmaq fisheries within the limited commercial fishery (after the *Donald Marshall* cases); and once it was also clear that diminishing cod stocks meant there had to be fewer fishermen, the Government of Canada started "buying out" existing fishermen. But the fish stocks are a public resource: they are "owned" by the Crown for everyone in the country, in theory. The fishermen had no special ownership. They bought licenses each year. They paid for a right of access to a public resource. They bought boats and nets to harvest that resource, the way loggers buy skidders and chainsaws. Yet when the time came that Canada decided to issue fewer licenses, Canada "bought out" these fishermen, buying their boats and nets, and paying them for the loss of the licenses as if they owned something private, rather than a mere permitted access to something public.

Before beginning any discussion of cultural loss, it is necessary to recognize that principles of compensation apply and extend to many things that are not normally thought about in terms of compensation, often because these things are not “on the market.” It is necessary to think, too, about the origins of the legal idea that compensation should be made for certain things – and to recognize that the law of compensation has evolved over time.

Records of legal systems that required compensation for losses and wrongs date back to Babylonian times: the concept of “an eye for an eye, a tooth for a tooth,” which seems rather barbaric today, was revolutionary in its time for placing a limit on the amount of revenge that could be taken. In ancient Rome, the Aquilian Code established a simple process by which an individual whose property was injured²¹ by another could sue for compensation. That is, it was a beginning of civil (as distinct from criminal) law.

Though Kanienkeha:ka (Mohawk) law exists, it is more effective to seek to identify a broader set of Haudenosaunee (Iroquois) principles, both because Mohawk law exists within that larger system of thinking and law, and because Haudenosaunee law is better documented and more broadly understood. Traditional Haudenosaunee law also recognized some aspects of compensation, though they were entwined with principles of restoring peace and expressing atonement. Thus, it was customary to offer wampum to atone²² for a wrongful death – allegedly twice as much for a woman as for a man (because a woman was capable of bringing forth children) – in order to “cover the grave” so that the matter would be finished and a cycle of revenge would not begin. It would be wrong to suggest that the compensation offered was all about its commercial value:

²¹ The fundamental principle of Roman law was *jus*, which translates as what is right, righteous or proper. The idea of “injury” derives from a lack of *jus* (*iniuria*), which is therefore unfair or (another *jus*-derived word) “unjust.” A person who denied liability and was nevertheless found liable would be charged twice the debt (double indemnity) because his denial would be considered un-Roman or improper.

²² It has been suggested that European cultures tend to focus on *guilt*, which is an individual feeling, while tribal and Asian cultures tend to consider *shame*, which one feels only in relation to others. This is reflected in dealings with crime: an individual in a Canadian court is asked whether he pleads “guilty or not guilty” – a concept which, allegedly, many aboriginal defendants have difficulty understanding – while the atonement in Haudenosaunee law is something that one does in a gathering (modern “sentencing circles” are another manifestation of this approach).

rather, it had spiritual value, and the process itself permitted a grievance to become “reified” – to become concentrated or focused on a physical *thing* that could then be removed or transferred. For a relatively short period, wampum became a medium of commercial exchange; its spiritual value has originated long before that time,²³ and has long outlasted it.

North American legal systems have developed way of assigning economic compensation (that is, the payment of money) as compensation for losses that are not often thought of in terms of cash.

Snyder, Williams and Peterson provide a clear explanation of what this means.

To explain this point, we must differentiate among three types of economic value: the value a person assigns, the value the market assigns, and the value assigned by institutional fiat. From the personal point of view, there may be things for which there are no acceptable substitutes that money can buy, for example, the value of the life of a loved one or the sentimental value of a home that has been in the family for generations but is now condemned by eminent domain.

The market generally does not recognize the portion of such values not defensible as legally defined property rights. From the market point of view, there will be many substitutes for the loved one in the work force, so that aspect of the person will have a market value. The family home will also have a market price. These prices will generally fall short, however, of the value assigned by an individual to whom the life or the house has unique personal value. Given free choice, the individual might not be willing to sell at any price.

Some economic values are assigned by institutional fiat, such as the value of an eye or an arm, as specified by insurance contracts. These are economic values, but they do not necessarily compensate the victim for the full personal value of the loss. The individual might

²³ The spiritual significance of wampum arises from its association with the ceremony of condolence, which, with its powerful message of compassion, lies at the core of the making of the Great Law of Peace, the *Kaianerenko:wa*.

not be willing to sell the eye or the arm at any price, but the “price” assigned by the insurance convention is better than no compensation at all.²⁴

Struggling with losses that do not have simple price tags attached, the Canadian legal system has adopted a case-by-case approach to compensation. In *To v. Toronto Board of Education*, the court explained:

Each case must be given separate consideration to measure what Krever J. viewed as "immeasurable" and "incalculable" in *Gervais*, supra, at p. 201. Judges and juries are left to do the best they can in each case.²⁵

There is a difference, in law, between sentimental value, for which compensation is usually not paid, and value for a special purpose, for which compensation is paid. The fact that the special purpose is unique to an aboriginal people – for example, that an area is a fishing place, or a ceremonial place – does not do away with the need to compensate for that aspect of the land’s value.

Convention, both formal and informal, recognizes the economic value of many forms of loss. For example, Canadian courts have found no difficulty in compensating spouses for the loss of “consortium” or “amenities” when their husbands or wives are injured in a way that impairs their ability to provide either companionship or sexual functions.

But in these cases, as in most instances in Canadian law, the compensation has been to individuals, for individual losses, rather than to groups. Aboriginal rights and culture are

²⁴ Other typical episodes of a similar nature, probably more common: the \$100 limit Canada Post sets on lost mail, and the \$175 maximum that airlines pay for lost luggage.

²⁵ [2001] OJ No. 3490, 55 OR (3d) 641, Ontario Court of Appeal.

rights that, by their very definition, belong to groups,²⁶ while most of Canadian property law addresses individual rights.²⁷

Canadian courts have recognized that the aboriginal relationship to land – including the bundle of aboriginal rights connected with the land, can have “an important non-economic component:” that an activity conducted with land has cultural value. When this “non-economic component” is injured or affected, is compensation to be made? And if the thing itself is of a non-economic nature, is economic compensation appropriate or possible?

When the land is taken, the damage in this context is not the loss of the land itself, but the loss of the ability to continue the culture or the ceremony attached to the land. That loss is separate from economic loss. Since the Crown cannot offer compensation in the form of restoring or healing the ceremony or the cultural practices – only the injured people can have any hope of doing that, themselves – the Crown’s duty in these cases is to recognize the nature of the loss and to offer compensation that will enable the people to either address and remedy the loss, or accept monetary compensation in its place.

In *Osoyoos Indian Band v. Oliver (Town)*, the Supreme Court of Canada considered the *cultural* component of Indian lands to be a factor in determining whether land could be taken. The Court did not explain how this would work, but the statement is clear enough: “appropriate compensation” doesn’t cover the loss.

²⁶ *Delgam’uukw v. The Queen*, [1997] 3 SCR 1010 at paragraph 115, in a discussion of aboriginal title, and *R. v. Van der Peet*, [1996] 2 SCR 507 for the concept that aboriginal rights reflect practices that are integral to a distinctive society. The recent case of *Canadian National Railways v. Brant*, [2009] OR reaffirms the collective rather than individual nature of the rights.

²⁷ The *Canadian Charter of Rights and Freedoms* is essentially a listing of the rights of individuals to be protected from abuses by the state (the majority of the *Charter* being lifted, word for word, from international human rights conventions to which Canada was already a signatory). Indeed, most Canadian civil rights are individual rights, flowing from *Magna Carta* in the 13th century to the modern *Charter* in the constitution. Group rights are not an aspect of traditional British law. Section 35 of the 1982 *Constitution Act*, which protects aboriginal and treaty rights, is not part of the *Charter*. The difference between Pierre Trudeau’s vision of the “equality” of individual rights and the vision of both Quebec and aboriginal peoples of collective rights is explained in Michael Ignatieff’s *The Rights Revolution* (Toronto, Anansi Press,

The contention of the Attorney General that the duty of the Crown to the Band is restricted to appropriate compensation cannot be maintained in light of the special features of reserve land...in particular, the facts that the aboriginal interest in land has a unique cultural component, and that reserve lands cannot be unilaterally added to or replaced.²⁸

Canada's "specific claims" policy avoids these questions: it simply asserts that loss of use means *economic* loss of use, and that "compensation will be based on legal principles." Federal policy-makers and negotiators have taken the first statement to mean that there was a deliberate decision that compensation would *only* be for economic loss, and not for other kinds. Yet "legal principles" do cover other kinds of loss: in one sentence, the federal government's policy contains two very different attitudes toward compensation.

Maybe there is a consistency here: Canada sees loss of *use* as being economic only, but may acknowledge that loss of the land itself includes the "important non-economic aspect." This rationalization, though, does not address the basic issue that the loss most keenly felt in spiritual and cultural terms is the continuing loss of being able to use the land in these ways.

Perhaps the Government of Canada's failure to acknowledge the economic value of culture leads it to conclude that cultural loss is not compensable as an element of claims settlements. As in the case of the court cases following the damage caused by the *Exxon Valdez*, if an individual can show that the loss of his fishing can be measured in "pure" economic terms, Canada will consider compensating for that; where the loss is not merely of the livelihood but of the *way of life* associated with the activity ("cultural and ceremonial", to use the Supreme Court's terminology), the federal government would say that the loss is not economic and therefore not compensable under its policies. Yet, as we shall see, Canadian law provides compensation in cases involving individual loss for losses of a cultural nature, both by requiring different payment for losses that are greater

²⁸ [2001] 3 SCR 746 at Paragraph 54.

in some cultures than others,²⁹ and requiring compensation to be used to redress loss culturally.³⁰ The difficult boundary is that between “cultural loss” – loss that occurs within a culture – and “culture loss” – loss of aspects of the culture itself. Part of the difficulty is that some losses involve aspects of both: where a chief is injured and loses her part of her memory, and therefore her ability to function within her society, the loss is both a loss of status (a cultural loss) and a loss of culture itself.

There is an inherent contradiction within the specific claims policy: if forms of loss other than economic loss are compensable in Canadian law, and if compensation pursuant to the policy is to be based on “legal principles” – then the policy’s limiting compensation to “economic loss” would amount to turning one’s back on part of the law. The problem may simply be that the “specific claims policy” is a 1973 construct that has not kept up with the evolution of the law as articulated by the courts.³¹

In *Delgam’uukw*, having identified that there is a non-economic component of aboriginal rights and title, the Supreme Court of Canada then examined the “economic aspect.”³²

Aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic impact, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put.³³ The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal

²⁹ Described later in this paper, courts have awarded higher compensation for orthodox Jewish or Muslim widows or divorcees where their chances of remarriage are demonstrably lower than “mainstream” Canadian women.

³⁰ Described later, as well, courts have required defendants to pay for feasts to restore a person’s community respect, or a special headstone required to acknowledge a dead chief’s status.

³¹ Probably not: Canada’s claims policies tend to artificially reduce the Crown’s financial exposure: examples include the practice, unsupported by law, of offering 80% simple and 20% compound interest in claim settlements; or of arbitrarily concluding that a 2.7% rate of return is appropriate in its new “proxy model” for calculating compensation.

³² *Delgam’uukw*, *ibid.* at paragraph 166: the Court calls this an “inescapable economic component.”

³³ Elsewhere in the judgment, the Court stated that modern uses inconsistent with traditional uses could result in a loss of aboriginal title.

rights: *Guerin*. In keeping with the duty of honour and good faith of the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.³⁴

Having said that there is an “important non-economic component” to aboriginal title, and having suggested that this may include the “ceremonial and cultural” aspects of the land for the people, the Supreme Court nevertheless took only an economic approach in describing the nature of “accommodation:”

...the prior interest of the holders of aboriginal title in the land...that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licenses for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (i.e. license fees) be somewhat reduced...No doubt there will be difficulties in determining the precise value of the aboriginal interest in land and any grants, leases or licenses given for its exploitation. These difficult economic considerations obviously cannot be solved here.³⁵

As of 2009, there have been no appeal court cases addressing the value of aboriginal title to land: instead, there have been cases (like *Bernard, Marshall*) that make it increasingly difficult to prove aboriginal title at all.

The Supreme Court has offered an economic approach to addressing loss, and seems to be suggesting that participation in development, perhaps with a reduction in fees, might be an appropriate way of dealing with the taking of land that has both an economic and a non-economic – cultural and ceremonial – component.

³⁴ *Delgam’uukw, ibid.* at Paragraph 169.

³⁵ *Delgam’uukw, ibid.* at Paragraph 167. The inability to solve those issues in court led the Chief Justice to declare at the end of the judgment that negotiation, not litigation, was the proper route for addressing compensation.

There are two possible ways to address a situation in which land taken has an important non-economic component, a cultural component.

The first is to conclude that only the infringement of the “economic aspect” of the land triggers a duty to compensate, and that compensation is appropriately in economic measures – and that the “non-economic component,” when the land and trees and fish are affected or infringed, is not something that attracts a duty to compensate.

The second is to say that both aspects of aboriginal rights and title – the economic and non-economic – are capable of being affected, injured or infringed, and therefore both give rise to the duty to compensate. In the absence of other forms of compensation, cultural damage is to be compensated for in economic terms. That is what Canadian courts are saying.

Perhaps the most effective way to consider an approach to “non-economic loss” is to place it in the same category of legal thought as pain and suffering. These are hard to measure,³⁶ but they are very real.

It is useful to consider that when the Supreme Court uses the term “non-economic” to describe an aspect of the value of Indian land, it does not mean “without value.” It means that the value of the land is not linked to the land’s ability to produce revenue.

The problem, in part, is that lawyers and courts, when they think about compensation, immediately think in economic terms, seeking to measure the loss, first in terms of severity,³⁷ and then in terms of dollars. In some instances, if the loss is not economic,

³⁶ In *Peanuts*, Charlie Brown would measure pain in terms of whether it hurt more than a punch in the eye, or less than a punch in the eye.

³⁷ Canada proposed an independent review of the cases of individual former residential school students. The reviewers would interview each plaintiff and then classify the severity of the damage he or she had suffered – as light, moderate or severe. A similar craving for quantification appears in the thinking of the Supreme Court of Canada in the *Haida* decision, in which the federal and provincial governments are urged to classify the strength of claims (weak, strong, or “established”) in order to set the degree and depth of consultation required.

then it does not attract compensation. The law in the United States seems to be significantly different from the law in Canada.

In Alaska, when the *Exxon Valdez* foundered, releasing a massive oil spill, a generation of litigation resulted in a series of settlements and another series of court cases. The United States federal Court of appeals dismissed culturally-based claims of Alaska natives flowing from the *Valdez*. The terms of the court's dismissal are short, blunt, and refuse to recognize any cultural rights – or, indeed, any cultural differences. The issue was whether the Alaska Natives has suffered any non-economic injury different in kind from that suffered by the general public. The court said:

The determinative issue is whether cultural damage – damage to the Class members' "subsistence way of life" – may cause compensable injury. The Class asserts that its claims "comport with established principles of tort recovery" but cites no authority and does not dispute Exxon's assertion that no reported decision supports such a claim³⁸. Instead, the Class attempts to infuse an economic character into its claims by asserting that Class members suffered "economically measurable damages" beyond the commercial injury. The Class asserts that its cultural injury has a "pervasive economic foundation" and is based on "economic injuries from disruption of Native subsistence activities". The spill allegedly harmed "an integrated system of communal subsistence... inextricably bound up not only with the harvesting of natural resources damaged by the spill but also with the exchange, sharing and processing of those resources as the foundation of an established economic, social and religious structure.". These arguments miss the mark, however, for all the economic claims were resolved in the settlement, and the district court's judgment is specifically limited to non-economic claims.

Admittedly, the oil spill affected the communal life of Alaskan Natives, but whatever injury they suffered (other than the harvest loss), though potentially different in degree than that suffered by other Alaskans, was not different in kind. We agree with the district court that the right to lead subsistence lifestyles is not limited to Alaskan Natives. See

³⁸ If there is no statute confirming a right of action, the courts will look for a precedent. But there are no real precedents for compensation for loss of culture. To establish the right, the first case has to be able to show that it follows the same *principles* as other cases.

Alaska Const. art. VIII, SS 3, 15& 17; *Gilbert v. State Dept. of Fish and Game*, 803 P. @d 391, 399 (Alaska 1990). *McDowell v. State*, 785 P. 2d 1, 11-12 (Alaska 1989). While the oil spill may have affected Alaska Natives more severely than other members of the public, “the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual and psychological benefits in pristine natural surroundings” is shared by all Alaskans. Order No. 159 at 6. The Class has therefore failed to prove any “special injury” to support a public nuisance action.³⁹

The plaintiffs in the *Exxon Valdez* case had characterized their claim as for economic compensation for the non-economic aspects of their losses. The judge did not allow them to cross even the first threshold. Part of the problem was the failure of the plaintiffs to convince the judge that the “non-economic” aspect of the injuries they had suffered were more than their “subsistence lifestyle:” the Canadian courts’ recognition of the “ceremonial or cultural significance” of the rights and practices would have made a significant difference in this case: it is difficult to argue that matters of cultural or ceremonial significance to indigenous peoples are shared by all Canadians, but in several cases, Canadian courts have done just that.

The courts’ approach in the Alaskan cases may have been affected by the way the Alaska Native Claims Settlement Act purported to end Alaska’ native peoples’ aboriginal rights and replace them with rights that are statutorily defined. Another factor, clearly, is that United States courts, except where the “sovereignty” of Indian nations is involved, tend to adopt an “equal rights” approach, where Canadian courts have recognized the collective rights of groups within Canada.

The federal District Court decision in the *Alaska Natives v. Exxon* case was the same:

Judge Holland...[determined] that “villagers cannot collect damages for harm that was alleged to have been suffered by native culture.” While acknowledging that “the *Exxon Valdez* was a disaster of major proportions,” he concluded that “it did not deprive Alaska

³⁹ *Alaska Native Class v. Exxon*, US 9th Circuit Court of Appeals, 1997.

natives of their culture.” He based his opinion on the view that culture is “deeply embedded in the mind and the heart” and is therefore undiminished by external events such as environmental disaster.

The courts also ruled that the Alutiiq people had been deprived of access to resources, prompting a negotiated settlement with Exxon for US\$20 million. However, Judge Holland refused to recognize cultural differences between native and nonnative fishermen with respect to the impact of the oil spill. His position was supported by the testimony of the distinguished American cultural anthropologist Paul Bohannon, who had been engaged by Exxon. In his deposition to the courts, Bohannon defined culture as a strategy for adaptation, “[a] basic device for surviving and prospering – a set of ideas and artifacts by means of which human beings adapt to the environment, including the social environment.” He argued that Alutiiq culture and its core meanings were not substantially affected by the oil spill. Finally, he concluded that the impact of the natural disaster was the same for all of those persons affected, regardless of ethnic or cultural identity, declaring, “I believe the Alaska natives are no different from anybody else in the matter.” The judge agreed that there was no basis for distinguishing between the claims for loss of the two communities; cultural difference was irrelevant to his findings. “All Alaskans have the right to lead subsistence lifestyles, not just Alaska natives,⁴⁰” Holland later explained.⁴¹

The *Exxon Valdez* cases point to a consistent principle in United States law. Where aboriginal cultures are concerned, to attract protection or compensation, the infringement cannot be minimal, or even damaging: it must be profoundly destructive and preventive. It must “deprive them of their culture,” not merely damage the culture.⁴² Otherwise, the

⁴⁰ This is not substantially different from Anatole France’s observation that in France, the rich as well as the poor are prohibited from begging or sleeping under bridges.

⁴¹ Kirsch, 2001:171. The decision points out another challenge in taking damage to group culture to court: it must be a “class action”, not an individual action, and this immediately triggers the defence that the class is not “certifiable” in that not all members of the group suffered the same damage, the same kind of damage, or damage to the same extent. Class actions only work where the group can be clearly identified and where the nature of the damage suffered is similar or the same. Residential school court class actions in Canada faced numerous challenges to the viability of the classes.

⁴² Severe damage to rights carries an unexpected additional blow, as the Cayugas in New York discovered. If your land has been illegally taken away, and occupied by innocent third parties for an extended period, all your remedies, including trespass, disappear.

damage is no different than that suffered by everyone, the general public, and therefore attracts no special right to compensation. The case of *Navajo Nation et al. v. U.S. Forestry Service* illustrates this principle. In that case, land in the San Francisco Peaks had been leased from the Forestry Service for the purpose of a ski resort. Though, as the trial judge pointed out, those who choose to operate a ski resort in a desert should not expect a right to precipitation, the operators did apply to the federal government for permission to create artificial snow with treated sewage waste water. The trial judge overruled the permit, agreeing that the mountains were indeed sacred to the tribes, and that requiring them to accept the spreading of waste water on their sacred places would be like requiring Catholics to accept that water in their baptismal fonts. By an 8-3 vote, the Court of Appeal overruled the trial judge, finding that, while the use of sewage waste water in the mountains certainly offended the tribes' sensibilities, that was not enough to trigger legal protection. It is worth reproducing large extracts of the judgment, to understand both the nature of the loss and the nature of the reasoning that denied the remedies.

Plaintiff Indian tribes and their members consider the San Francisco Peaks in Northern Arizona to be sacred in their religion. They contend that the use of recycled wastewater to make artificial snow for skiing on the Snowbowl, a ski area that covers approximately one percent of the San Francisco Peaks, will spiritually contaminate the entire mountain and devalue their religious exercises. The district court found the Plaintiffs' beliefs to be sincere; there is no basis to challenge that finding. The district court also found, however, that there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow. No plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified. The Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes. On the mountain, they continue to pray, conduct their religious ceremonies, and collect plants for religious use.

Thus, the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience. That is, the presence of the artificial snow on the Peaks is offensive to the

Plaintiffs’ feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain. Nevertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a “substantial burden”—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the free exercise of religion. Where, as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs’ religious beliefs, there is no “substantial burden” on the exercise of their religion.⁴³

The only effect of the proposed upgrades is on the Plaintiffs’ subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs’ religious sensibilities. To plaintiffs, it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain. Nevertheless, under Supreme Court precedent, the diminishment of spiritual fulfillment—serious though it may be—is not a “substantial burden” on the free exercise of religion.⁴⁴

The dissenting judges were eloquently contemptuous of the majority’s findings:

In addition to misstating the law under RFRA, the majority misunderstands the nature of religious belief and practice. The majority concludes that spraying up to 1.5 million gallons of treated sewage effluent per day on Humphrey’s Peak, the most sacred of the San Francisco Peaks, does not impose a “substantial burden” on the Indians’ “exercise of religion.” In so concluding, the majority emphasizes the lack of physical harm. According to the majority, “[T]here are no plants, springs, natural resources, shrines with religious significance, nor any religious ceremonies that would be physically affected” by using treated sewage effluent to make artificial snow. In the majority’s view, the “sole effect” of using treated sewage effluent on Humphrey’s Peak is on the Indians’ “subjective spiritual experience.” Maj. op. at 10041. The majority’s emphasis on physical harm ignores the nature of religious belief and exercise, as well as the

⁴³ P. 10042

⁴⁴ P. 10054

nature of the inquiry mandated by RFRA. The majority characterizes the Indians' religious belief and exercise as merely a "subjective spiritual experience." Though I would not choose precisely those words, they come close to describing what the majority thinks it is *not* describing — a genuine religious belief and exercise. Contrary to what the majority writes, and appears to think, religious exercise invariably, and centrally, involves a "subjective spiritual experience." Religious belief concerns the human spirit and religious faith, not physical harm and scientific fact. Religious exercise sometimes involves physical things, but the physical or scientific character of these things is secondary to their spiritual and religious meaning. The centerpiece of religious belief and exercise is the "subjective" and the "spiritual." As William James wrote, religion may be defined as "the feelings, acts, and experiences of individual men [and women] in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine." WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE* 31-32 (1929).

The majority's misunderstanding of the nature of religious belief and exercise as merely "subjective" is an excuse for refusing to accept the Indians' religion as worthy of protection under RFRA. According to undisputed evidence in the record, and the finding of the district court, the Indians in this case are sincere in their religious beliefs. The record makes clear that their religious beliefs and practice do not merely require the continued existence of certain plants and shrines. They require that these plants and shrines be spiritually pure, undesecrated by treated sewage effluent. Perhaps the strength of the Indians' argument in this case could be seen more easily by the majority if another religion were at issue. For example, I do not think that the majority would accept that the burden on a Christian's exercise of religion would be insubstantial if the government permitted only treated sewage effluent for use as baptismal water, based on an argument that no physical harm would result and any adverse effect would merely be on the Christian's "subjective spiritual experience." Nor do I think the majority would accept such an argument for an orthodox Jew if the government permitted only non-Kosher food.⁴⁵

The San Francisco Peaks have been at the center of religious beliefs and practices of Indian

⁴⁵ pp. 10104-06.

tribes of the Southwest since time out of mind. Humphrey's Peak, the holiest of the San Francisco Peaks, will from this time forward be desecrated and spiritually impure. In part, the majority justifies its holding on the ground that what it calls "public park land" is land that "belongs to everyone." Maj. op. at 10042. There is a tragic irony in this justification. The United States government took this land from the Indians by force. The majority now uses that forcible deprivation as a justification for spraying treated sewage effluent on the holiest of the Indians' holy mountains, and for refusing to recognize that this action constitutes a substantial burden on the Indians' exercise of their religion.⁴⁶

If the principle that emerges from the *Exxon Valdez* case is that if the aspects of your culture that are damaged *look* like other people's activities, you get no compensation, the principle that emerges from the San Francisco Peaks case is that, to attract protection, the damage must be profoundly destructive. There is a common principle to the two cases, as well: the natural resources to which an indigenous culture is attached "belong to everyone," so that damage to those resources does not trigger greater damage for one kind of people than another. While recognizing the attachment that aboriginal peoples have to their land, United States courts do not recognize that it entails special legal rights to protection or compensation.

If Canadian courts recognize a separate "cultural and ceremonial significance" in the relationship between aboriginal peoples and their land, a significance that is not the same as that of non-aboriginal peoples' relationships, then a Canadian court would not have made the finding of the *Exxon Valdez* courts – that the plaintiffs had suffered no special damage.

As we shall see, Canadian courts would require the damage to be substantial, but they would not go as far as the majority in the *Navajo Nation* case, to require that the damage be such as to totally destroy or prevent the exercise of the right.⁴⁷

⁴⁶ P. 10137.

⁴⁷ In Canadian law, a right that has been totally destroyed, to the point where it was absolutely prohibited (instead of regulated) before 1982, would be said to have been "extinguished."

In Aotearoa, as a result of negotiations in the context of the Waitangi Treaty, both the Government of New Zealand and the Maori *iwis* have recognized the nature of the loss as greater than simply financial, and the nature of atonement and settlement as more than money can buy: the Waikato-Tainui settlement agreement begins by acknowledging:

Widespread suffering, distress, and deprivation were caused to the Waikato iwi... as a result of the war waged against them, the loss of life, the destruction of their taonga and property, and the confiscations of their lands, and the effects of the Raupatu have lasted for generations.

The injustice of the Raupatu is as keenly felt by Waikato-Tainui today as in the past... The Court of Appeal noted "...an expressed sense of the crippling impact of Raupatu on the welfare, economy, and potential development of Tainui," and that subsequent annual monetary payments made by the Government were trivial "in present day money values," and concluded that "some form of more real and constructive compensation is obviously called for if the Treaty is to be honoured."⁴⁸

The Government of Canada, in its claims policies, limits compensation only to "economic loss of use." In negotiations, government officials have clarified that this means only the "economic component" of the land, and not the "non-economic." By imposing this limit, I suggest that it falls short of recognizing and implementing the principles of Canadian law. Explaining that is part of the purpose of this paper.

The Indian Claims Commission, a now-defunct independent body established to consider "specific claims" in Canada, has addressed cases in which cultural or spiritual damage was claimed. In the *Canupawakpa Dakota First Nation Inquiry into the Turtle Mountain Surrender Claim*, the Commission found:

It seems to us that the claim put forward by the Canupawakpa Dakota First Nation has less to do with monetary compensation that it does with the connection between these Sioux people and the Turtle Mountain Indian Reserve No. 60... In pursuit of a just

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From the Preamble to the Waikato-Tainui Raupatu Claims Settlement Act.

solution and one that recognizes the deep spiritual connection these Dakota Sioux people have to this land, we believe the Government of Canada should work with the Dakota Sioux people to acquire and properly designate the lands where the ancestors of the Turtle Mountain Band are buried. The Government of Canada does not have a legal obligation to undertake such a project but in our view it would be the equitable and moral thing to do.⁴⁹

In the *Turtle Mountain Inquiry*, the Commission addressed a “specific claim” and found no legal basis for it – but it nevertheless acknowledged a spiritual aspect of the matter that required redress. Is the spiritual value of the land distinct and separable from its other values? In a matter involving an unlawful or legally flawed taking, that need not be answered: it certainly has not been considered in any depth by Canadian courts.⁵⁰

In summary, aboriginal rights are core practices of an indigenous culture. By their very nature and definition in Canadian law, they are inextricably linked to – “integral to” – the distinctive culture of the people. The Crown is committed to avoiding injury to aboriginal rights. Where, in order to accomplish a justifiable public purpose, there is no alternative but to affect aboriginal rights, the law states that the Crown must strain to affect those rights as little as possible, and to make appropriate compensation where injury cannot be avoided. “Settlement agreements”⁵¹ address compensation for loss or injury to hunting, trapping and other land use rights – including a right to control or exclude other users of land. These agreements generally do not address losses as “culture loss,” though, or if they do, they do so by bundling such losses in among the general matters for which compensation is to be made.⁵² But the fact remains that cultural or non-economic rights

⁴⁹ *Canupawakpa Dakota First Nation: Inquiry into the Turtle Mountain Surrender Claim*; Indian Claims Commission, Ottawa, July 2003, pp. 90-91.

⁵⁰ See also, in the Indian Claims Commission, the *Taku-Wenah Inquiry* in 2000.

⁵¹ The Constitution of Canada states that “land claim settlement agreements” have the same status as treaties – and therefore the same constitutional entrenchment and protection. However, the Government of Canada asserts that this only applies to “comprehensive claim” settlements, and that the agreements that resolve “specific claims” are not “land claim settlement agreements”, even though it admits that these are agreements that settle land claims.

⁵² Generally, this is accomplished in negative or broad terms rather than in positive or specific ones. Compensation is made without a detailed breakdown of what is being paid for, or how much is allocated to each head of compensation; the surrender or indemnity to Canada, which includes a promise that no more

among the rights that can be injured – and often are injured – by the taking of land, and that compensation ought to be made for their taking.

The fact that the rights and cultural values involved do not easily lend themselves to economic valuation or compensation is a separate challenge. If economic compensation is not possible, not adequate or not appropriate, do other forms of compensation exist?

We need to recognize, too, that we are discussing two very closely related and probably overlapping ideas: the idea that the loss of indigenous lands involves a compensable loss for the unique cultural component of the value of the land, and the idea that loss of land leads to damage to or loss of culture itself. Canadian courts have certainly acknowledged the former; the latter is an associated conclusion. The third step – that loss of culture, or damage to culture, whether associated with land loss or resulting from other impact, is compensable in Canadian law – comes after the first two.

claims will be made, describes the rights in respect of which compensation is being made in general and all-encompassing rather than specific terms.

1. **The Relationship Between “Culture” and Aboriginal Rights**

Every age, every culture, every custom and tradition has its own character, its own weakness and its own strength, its beauties and cruelties; it accepts certain sufferings as matters of course, puts up patiently with certain evils. Human life is reduced to real suffering, to hell, only when two ages, two cultures and religions overlap.

Herman Hesse

Whenever I hear the word culture, I reach for my revolver.

Hermann Goering⁵³

Before we begin to consider whether damage to culture triggers an obligation to make compensation, we ought to decide what is “culture”. There is no legal definition. Wade Davis, “explorer in residence” of the National Geographic Society, wrote:

The very word *culture* defies precise definition, even as the concept embraces multitudes. A small, isolated society of a few hundred men and women in the mountains of New Guinea has its own culture, but so, too, do countries such as Ireland and France. Distinct cultures may share similar beliefs – indeed, this is the norm in lands that have been inspired by Christianity, Islam and Buddhism. While language in general tends to delineate unique world views, there are peoples in Alaska, for example, that have lost the ability to speak in their native tongues, yet still maintain a thriving and vibrant sense of culture.

Perhaps the closest we can come to a meaningful definition of *culture* is the acknowledgment that each is a unique and ever-changing constellation we recognize through the observation and study of its language, religion, social and economic organization, decorative arts, stories, myths, ritual practices and beliefs, and a host of

⁵³ Perhaps the most famous line attributed to Goering, who may actually have used it, this probably comes from the 1933 play *Schlageter* by Hand Johst.

other adaptive traits and characteristics. The full measure of a culture embraces both the actions of a people and the quality of their aspirations, the nature of the metaphors that propel their lives. And no description of a people can be complete without reference to the character of their homeland, the ecological and geographical matrix in which they have determined to live out their destiny. Just as landscape defines character, culture springs from a spirit of place.⁵⁴

Indigenous peoples and “other Canadians” have differing views on what constitutes “the people,” and this difference has legal significance to the relationship between people and land. Traditional Haudenosaunee, including Mohawks, would say that “the people” consist of the ancestors, the people who are alive today, and the generations yet unborn. The ancestors, they will say, have been returned to Mother Earth. The “coming faces” are still underground, and they are a powerful reason why we should tread gently on the earth, for we are walking on the faces of our own unborn children. The connection between the people and the land is increased powerfully by the fact that so many of the people are inseparable from the land. In contrast, the average Canadian, in reply to a question about the Canadian people, would cite the present population of about 30 million, without reference to past or future generations, and therefore without reference to the land. This difference is reflected in Canada’s constitution in a way that has not received attention. The average Canadian seeks constitutional protection of “mobility rights,” the right to live and work anywhere in the country, and to move around freely. In contrast, the parts of the 1982 Constitution addressing the rights of aboriginal peoples are centred on “site-specific” matters, and can be summarized as the right of “non-mobility”: the right not to be removed from one’s land. One reason land has cultural value to aboriginal peoples is its connection to the earlier and unborn generations, and this view of a people’s identity and nature is central – integral – to its culture.

⁵⁴ Wade Davis, *The Wayfinders: why ancient wisdom matters in the modern world*, Anansi Press, 2009, p. 33.

Since Canadian courts have said that the “aboriginal perspective” is important in any discussion of aboriginal land rights and title, the difference between the aboriginal view of “non-mobility” and the Canadian view of “mobility” is significant.

Canadian courts have not directly addressed the issue of whether cultural loss is a compensable head of damage (as distinct from the conclusion that the cultural aspect of aboriginal land is a distinct component of its value). However, they have done so in an indirect but inescapable and clear manner by linking aboriginal rights closely to a people’s distinctive culture.

In 1982, the Canadian Constitution was amended. Section 35(1) of the *Constitution Act, 1982* provided that “existing aboriginal and treaty rights” were recognized and affirmed. While earlier court cases had referred to aboriginal rights, they had done so only in general terms, almost always in relation to hunting and fishing, and almost always in situations in which federal and provincial laws were held to override such rights. As a result, there was never any real need, before 1982, for the courts to define the content and nature of the rights. No Canadian statute defined or even addressed the rights, either.

Since 1982, the courts have addressed the nature of “culture”, in an aboriginal or indigenous context, in several important court cases.⁵⁵ The definition of an “aboriginal right” has been linked to the people’s “distinctive culture,” so that aboriginal rights are practices that are “integral to the culture.” The courts have said that where aboriginal rights are about to be infringed upon, the Crown is obliged to pursue a process of avoidance, minimization, notice, consultation, negotiation – and compensation.

The first point to consider is that *aboriginal rights are defined in relation to a people’s distinctive culture*. An aboriginal right has been defined by the courts as a practice that is

⁵⁵ Of the first sixty cases produced by a search for the word “culture” in Supreme Court of Canada decisions, thirty-four involved aboriginal rights and aboriginal people, and most of the cases involved land. The link between land and culture, for aboriginal people, is deeper and more significant than for other people – at least, in terms of how the courts think about them.

so integral to an indigenous people's distinctive culture that they would not be the same people without it.

The nature of an applicant's claim must be delineated in terms of the particular practice, custom or tradition under which it is claimed; the significance of the practice, custom or tradition to the aboriginal community is a factor to be considered in determining whether the practice, custom or tradition is integral to the distinctive culture, but the significance of a practice, custom or tradition cannot, itself, constitute an aboriginal right.

...in order to inform the court's analysis the activities must be considered at a general rather than at a specific level. Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly. In order to be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question.

To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive – that it was one of the things that truly made the society what it was.

This aspect of the integral to a distinctive society test arises from the fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive societies it is to what makes these societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g. eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society

distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).

...A practical way of thinking about this problem is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, culture or tradition is a defining feature of the culture in question.⁵⁶

To put this principle in reverse, one would say that an indigenous people without a distinctive culture would have no aboriginal rights at all.⁵⁷ An indication of this line of reasoning appears in the case of *Powley v. The Queen*, in which the Supreme Court of Canada, considering the nature of Métis aboriginal hunting rights for the first time, stated that, to be a Métis, a person had to “participate in the cultural life of the Métis community.”⁵⁸ If the person had no such participation, even though he might have Métis ancestry, he would not be considered Métis in Canadian law for the purpose of exercising Métis aboriginal rights.⁵⁹

The Government of Canada, in court, has tended to make it as difficult as possible for an aboriginal people to establish loss of culture as a compensable head of damage. That tactic was obvious in the case of *Kwakiutl Nation v. Canada*, in which the court agreed, in a treaty rights case, that because “cultural loss” is a novel head of damage, the

⁵⁶ *R. v. Van der Peet*, [1996] 2 SCR 507, Supreme Court of Canada, Paragraphs 52 to 59.

⁵⁷ Another aspect of Canadian legal doctrine about “distinctiveness” is that the practice in question must not be one that is shared by all (or most) human societies.

⁵⁸ There were two other things that a person had to prove in order to satisfy the courts that he was a Métis. The person had to “self-define” as a Métis, and do so before it became fashionable or convenient to be a Métis (this requirement might prove difficult for people born after that time). And the person had to be connected to a Métis community by descent (a requirement that seems to reject naturalization by marriage or adoption).

⁵⁹ The Supreme Court in *Powley* actually set three criteria for Métis identity. First, the person had to have “self-identified” as Métis before it had become advantageous or fashionable to do so – an impossibility for people born after the court decision. Second, he had to be linked to an actual Métis community by descent. Third, he had to be an active participant in the cultural life of the community. While the third criterion is important because it establishes that communities are political entities rather than racial ones, the combination of the three criteria make it increasingly difficult for a person to prove he is a Métis.

plaintiffs would bear a heavier than usual burden of proving its existence, in the form of providing in the pleadings “greater detail in material facts supporting the claim.”⁶⁰

Another connection between culture and rights has been made by Canadian courts in a series of cases involving liability for income tax. The basic principle of Section 87 of the *Indian Act* is that the property of an Indian situated on an Indian reserve is exempt from all forms of taxation. In *Nowegejick v. The Queen*,⁶¹ the Supreme Court of Canada found that an Indian’s wages from a source on a reserve were exempt from income tax, even where the majority of his work was done off-reserve. In *Southwind v. Minister of National Revenue*, an Ojibway doing work almost identical to that of Nowegejick was found to be taxable, because, though his place of business was on-reserve and his work was substantially off-reserve, he had “entered the commercial mainstream”.⁶² In *Williams v. The Queen*, the Supreme Court of Canada moved to what has been called a “connecting factors analysis”, measuring the extent to which the worker, the employer and the work are connected with the reserve, and with “the life of the reserve”. The courts referred to the “Indian-ness” of the work, suggesting that the more “Indian” work is, the less it has “entered the commercial mainstream.”⁶³ In other words, there is a value, for tax purposes, in having work that is “Indian” in nature – and culture is a fundamental aspect of “Indian-ness”. But the courts have not defined what “Indian-ness” is.

In the *Kitkatla* decision, the Supreme Court of Canada concluded that it was possible that some of the physical elements of culture may be linked to constitutionally protected rights. In that case, the issue was whether the presence of “culturally modified trees” was a reason to prevent the provincial government from permitting the logging of the forests. The Supreme Court of Canada said:

⁶⁰ *Kwakiutl Nation v. Canada (Attorney General)* [2004] BCJ No. 278, [2004] 2 CNLR 82 at Paragraphs 41 to 52.

⁶¹ [1983] 1 SCR 29..

⁶² [1991] 4 CNLR 75.

⁶³ The “connecting factors analysis” leads to anomalies. Rachel Shilling, who worked in Toronto with an all-aboriginal clientele providing traditional Ojibway medicine on behalf of an aboriginal non-profit agency, was held by the Federal Court of Appeal to have “entered the commercial mainstream”. Alex Akiwenzie, working with an all-aboriginal clientele on behalf of the Department of Indian Affairs and Northern Development, was found not to have “entered the commercial mainstream”.

Heritage properties and sites may certainly, in some cases, turn out to be a key part of the collective identity of a people. In some future case, it might very well be that some component of the cultural heritage of a First Nation would go to the core of its identity in such a way that it would affect the federal power over native affairs and the applicability of provincial legislation.⁶⁴

In *Kitkatla*, the Supreme Court of Canada also recognized that it was possible for the preservation of cultural objects to have “value” – even as the Court set out ways to justify their destruction for purposes that have “greater value” to other people:

In some cases, the value of preserving an object may be greatly outweighed by the benefit that could accrue from allowing it to be removed or destroyed in order to accomplish a goal deemed by society to be of greater value.⁶⁵

Preserving objects has “value.” So, presumably, do the objects themselves. But is this “economic value”?

One problem with having to prove that a practice or right goes “to the core of identity” is the possibility of the courts shifting “characterization” of the right.⁶⁶ For example, in the *Mitchell* case, Kanentakeron had proved, to the satisfaction of the trial court and the Federal Court of Appeal, that trade was “integral” to Mohawk culture at the time of “first contact with Europeans” or shortly thereafter. In reconsidering the evidence, the Supreme Court of Canada decided that aboriginal rights have to be “site-specific,” and therefore that the trade in question was not “trade” in general, but rather “north-south trade” across

⁶⁴ . . . at Para. 78. The Kitkatla people had argued that the effect on the “culturally modified trees” so affected their culture that it was the federal and not the provincial government that would have the authority (under the constitutional provisions granting exclusive authority to the Parliament of Canada to make laws about “Indians, and lands reserved for Indians”), to legislate in respect of the trees.

⁶⁵ *Kitkatla*, at Para. 62.

⁶⁶ In *R. v. Cardinal*, the Supreme Court stated that provincial laws regulating aspects of estates did not “go to the core of Indian-ness” and that the Crown had not intended to make Indian reserves into “enclaves” where laws of general application did not apply. The decision raised the continuing question of what constitutes “the core of Indian-ness.” Later cases on aboriginal rights have moved that core into the equally undefinable field of matters “integral to the distinctive culture.”

the St. Lawrence River. There was virtually no evidence of that trade – partly because the applicants weren't aware that this was what they had to prove, but also because it's hard to find 400-year-old evidence at the best of times. If appeal courts can change what needs to be proved, and move the goalposts beyond the reach of available evidence, aboriginal rights will have an increasingly difficult time in court.⁶⁷

If the rights are “site-specific,” and may not exist in other locations, and if the rights are inextricably linked to culture, then that supports the conclusion that cultural aspects of the land and its value must be taken into account in considering compensation, since, as the judge in *Osoyoos* noted, there is no easy replacement.

The difficulty of replacing the land is not only administrative, though Canada's “additions to reserves” mechanisms are startlingly inefficient. Because Canada insists that land be acquired on the open market, from willing sellers, over time, where the loss of land has been substantial, it is difficult to assemble a large block of land, and small, checkerboarded plots, especially where they have been clearcut and “improved”, are not replacements for the large natural areas that were lost. Communities may have to wait decades to recover enough land, and generations for the land to be restored.

In 1990, the Supreme Court of Canada considered for the first time the legal impact of the recognition and affirmation of “existing aboriginal and treaty rights” in Section 35(1) of the *Constitution Act, 1982*. In the *Sparrow* decision, the Court concluded that a right that had not been absolutely abolished was still “existing,” no matter how wounded or regulated, and that any further infringements on the right were possible, but had to pass a carefully structured test. The *Sparrow* test can be summarized as a burden on the Crown⁶⁸ to show:

⁶⁷ This phenomenon – that the court will announce that it intends to be generous in allowing evidence, but requiring “site-specific” evidence that is likely to be impossible to produce, given the several centuries intervening since the “first contact” date, and the lack of written records – was accentuated in the 2006 *Bernard and Marshall* decision.

⁶⁸ The aboriginal people in question have a burden to satisfy first: they must show that the practice in question is an aboriginal right and that the infringement has been or would be “substantial.” Thus, in *Coté*, the Supreme Court wondered decided that a park entrance fee that affected Algonquin hunting was not a

1. that the measures which would infringe the aboriginal right are justified;⁶⁹
2. that the measures involve the least damage to, or infringement upon, aboriginal rights or title;⁷⁰
3. that the measures were taken only after the non-aboriginal users of the resource had been regulated (this is known as the “first-in, last-out” principle);
4. that there had been consultation with the aboriginal people about the measures;⁷¹
5. that compensation had been offered for the loss.

It is the last statement that gives rise to the suggestion that a taking of aboriginal rights, or an infringement on those rights, must involve compensation.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include questions of whether there has been as little infringement as possible in order to effect the desired result; *whether, in a situation of expropriation, fair compensation is available*; and whether the aboriginal group has been consulted with respect to the conservation measures being implemented [italics added].

This statement is one of the few instances in which a Canadian court has linked the aboriginal rights of an aboriginal group with a right to compensation. What did the court mean? If fair compensation was not available, would this mean that justification for the taking would not be possible? Would it mean that justification of a taking becomes more difficult as fair compensation becomes less available? The Court did not clarify what

“substantial” infringement, especially since the money would be used by the provincial government to fund conservation efforts.

⁶⁹ In *Sparrow*, the Supreme Court stated that the conservation of fish is a justifiable public purpose. In *Delgamuukw*, the Court went further and included in such purposes “the settlement of immigrants” and “the development of natural resources,” which led some scholars to conclude that virtually anything that a government wants to do can be classed as a “justifiable public purpose” that would be legal grounds for taking Indian lands and resources.

⁷⁰ This principle was extended to land – Indian reserve land – in the *Semiahmoo* decision.

⁷¹ The nature of the consultation required has been further defined by the Supreme Court of Canada in 2004 and 2005 in the *Haida Nation*, *Taku Tlingit*, and *Mikisew Cree* decisions. Consultation has become a procedural right, linked to the honour of the Crown, and is independent of the fiduciary relationship that grounded much other litigation.

kinds of “infringement” amount to “expropriation”, nor whether it is only in cases of “expropriation” that compensation ought to be made.

“Infringement” sounds minor – the words suggests that only the “fringes” of the rights have been injured. Infringement is not minor: it is a serious, nasty concept: its primary definition is to

...act contrary to; violate (a law, an oath, etc.); act in defiance of (another’s rights etc.).⁷²

“Expropriation” means “to take away property from its owner; to dispossess.” Putting the concept into a discussion of aboriginal rights means that the court must have considered that aboriginal rights are capable of being seen as “property” – or at least that some of them would be seen in that vein.

As property, they would be owned communally: the Supreme Court made that clear when it began to describe aboriginal title in the *Guerin* case.

The suggestion is that the principles of compensation to be applied to an infringement, and therefore a violation and a taking, of aboriginal rights are the principles of compensation that apply in the law of expropriation. It is unusual that analysis of whether fair compensation is available is to be carried out early, at the justification stage, rather than at some later negotiation: in expropriation law in Canada, the expropriation occurs at the beginning, and negotiation about the value to be paid in compensation takes place once the original owner’s property rights have passed to the expropriating authority. In cases of infringements on aboriginal rights, the availability of fair compensation may determine whether the taking can happen at all.

⁷² *Concise Oxford Dictionary*, 8th Edition, Clarendon Press, Oxford 1990 p. 613.

Some components of the cultural heritage of an indigenous group lie at or near the core of the group's identity.

These will be recognized by Canadian courts as aboriginal rights.

The “practices, customs or traditions” which constitute aboriginal rights are aspects of the group's distinctive culture.

When an aboriginal right is infringed upon or expropriated, even “justifiably” and pursuant to due process of law, its possessors are entitled to appropriate compensation.

In other words, compensation is payable for injury to culture.

If culture loss is caused by the Crown, the Crown is liable to compensate for that loss.

2. Compensation for the “Non-economic Cultural Component” in Aboriginal lands

Canadian courts have said that aboriginal lands are different from other people’s lands because they contain an important cultural component. Or, to put it slightly differently, aboriginal people have a different relationship with their land than other people in Canada do, and that difference is cultural.

In *Osoyoos Indian Band v. Oliver (Town)*, the Supreme Court of Canada stated that the “unique cultural component” of reserve land meant that “appropriate compensation” was not enough to satisfy the Crown’s duty. It means that reserve land cannot simply be converted into cash.

The contention of the Attorney General that the duty of the Crown to the Band is restricted to appropriate compensation cannot be maintained in light of the special features of reserve land...in particular, the facts that the aboriginal interest in land has a unique cultural component, and that reserve lands cannot be unilaterally added to or replaced.⁷³

In *Kitkatla* the Supreme Court of Canada said:

Heritage properties and sites may certainly, in some cases, turn out to be a key part of the collective identity of a people. In some future case, it might very well be that some component of the cultural heritage of a First Nation would go to the core of its identity in such a way that it would affect the federal power over native affairs and the applicability of provincial legislation.⁷⁴

⁷³ [2001] 3 SCR 746 at Paragraph 54.

⁷⁴ ...at Para. 78.

In both *Osoyoos* and *Kitkatla*, the court considered that the cultural component of the land affected, or could affect, the Crown's ability to take it at all. This would be in part because making "appropriate" compensation would be impossible. This thinking may come from the law of injunctions, in which a court weighs whether the damage sought to be prevented can be compensated in cash.⁷⁵ The "cultural component" of indigenous lands was acknowledged by the Supreme Court of Canada in *Delgam'uukw*:

The inalienability of lands held pursuant to aboriginal title suggests that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an *important non-economic component*. The land has an inherent and unique value in itself.⁷⁶

The court said that aboriginal people have a "special bond with the land." One path to aboriginal title can be the land's "ceremonial or cultural significance."⁷⁷ It is likely that the court was thinking about spiritual aspects, matters not only outside economics but also outside the stream of modern Canadian law. Yet spiritual matters are not outside the thinking of all common law jurisdictions. In the *Miriuwung Gajerrong* case in Australia,⁷⁸ the court acknowledged that "the secular and spiritual aspects of the aboriginal connection with the land are twin elements of the rights to the land. Thus the obligations to care for country has a secular aspect – burning the land – and a spiritual aspect, acquiring knowledge of ritual." In *Hayes v. Northern Territory*,⁷⁹ the control and management of spiritual forces was identified as a valid incident of native title in Australia.

⁷⁵ For example, in the *Lyell Island* case, the court concluded that a delay of two or three years until trial created a balance of inconvenience in favour of the Haidas over the loggers, for if the loggers were found to be in the right, the trees would still be there to be taken, while if the Haidas were right, and the injunction failed, they would be right in a wasteland.

⁷⁶ *Delgam'uukw*, *ibid.* at para. 129. There is also what the Court called an "inescapable economic component"

⁷⁷ *Delgam'uukw*, *ibid.* at paragraph 128.

⁷⁸ *State of Western Australia and Ors v. Ward and Ors* (2000) 170 ALR 159 (*Miriuwung Gajerrong*) at 376, per North J.

⁷⁹ *Hayes v. Northern Territory*, (1999) FCA 1248.

In *Guerin*, in 1984, the Supreme Court of Canada was explicit in saying that the nature of aboriginal title in unsurrendered land in which aboriginal title persists and in reserve lands under the *Indian Act* is essentially the same. That thinking has obviously continued, since *Osoyoos*, *Kitkatla* and *Delgam'ukw* dealt with both reserve and unsurrendered lands.

Canada's "comprehensive claims policy" is intended to lead to agreements where aboriginal people have been in exclusive, continuous occupation of their lands, and where the Crown will compensate those peoples for the taking of the land for the Crown's purposes. Common-law rules governing compensation in expropriations are not applied to these essentially political agreements.

Is the unique value of aboriginal lands a "special value to the owner" which ought not to attract compensation in the law of expropriation? The law recognizes its uniqueness in the sense that it ought not to be taken, or ought not to have been taken. Once taken, though, the uniqueness requires a different approach to compensation. Surely it cannot be that the Crown ought to avoid taking these lands because of their unique nature and additional value to the aboriginal people, but when the taking actually happens, the cost to the taker would be the same as if the land were an ordinary "fungible commodity."

The U. S. Federal Court in *Navajo Nation v. United States Forestry Service* began to consider how compensation for such unique lands might be found.

Compensation may be far-reaching, assessing losses from social, spiritual and broader cultural deprivation which will necessitate relationships with valuation, anthropological and archaeological disciplines. Spiritual interaction (with the land) has deep psychological connotations that are difficult to measure.⁸⁰

⁸⁰ Raewyn Fortes, *Compensation Modes for Native Title*, Pacific Rim Real Estate Society Conference, Melbourne, Australia, January 2005, p. 7. See also John Sheehan, *Land Rights Queensland*, "Can cultural and spiritual attachment be valued?", February 2000.

In the Hawai’ian case of *Hawaii v. Office of Hawaiian Affairs*, the Federal District Court explained that:

Aina is a living and vital part of the native Hawaiian cosmology, and is irreplaceable. The natural elements – land, water, ocean – are interconnected and interdependent. To native Hawaiians, land is not a commodity: it is the foundation of their cultural and spiritual identity as Hawaiians. The aina is part of their ohana, and they care for it as they do for other members of their families. For them, the land and the natural environment [are] alive, respected, treasured, praised and even worshiped.⁸¹

Aboriginal lands have a unique cultural value. This can mean that the Crown must avoid taking them. In the event of a taking, it can mean that the approach to compensation must be different. The courts have not yet explained the difference. There is no “formula.”

⁸¹ 117 Haw. 174, 177 P. 3d 884, reversed on other grounds by Supreme Court, March 31, 2009.

3. **A Haudenosaunee Perspective: Collision Avoidance, Atonement and Satisfaction**

What sets worlds in motion is the interplay of differences, their attractions and repulsions. Life is plurality, death is uniformity. By suppressing differences and peculiarities, by eliminating different civilizations and cultures, progress weakens life and favours death. The idea of a single civilization for everyone, implicit in the cult of progress and technique, impoverishes and mutilates us. Every view of the world that becomes extinct, every culture that disappears, diminishes a possibility of life.

Octavio Paz

Canadian courts have said that, in the interpretation of issues dealing with aboriginal rights and aboriginal title, it is important to take into account “the aboriginal perspective.” There is no single “aboriginal perspective.” Different nations have different cultures and different perspectives and laws.⁸²

This perspective or understanding is even more important where treaty rights and relations are at stake, because the treaty is to be interpreted “as the Indians understood it,” and the honour of the Crown is always at stake in the performance of treaties.

When considering the “perspective” of entire societies, it is useful to consider underlying principles. Perhaps the most comprehensive and powerful analysis of the perspectives of Haudenosaunee and Euro-American societies has been undertaken by Sotsisowah, the late John Mohawk.

⁸² In the Australian case of *Napaluma v. Baker*, the court awarded damages under a new head – loss of position in the aboriginal community – stating that it was “conscious that I look at the problem with European eyes and not with the eyes of those within the community.” [1982] 29 SASR 192 at 194. See also the Papua New Guinea case of *Rescena v. Mabri*, 1972 Sup. Ct. PNG.

...The Iroquois possessed a tradition of law, and that tradition of law is what has created them as a people. That part is definitely true, but the Iroquois tradition is not a tradition of law, exactly. The Iroquois tradition is a tradition of responsible thinking. It is not something written in paragraphs and lines because it doesn't matter whether the letter of the thing is right. The questions that have to be before the people are *What is the thinking? Is the thinking right?*⁸³

Since the time of Aristotle, he suggests, the thinking of European societies has been “Utopian.”⁸⁴ These societies believe that it is their purpose, mission or destiny to make “progress,” to move from the way things are now to an improved situation. Their sense of time is linear; their sense of purpose requires planning and development.

What these societies met in a number of parts of the world were distinct, different peoples with a different sense of place and purpose. In North America, they met peoples with a more cyclical sense of time.⁸⁵ These societies believe that their responsibilities and their instructions are to assist in maintaining the web of life, and that the world that has been provided is not in need of improvement. They believe their obligation is to give thanks for what they have, rather than to constantly seek change.

Both kinds of societies have much in common. Individuals want a decent quality of life and standard of living. While a “Utopian” society plans its changes, a Haudenosaunee government is admonished to consider the effects of its decisions on the coming seven generations. Both approaches are the result of serious thinking about the basic questions: *who are we? Where do we come from? Where are we going?*

⁸³ John Mohawk, *The Indian Way is a Thinking Tradition*, Indian Roots of American Democracy, Northeast Indian Quarterly, 1988, p. 16.

⁸⁴ John Mohawk, *Utopian Legacies*,

⁸⁵ For example, the Midwinter ceremonies this year took place when the Pleiades, the Seven Dancers, were overhead, and were the same ceremonies as were done last year at this time and the same as will be done next year at this time. The difference between Euro-American and Haudenosaunee senses of time may shed some light on the *Bonaparte* case, in which the Haudenosaunee sense of responsibility for future generations obviously clashed with the Canadian principle that liability at law extends only to people who are alive at the time of the cause of action.

One consequence of the sense of mission or purpose that results from utopian thought is the feeling that obstacles to society's progress must be removed.⁸⁶ Where that obstacle is a people with a different system of values, the choices are generally either elimination or assimilation. The rights of these peoples face the same options. The purposes of the "larger society" are themselves "justifications" for the removal of the lesser one, which must "accommodate" those purposes. What is "justifiable," according to utopian thinking? Well, anything that furthers the society's "progress:"

...the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad... In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that...in principle, can justify the infringement of aboriginal title.⁸⁷

Given this list of "justifications," it is hard to think of any activities or objectives that could *not* be used to justify the violation of aboriginal title. Utopian thinking, with its sense of destiny, justifies the removal of obstacles to progress through legal means, including compensation. The operation of this approach to law and society validates the taking, whether the people involved see themselves as obstacles or not, and whether they want to be removed or not. Constitutional "protection" only slows down the erosion.

A people who define themselves not only as part of their land but in terms of their duty to renew and maintain their relationship with the land would have difficulty with the idea that the land has as its purpose "development" rather than existence, and transformation

⁸⁶ David Maybury-Lewis, the founder of Survival International, asks: "But what kind of progress is it that rolls over people and crushes their way of life? Why are tribal peoples constantly victims of a progress that is defined and imposed upon them by outsiders". *Millennium: Tribal Wisdom and the Modern World*, Viking-Penguin, London, 1992.

⁸⁷ *Delgam'uukw*, ibid. Paragraph 165. "Justification" began in the *Sparrow* decision in 1990 with the idea that salmon conservation was a goal that both societies shared and that everyone would agree was a justifiable legislative purpose. The list in *Delgam'uukw* consists mostly of objectives that one cannot assume that both societies share.

rather than maintenance – and with the idea that wilderness is a “frontier” to be “conquered” rather than a providing environment within which to live in gratitude.

This gulf between the attitudes of the two kinds of societies was not immediately apparent. In the 17th century, European populations were small and their priorities were trade and survival.

The formal relationship between the Haudenosaunee and the Crown began with the agreement made at Fort Albany in 1664. That agreement provided for “free trade, as formerly;” for a military alliance; for accommodation in the event of military defeat; and for a dispute resolution mechanism that required government-to-government negotiations rather than individual initiative. In 1677, the relationship was transformed into that of the Silver Covenant Chain, a “brotherhood” of equal partners that reflected the relationship between the Haudenosaunee nations within their confederacy. As with the two sides of the council fire in the Great Law of Peace, the *Kaianeren:kówa*, the Haudenosaunee and the British would be constantly required to ask: *how can we help each other?*

This attitude of mutual aid and support was not merely political or military. It often was manifested in the sincere condolences of each side for misfortunes of the other. It also found its way into times when the Haudenosaunee provided land to the settlers. In the land issues of the day, the Haudenosaunee were not ignorant of the land’s economic value: they viewed these matters as part of their larger relationship, in which each would provide for the other:

What we are now going to say is a matter of great moment, which we desire you to remember as long as the Sun and Moon lasts. We are willing to sell you this large tract of land for your people to live upon, but we desire that this may be considered as part of our Agreement that when we are all dead and gone your Grandchildren may not say to our Grandchildren, that your Forefathers sold the land to our Forefathers, and therefore be gone off them. Let us all be as Brethren as well after as before giving you Deeds for lands. After we have sold our land we in a little time have nothing to show for it; but it is

not so with you, your Grandchildren will get something from it as long as the world stands; our Grandchildren will have no advantage from it; they will say we were fools for selling so much land for so small a matter and curse us; therefore let it be a part of the present agreement that we shall treat one another as Brethren to the latest Generation, even after we shall not have left a Foot of land.⁸⁸

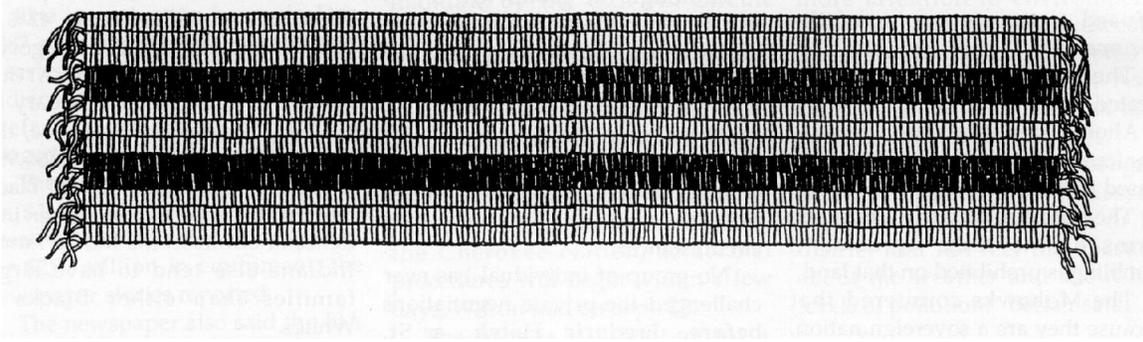
We know our lands have become more valuable. The white people think we do not know their value. But we are sensible that the land is everlasting, and the few goods we receive for it are soon worn out and gone.⁸⁹

Despite the best intentions on both sides, collisions between the two societies were inevitable. Whether this was obvious from the start or was an adjustment after people recognized the danger of such collisions, the Two Row Wampum became an important symbol of the relationship and an integral aspect of the thinking of both sides.

The Two Row Wampum depicts two parallel rows of dark wampum running the length of a field of white wampum. The white field, the context of the agreement, symbolizes peace, but it is also the River of Life. The two dark rows are symbols of the canoe of the Haudenosaunee and the sailing ship of the British. They are to go down the river together, side by side, but neither is to interfere in the governance or the course of the other. The three rows of white wampum between them keep them both affectionately close together and respectfully apart. The three rows symbolize respect, trust and friendship – the three links of the Covenant Chain.

⁸⁸ July 5, 1754, Theyanoguin to William Penn. Pennsylvania Archives Ser. 4, 2:698-707, cited also in Timothy J. Shannon, *Indians and Colonists at the Crossroads of Empire: the Albany Congress of 1754*; Cornell University Press, 2000, p. 166.

⁸⁹ Canessatego, at the Treaty of Lancaster in 1742.



It is useful to think of the principles set out in the Two Row Wampum as active provisions of a treaty.⁹⁰ It is also useful to think of the area between the canoe and the sailing ship as a shock absorber, and the thinking behind the agreement as a collision avoidance system. Yet it is difficult to reconcile the broad range of “justifications” for the breach of protected aboriginal rights and title – the things that, by definition, are so “integral to a distinctive society” that “they would not be the same people without them” – with the obligations of respect, trust and friendship that would militate against these takings.

Essentially, what Canadian courts have said is that it ought to be legal for the Crown to undertake actions that fundamentally change and injure aboriginal societies, against the wishes of those societies, as long as the way it is done is fair.

The Canadian constitution “entrenches” aboriginal rights and title and treaty rights. On its face, this is consistent with the commitment of respect and protection contained in the Covenant Chain and Two Row principles.

The Constitution of Canada protects these basic rights from arbitrary taking. But it does not protect them against “justifiable” taking.

⁹⁰ In the *Mikisew Cree* decision, the Supreme Court of Canada recognized that treaty relations are continuing ones, organic and alive, and that there are “procedural treaty rights” as well as substantive ones.

The “justification” in every case is either the facilitation of “progress” or the mitigation of the negative effects of progress. In each instance of “justified infringement,” the result would be the Crown taking or injuring the lands or rights of an indigenous people, or authorizing or licensing that taking or injury.

In each case, the Crown solemnly promised that the rights would be respected and protected. Now it seeks to justify the breaking of those promises through a legal process of justification, consultation, compensation, accommodation and infringement that in total amounts to replacing the firm protection with a fluid, negotiable, porous one.

The “justification” for legislative infringement on aboriginal rights began with thinking about conservation in *Sparrow*, but moved seven years later, in *Delgam’uukw*, to goals and objectives that aboriginal peoples would not be expected to share: the destruction of their forests and environments; the settlement of their lands; the removal of their resources. The process of “reconciliation and accommodation” envisaged by the courts would provide “compensation” for the losses....er, infringements.

Yet it is envisaged that these losses would include the taking of the things that are integral to the aboriginal societies – the things that make the people what they are. The taking would strike at the roots of the societies. And in their place, what would be offered would be economic participation and compensation.

Creating a legal process for these takings has a collateral impact. It sends the message that, since there is an approved path for doing this, the taking must be expected, ordinary and acceptable.⁹¹ Once it becomes clear that “compensation” is possible, the debate is no longer about whether promises must be kept: now we are only haggling about the price. As Joaquiso Oren Lyons said: “When everything is for sale, nothing is sacred.”

⁹¹ An analogy might be the idea that a permanent “state of emergency” such as has existed in the United States since September 2001 eventually erodes the definition of “emergency” and becomes the status quo.

The *Sparrow* dance of justification, consultation, compensation and accommodation is an extension of a utopian society's sense of manifest destiny. The protection of aboriginal rights and title and treaty rights in the Constitution of Canada is far from absolute: the courts have devised a process that charts and announces the gradual erosion, destruction and taking of precisely those things that they have said are defining, integral and central to indigenous societies.

If the courts are saying that it is lawful for the governments to “infringe” – break, violate, breach – those defining, integral central things, without which an aboriginal people would not be the same people – is this not, in effect, a prescription for legalized genocide?⁹²

In this sense, consent to compensation for cultural damage is a form of accepting the idea that treaty and aboriginal rights are going to continue to be violated, and that the payment of compensation somehow makes that tolerable.

And yet...it is also like the earlier discussion about things that were not for sale. While a person would insist strongly that his arm is not for sale, he would insist equally strongly that his insurance company ought to compensate him if his arm were lost in a car accident. While an aboriginal people would never sell its language or the practices that define it as a people, it would still be justified in demanding compensation when those things are injured. But it would also be justified in resisting the injury.

The honour of the Crown is pledged to avoid the injury. That pledge is implicit in the most basic element of the Covenant Chain: respect. The promise not to injure is not replaced by a commitment to compensate once the injury is done.

Haudenosaunee law and culture do contain principles that assist in situations where there have been breaches of promises, of order, or of peace. The violator is given an opportunity to atone for his actions – sometimes, especially in a Longhouse context, this

⁹² For a comprehensive discussion of the nature and issues of genocide, see Samantha Power, *A Problem from Hell: America and the Age of Genocide*, New Republic Books, 2002.

is called “repentance.” When a person recognizes and admits that he has done wrong, that is considered an important step toward restoring peace.⁹³ Compensation – an effort to make things right – is often an integral part of this. So is the promise not to do the thing again.

What historic documents have called “satisfaction” is a two-sided concept. On one hand, it is used to describe the taking of revenge – the idea that a life for a life somehow “satisfies” the loss. On the other, it has a more rational and less bloody meaning: that the injured party has a right to be compensated in ways that restore peace, dignity, self-respect and harmony. “Satisfaction” might be seen as equivalent in effect to the common-law approach to compensation in cases of breaches of fiduciary obligations: the victim is to be placed in the same position he would have been in had the breach not occurred. Yet the approach is moral and emotional, rather than commercial. Process, and repentance, are integral to “satisfaction”. Sending a cheque is insufficient.

When in the 1664 Albany treaty “private satisfaction” is prohibited, the treaty-makers clearly intended to prevent acts of revenge, but they also wanted to elevate dispute resolution to a governmental rather than individual level. This principle – that matters of dispute should not be dealt with in an unregulated, individual manner – continued to be an element of the Crown – Haudenosaunee relationship, and was also integrated into the Haudenosaunee relationship with the United States when the Treaty of Canandaigua provided for direct communication between the Confederacy Chiefs and the President.

“Satisfaction,” as a principle, requires a process of government-to-government issue resolution, and includes the idea that compensation, where appropriate, is required.

Resolving a matter does not mean that it must be forgotten. While in the metaphors of treaty councils, a source of anger is “buried,” so it may not be seen or raised again, there are other metaphors that suggest that reconciliation is a matter of forgiving but not

⁹³ In Canadian law, expressions of remorse are an important factor when it comes to sentencing a criminal, or to deciding, years later, whether he is to be paroled.

forgetting. Numerous councils require the wrongful party to “remove the tomahawk from the head” of the injured party: while in some cases it is buried, in others it remains in sight, a reminder of the wrong and the reconciliation as stark as the *raupatu mere* in the Houses of Parliament in New Zealand. Sometimes it is necessary to keep the reminder in sight, as part of the promise not to do it again.

Haudenosaunee law and treaty relations with the Crown seem to bring us to the same place as Canadian law: that collisions should be avoided, and that compensation should be made where collisions nevertheless take place. The difference is that Canadian law is far more permissive of the collisions, considering many of them “justifiable,” and contemplates compensation as a substitute for collision avoidance.

Where the collision does take place, there is a requirement of “satisfaction.” In some ways, this is equivalent to the common-law concept of compensation for breaches of fiduciary obligation – placing the victim in the same position he would have been in had the breach not occurred.

4. Restorative Justice, Atonement and Apology

In Aotearoa – New Zealand, as it was called by its Dutch “discoverer” – about one-quarter of the human population is Maori. The Maoris were there when the British arrived, and the history of the country is speckled with land takings, treaty relations, accommodations, wars and injuries. There are some important differences between the Maori-Pakeha experience and those of indigenous peoples in North America. There is one Maori language. There is one key treaty, as well: the Waitangi Treaty of 1854. In that treaty, the Maori leaders kept their *mana*, their spiritual authority, even as they acknowledged that the Crown would have governance.

The retention of Maori dignity has translated and evolved into a legal culture of respect that is rare in 21st century North America. The Waitangi Tribunal takes into account both Maori and New Zealand law in arriving at its decisions, and those decisions address current problems as well as long-standing claims. Also significant, as an element of the respect that permeates the relationship, is the Crown’s willingness to apologize for its mistakes and wrongdoing. The apology issued in the Queen’s name at the beginning of the Waikato-Tainui settlement is a good example:

The Crown acknowledges that its representatives and advisers acted unjustly and in breach of the Treaty of Waitangi in its dealings with the Kiingitanga and Waikato in sending its forces across the Mangataawhiri in July 1863 and in unfairly labeling Waikato as rebels.

The Crown expresses its profound regret and apologises unreservedly for the loss of lives because of the hostilities arising from its invasion, and at the devastation of property and social life which resulted.

The Crown acknowledges that the subsequent confiscations of land and resources under the New Zealand Settlements Act 1863 of the New Zealand Parliament were wrongful, have caused Waikato to the present time to suffer feelings in relation to their lost lands

akin to those of orphans, and have had a crippling impact on the welfare, economy and development of Waikato.

The Crown appreciates that this sense of grief, the justice of which under the Treaty of Waitangi has remained unrecognized, has given rise to Waikato's two principles 'i riro whenua atu, me hoki whenua mai' (as land was taken, land should be returned), and 'ko to moni hei utu mo te hara' (the money is the acknowledgment by the Crown of their crime). In order to provide redress the Crown has agreed to return as much land as is possible that the Crown has in its possession in Waikato.

The Crown recognizes that the lands confiscated in the Waikato have made a significant contribution to the wealth and development of new Zealand, whilst the Waikato tribe has been alienated from its lands and deprived of the benefit of its lands.

Accordingly, the Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as that is now possible, and, with the grievance of raupatu finally settled as to the matters set out in the Deed of Settlement signed on 22 May 1995 to begin the process of healing and to enter a new age of co-operation with the Kiingitanga and Waikato.⁹⁴

Canada and the United States have cultures in which redress is often referred to as compensation, and compensation is generally thought of in terms of money. The basic theory of compensation in Canadian law is that the successful plaintiff should be placed in a position that he would have been in had the wrong not occurred. Generally, the legal culture seeks to resolve this challenge by calculating what it would cost, in cash, to achieve that. In indigenous cultures around the world, there is recognition that there is an "important non-economic component" to redressing wrongs, as well. Elements of restoring peace, pride, and respect are important to returning the plaintiff to his original position. The admission by the defendant that "I was wrong to have done that" is a first

⁹⁴ This historic apology set the tone and precedent for others, which are now integral parts of claim settlement agreements. In dealing with Ngati Tuwharetoa, the Crown made its apology to the people, "to their ancestors, and to their descendants," "for the cumulative effect of its actions over the generations," and also stated that it "profoundly regrets its failure to acknowledge the mana and rangatiratanga of Ngati Tuwharetoa." *Mana* is the spiritual power of the people and their leaders. *Rangatiritanga* is sovereignty.

step. The apology, “I am sincerely sorry that I did that,” is a second step. The promise, “I will not do that again,” is a third step. The compensation, which is a further effort to make things right, then becomes the fourth step. Setting structures and processes in place to ensure that the wrong is not repeated is a logical fifth step.⁹⁵

Each of these steps is important. Especially where there has been deep personal and emotional damage, it is vital to persuade the victim that what happened was not his or her fault. The apology, and the admission of responsibility, on the part of the defendant, are steps toward healing. They are a component of the “package” of compensation.

In the records of historic treaty councils between the British and the Haudenosaunee, when there is a discussion of wrongs done by individual citizens of either side, there is often reference to “satisfaction.” It comes in a number of forms. The first is the desire to avoid the “private taking of satisfaction” – that is, to avoid individuals or families taking revenge. It was constantly acknowledged that this is an aspect of human nature, and that it leads almost inevitably to a cycle of revenge-taking and a breakdown of society. In its place, governments act on behalf of individuals and families. “Satisfaction” by a government still involves offering and accepting compensation, but it also involves, as a key component, the recognition and acceptance of responsibility. The process of putting the cause of “dissatisfaction” behind is completed with both atonement and ceremony. The fact that both sides know that their political state representatives are not personally responsible removes many of the hard feelings and preserves dignity.

It is sometimes said that the difference between “guilt” and “shame” is useful in understanding cultural differences. “Guilt” is something that an individual feels within

⁹⁵ In *Denial, Acknowledgement and Peace Building Through Reconciliatory Justice*, Professor Robert Joseph sets out eight steps: *Recognition* (truth finding and telling of the injustices); *Responsibility and remorse* (acknowledgment and apology for the injustices); *Restitution* (of Maori land and power to determine its use); *Reparation* (for injustices in financial terms recognizing the ethnoidal and genocidal harms are really uncompensable in this way); *Redesign* (of state political-legal institutions and processes to empower Maori to participate in their own governance and the government of the state); *Refraining* (from repeating the injustice); and *Reciprocity* (the obligation to do unto others as you would have them do unto you; to give as you have been given) (P. 11).

himself. “Shame” is something that he feels around other people. In a Canadian court, the accused is asked whether he pleads “Guilty or Not Guilty,” and if he pleads guilty, the matter between himself and the state is resolved with a fine or a jail sentence or probation. In an aboriginal “sentencing circle,” used by some Canadian courts as an adjunct to sentencing, the individual accused is placed in a meeting with the victim and with other members of the community, and given a chance to understand the impact of his actions – and to atone for the damage done, and to apologize, and to convince the victim and the community that he has recognized that he has made a mistake, accepted responsibility for it, and learned from it.

Paying a fine and walking away is often seen not as an acceptance of responsibility so much as a cost of doing business.

Cash compensation without an apology looks like a payoff, because that is what it is.

A person who refuses to apologize for wrongdoing is sending a further message. Given the same opportunity, and some reassurance that he will be able to get away with it, he would probably do the same thing again. Sometimes, the implication of paying the damages without any form of acknowledgment by way of apology or atonement sends the message that what was wrong was not the original deed, but only getting caught.

An apology without taking any other steps toward redress can be seen as another form of incomplete process. It is cheap, and often empty. The other steps that accompany it make it meaningful and persuasive.

In 2009, the Prime Minister of Canada apologized, in Parliament, to the victims of violence and abuse in residential schools. The terms of the apology were negotiated as part of the settlement of a large number of residential school class actions. The Prime Minister wanted to wait until after the report of the Truth and Reconciliation Commission (another element of the settlement) before apologizing, but pressure had been put on him by those who recognized that many of the people to whom the apology would matter

most were elderly, and many would be dead by the time he was ready. There were further negotiations over whether aboriginal representatives would be allowed to receive the apology and acknowledge it, or whether they would only be allowed to stand in the visitors' gallery of Parliament.⁹⁶ The apology was well received, but its negotiated, grudging, "managed" character reduced its effectiveness. As G.K. Chesterton wrote: "A stiff apology is a second insult... The injured party does not want to be compensated because he has been wronged; he wants to be healed because he has been hurt." Here are Excerpts of the Prime Minister's apology on behalf of the Government of Canada:

Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.

The government now recognizes that the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language.

The legacy of Indian residential schools has contributed to social problems that continue to exist in many communities today.

The government recognizes that the absence of an apology has been an impediment to healing and reconciliation.

We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities, and we apologize for having done this.

The burden of this experience has been on your shoulders far too long. The burden is properly ours, as a government, and as a country.

⁹⁶ Allegedly, Prime Minister Harper was worried about the precedent this would set, since nobody other than Members of Parliament and Parliamentary staff was allowed to stand on the floor of the House of Commons, and nobody but MP's (and the Sovereign delivering the Throne Speech) was allowed to speak there.

Also in 2009, the Prime Minister of Australia issued an apology in Parliament to the “lost generations” of aboriginal people. Unlike the Canadian apology, this one came without a settlement of the ongoing litigation, and the government made it clear that there would be no compensation attached. Nevertheless, the apology was straightforward and emotional. Where the previous Prime Minister had vowed that he would never say he was sorry for the things done to aboriginal people, this apology contained repeated, stark, unadorned statements: “We say Sorry.”⁹⁷

These apologies are issued in legislatures. Does that make them “law”? And if they are “law,” do they have any effects or consequences that can be used in court? In 1896, a group of American-born citizens of the Kingdom of Hawai’i, mainly sugar plantation owners, staged a coup d’état, which was immediately supported by the United States Navy and Marines in Honolulu Harbour. Hawai’i was shortly afterward annexed by the United States as a “territory” and in 1960 became a “state.” Kanaka Maoli, the indigenous people of Hawai’i, have maintained that the actions of the United States were in violation of international law. An apology for the United States’ participation in the overthrow of the Hawai’ian monarchy was issued by Congress. The administration of the “trust lands,” left to the Hawai’ian people by the royal family, had been placed by the State government in the hands of the Office of Hawaiian Affairs. It was proposed that these lands should be disposed of as public lands. Hawai’ian sovereignty supporters argued in court that the issuance of the apology was a form of legal recognition of the rights of the Hawai’ian people to their land. The courts held that the apology had no such legal effect. Similarly, though Canada has apologized for the deep injuries to culture and language caused by the residential schools policy, the federal government fights vigorously against any liability in court, as do some of the churches that have also apologized for their role in the operation of the schools.⁹⁸

Indeed, the tension between the quite human desire to apologize and the fear that an apology will be seen as an admission of “guilt” or liability is not restricted to aboriginal

⁹⁷ In contrast to Canada, though, there had been no settlement of the litigation before the apology.

⁹⁸ *W.R.B. v. Plint*, 2003 BCCA 671, [2003] BCJ No. 2783.

issues. Some states and provinces have passed legislation that would allow doctors to apologize for mistakes they have made in treatment without having those apologies used as evidence in malpractice lawsuits.⁹⁹

In “specific claims” negotiations, the “protocol” Canada insists upon at the start of the talks and the settlement agreement at the end proclaim that these documents do not constitute “any admission of fact or liability.” The negotiations are taking place because the Department of Justice has advised the federal government that, if it were taken to court by the claimants, there would probably be a finding of “lawful obligation,” and though the federal government insists on elaborate releases and indemnities. Nevertheless, Canadian federal negotiators are instructed that there shall be no apology. “Her Majesty does not apologize,” say federal negotiators, who then maintain that whoever that octogenarian Englishwoman in New Zealand was, she was not Her Majesty in Canada.

Is an apology a form of “compensation”? Certainly. It is delivered to a person who has endured loss, injury or suffering. It is delivered by or on behalf of the person who caused or inflicted that loss, injury or suffering. It is intended to make the victim feel better. It has value. But, like “culture” itself, its *cash* value is difficult to determine.

To apologize for an action or a policy is to acknowledge that a wrong was done. An apology coming after a legal settlement – as in the Canadian residential schools situation, or the Waikato land settlement – is a part of the settlement and reconciliation, and can be seen as a kind of “non-economic” compensation. An apology coming on its own – like the Australian or Hawai’ian ones – leaves its recipients gratified but wondering what will come next, to make it real.

⁹⁹ This stands in stark contrast to the situation in the “tainted blood” disaster in Canada, in which hundreds of people contracted HIV or hepatitis as a result of a failure of the Canadian Red Cross to properly test blood donations. The President of the organization explained in an interview that he felt like apologizing, but on the advice of his lawyers he could not do so.

Apologies are not matters of indigenous peoples' cultures alone. Throughout Asia, "face" is an important aspect of social standing, and just as an injury can result in loss of face, so an apology can be restorative. Having to deliver an apology can be humiliating as well as humble: in April, 2001, China released the crew of an American surveillance aircraft only after the United States issued a statement that would be "interpreted as an apology on the Chinese side but simply as regret on the United States side."¹⁰⁰

The broader purpose of the Chinese demand was to inflict upon the United States a public international humiliation. This, of course, is the flipside of China's face-conscious culture. In such a culture, to lose face is not only embarrassing. It is dangerous. It is a sign of weakness that invites repeated exploitation by those who have witnessed it. To be deprived of face by someone is in some sense to be vanquished and reduced to subservience. He who makes another lose face is essentially declaring himself superior and the other inferior, not worthy of respect. By demanding a public apology from the United States, therefore, the Chinese government was not only saving its own face, it was consciously and deliberately forcing the United States to lose face, and thereby to admit its weakness.¹⁰¹

When the waters of Minamata Bay were poisoned with mercury emitted by the Chisso Corporation, and fishermen were killed or disfigured by that poison, company officials went personally to apologize to the community and to the fishermen, literally getting down on their knees in contrition. In 2006, Prime Minister Koizumi issued the government's apology: "The government feels a deep responsibility and offers a frank apology for failing to take appropriate steps for a long period of time or to prevent the spread of Minamata disease."¹⁰² In most cultures, apologies gather strength with the status of the person delivering them. That is why the "residential school apology" from Minister of Indian Affairs Jane Stewart was not nearly as important as the apology in Parliament from Prime Minister Harper. In the Japanese context, an apology from President Clinton to the parents of a Japanese exchange student gunned down in

¹⁰⁰ Hang Zhang, "Culture and Apology: the Hainan Island Incident," *World Englishes*, 20:3:383-91.

¹⁰¹ Robert Kagan and Irving Kristol, *The Weekly Standard*, April 8, 2001.

¹⁰² *Japan Times*, April 29, 2006.

Louisiana was welcomed: “We felt it was a great honour to get an apology directly from the President.”¹⁰³

In Australia, Graeme Orr wrote about what the courts had called “damages for loss of fulfillment in Indigenous community life,” cataloguing the practice in negligence cases of awarding damages where an individual’s status within aboriginal culture or community had been injured. Orr struggled with the limitations of common law compensation:

These cases attempt to achieve a measure of sensitivity to cultural difference, by rendering comprehensible, within the law's factual understanding of loss, the special nature of indigenous life: its tight - knittedness, its emphasis on (extended) family and community life, its sacred knowledge and rituals, and its fundamental groundedness in the outdoors and physicality in everyday interactions with the land and the world.

To return to such basic principles raises broader questions and possibilities. Why does the law limit compensation to dollars? If, as is developing through statutory reform in defamation law, and more controversially in governmental and institutional responses to the stolen generations inquiry, some restitutionary, therapeutic and compensatory purpose is served by requiring public apologies and explanations, might the same not have some role to play in negligence? If tortfeasors were made to apologise for, and if necessary, come clean with the details of their behaviour, that might generally help restore the balance envisaged by corrective justice principles, by mollifying a plaintiff's sense of grievance.¹⁰⁴

Apologies, to be meaningful, must be timely, sincere, delivered by the right people in the right contexts. Managed, delayed, diluted, they lose their freshness, strength and eventually their relevance. Apologies delivered in the appropriate cultural context may

¹⁰³ The court case, *Hattori v. Peairs*, Louisiana C.A. [1995] 662 So. 2d 509, is itself a chronicle of compensation that grazes a collision of cultures. Hattori, a 16-year-old in a John Travolta white tuxedo, had knocked on Peairs’ door looking for a Halloween party. Peairs, after calling out “Freeze!” (which Hattori did not understand), shot the young man dead with a .44 Magnum. Hattori’s parents presented Clinton with a petition for gun control in the United States, signed by 1.7 million Japanese.

¹⁰⁴ Graeme Orr, “Damages for Loss of Cultural Fulfilment in Indigenous Community Life”, [1997] *Indigenous Law Bulletin* 90. See also “The Stolen Generation: Canadian and Australian Approaches to Fiduciary Duties”, Dr. Julie Cassidy, *Ottawa Law Review* (2002-2003) 34 Ott. L. Rev. 175-238.

fulfill the legal requirement of dealing with legal matters “taking into account the aboriginal perspective” not only in fact-finding and analysis, but also in considering and delivering remedies. If a defendant can be made to pay for a feast,¹⁰⁵ perhaps the same defendant, in the spirit of reconciliation, can be ordered to participate in the feast. Apology, as an element of restoring balance, status or rights, is properly an element of the law.

It is appropriate to say that an apology is *part* of the process of reconciliation, just as economic compensation is part of that process. An apology is part of a legal remedy.

¹⁰⁵ See *Gawa v. Horton* and *Forsythe v. Collingwood*, below.

5. Procedural Treaty Rights and Remedies

In the 2006 *Mikisew Cree* case, the Supreme Court of Canada not only spoke of the honour of the Crown being always concerned in the fulfillment of ongoing, organic treaty obligations – it also stated that there are “procedural treaty rights.”¹⁰⁶ The Haudenosaunee have believed that process – the relationship – is as important as substance from the beginning of their relations with the Crown. The path of open, unobstructed communication between two council fires – between two governments, is the symbol of these procedural rights. Designating specific individuals or groups of individuals to whom notice or communications must be addressed is part of this process.

Relations between the Haudenosaunee and the Crown are based in the *Kaianerenko:wa*, the Great Law of Peace of the Confederacy. In that law, the Haudenosaunee are described metaphorically as a single family, within a single house. Their family relationship creates and imposes mutual obligations, and ways of resolving disputes. The relationship with the Crown, since 1677, has been symbolized by the Silver Covenant Chain. It symbolizes the manner in which the Crown and the Haudenosaunee are bound together, their arms linked as brothers. Brotherhood meant equality, respect, affection, alliance, trust and friendship. It also meant a mutual and reciprocal obligation to help each other, and to avoid injuring each other.

In the 1664 treaty at Albany, for example, instead of “private satisfaction” being taken, a situation involving the injury of a subject of one party by a subject of the other gives rise to a meeting between the Governor of New York or the officer commanding at Albany, on the one side, and the Haudenosaunee chiefs, on the other.

¹⁰⁶ The court described the “procedural treaty right” as the right to be consulted when the Crown proposed development of the lands on which the Crees had hunting rights.

During the two centuries that followed, there were repeated admonitions from the officers of the British Imperial Indian Department that the Haudenosaunee would be able to secure remedies to their grievances by dealing directly with representatives of the Department or with colonial governors. The government-to-government relationship and emphasis on free and open communication maintained the procedural right to fair remedies. At the same time, where cases were referred to colonial courts, the Haudenosaunee learned to expect technical defences and racism to protect defendants, even in cases that were blatantly obvious. The matters of the Canajoharie and Kayadosseras patents, in which New York courts upheld dubious deeds, were among the sources of the reference in the Royal Proclamation to “great Frauds and Abuses” committed upon the nations or tribes of Indians under the Crown’s protection, or with whom it was connected.

The Covenant Chain relationship was replete with procedural safeguards and remedies. These have not been used in Canadian courts, and certainly not since the “patriation” of the Canadian constitution in 1982, with its attendant protection of “existing treaty and aboriginal rights.”

In the 1794 Canandaigua Treaty, the fundamental Haudenosaunee arrangement with the United States of America, there is an explicit provision that the Haudenosaunee shall address any concerns directly to the President of the United States. This is still the path that is used.

These processes are reciprocal: both the Crown and the Haudenosaunee have the right to call upon each other to engage in the prescribed paths of dispute resolution. Having become brothers, and having established the respect, trust and friendship that are the hallmarks of the Covenant Chain relationship, they could be said to be fiduciaries for each other.¹⁰⁷

¹⁰⁷ In *Guerin*, the Supreme Court of Canada explained that the Crown was not a “trustee” for the Musqueam people, but it bore them a fiduciary obligation. The fiduciary relationship is broader than a trust relationship, which is associated with specific legal requirements. There are situations in which several

Doing things right – following the required process – is also a mark of respect. Thus, the Haudenosaunee adhere to the procedure they had used in councils with the Crown for the first two centuries of their relationship, and sincerely await the Crown’s re-learning of the proper way to behave in council, and continue to propose the formal re-polishing of the Covenant Chain. Is there a “procedural treaty right” to insist on compliance with the traditional ways of conducting relations? Is there a procedural treaty right that would require proper forms of “satisfaction” to be given as part of the resolution of claim? That remains to be seen.

However, it should be remarked that doing things the right way would not cost the Crown much in economic terms. There is no cogent economic argument against the procedural fulfillment of treaty relationships. The restoration of respectful relations has a unique value, one that the Crown in Canada, apparently unaware of the unique losses it has caused, is reluctant to settle.

There are procedural, as well as substantive, treaty rights. The procedural treaty rights include the right to a respectful process of resolving disputes and putting them to rest.

parties can be fiduciaries for one another, since they have authority or connection with the property or rights of the others. Partners in a law firm, or husbands and wives, could be said to be mutual fiduciaries.

6. The Crown's Obligation to Avoid and Prevent Cultural Loss or Damage

We have examined the courts' conclusion that the Crown should avoid taking indigenous peoples' land, because, among other things, it is impossible to replace and contains a unique cultural component. Though aboriginal peoples' cultures are far more land-linked than those of other people in Canada – a natural result of having been on the land a few thousand years longer – it is possible to have aspects of culture that are vulnerable to damage and are not necessarily linked only to the land. The most obvious of these is the right to speak one's language. Language is portable. That is, it travels with its speakers.¹⁰⁸ Some religions are also portable, and indeed are proselytized, while others are absolutely linked to land and landscape. In Canada, the law of protection against cultural loss and damage has developed around the rights of people who speak French,¹⁰⁹ and people who belong to a Catholic minority.

Canada is a heterogeneous, not homogeneous society – it is a mosaic of peoples and cultures.

Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian Charter of Rights and Freedoms*, the right to integrate into Canada's mainstream based on an notwithstanding these differences has become a defining part of our national character.¹¹⁰

¹⁰⁸ In the case of Hebrew, the language traveled with its speakers across Europe and Africa for two thousand years before once again becoming linked to a land where it became an official language.

¹⁰⁹ With the passing of Bill 101 in Quebec, courts have had to consider the obverse: the rights of minority English-speakers, and those who wish to speak English or have their children educated in English.

¹¹⁰ *Bruker v. Marcovitz*, 2007 SCC 54, para. 1.

In recognizing diversity, the courts have also begun to recognize that aboriginal peoples are not part of the wave of recent immigration, but have roots that are deeper and different from those of the rest of Canadian culture. The tension between aboriginal cultures and general Canadian culture is part of what courts seek to reconcile. In *Tsilhqot'in Nation v. British Columbia*, Vickers, J. explained:

Canada's multi-cultural society did not begin when various European nations colonized North America. Rather, multiculturalism on this continent had its genesis thousands of years ago with the receding of the last great ice age. Waves of Aboriginal people swept across North America, establishing themselves in diverse communities across the entire continent. While the lives of Aboriginal people were not without conflict, there are many examples of different Aboriginal cultures living side by side in peace and harmony. Today's modern, multi-cultural communities seldom, if ever, look back at the Aboriginal roots of Canadian diversity. The evidence in this case has provided me with the opportunity to acknowledge the multi-cultural roots of our Canadian culture; roots to be honoured and respected.¹¹¹

Distinct cultures or part of Canadian culture? That is a recurring tension in all the cases involving aboriginal peoples' rights. The more your culture is part of the "roots of our Canadian culture," the less need there is to respect its living distinctness, because it can be argued that it belongs to everybody, just as in the *Exxon Valdez* case, all Alaskans had the right to a subsistence lifestyle.

Aboriginal peoples are faced with having to prove that their cultures are distinctly their own, not shared with everybody else's, but have to avoid showing that they are so different that the judge, invariably an outsider, ceases to appreciate and understand the power and value of the culture.

A distinctly Canadian trap for aboriginal peoples is Canada's "mosaic" nature, and especially its constitutional tradition of protecting the French language and the culture

¹¹¹ [2007] BCJ No. 24656, BCSC 1700, Paragraph 1.

that accompanies it. On the one hand, an analogy with French will provide protection in law. On the other, it moves aboriginal peoples from a stance that their rights, and the protection of those rights, is political, and toward an approach that recognizes them as ethnic or racial. A nation does not want to be reclassified as an ethnic minority.

The formation of the federal government in 1867 was the result of a political bargain between English Upper Canada and French Lower Canada. The protection of the Catholic Church and the right of Catholic education for minorities in Ontario was part of the bargain; so was the protection and recognition of the French language.

It is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected.¹¹²

The right to maintain a culture is recognized in Canadian law. The Supreme Court of Canada has decided several times that the cultural rights of minorities – and especially their language rights – are protected, both by the terms of the *Constitution Act, 1982*, and by “fundamental unwritten constitutional principles” that are the “bedrock” of the law in Canada.

Recognition of the rights of the French-speaking minority in several provinces and of the English-speaking minority in Québec are part of that “bedrock.”

In the *Manitoba Language Rights* case, the Supreme Court of Canada concluded that “all of the unilingual Acts of the Legislature of Manitoba are, and always have been, invalid and of no force or effect.”¹¹³ The court, using “the rule of law” as its justification, gave Manitoba time to translate and print the laws.

¹¹² *Re Aeronautics*, [1932] AC 54 at 70, cited in *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54 at 71, and in *Montfort* at Para. 81.

¹¹³ [1985] 1 SCR 721.

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts, to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society...

The judiciary is the institution charged with the duty of ensuring that the government complies with the Constitution. We must protect those whose constitutional rights have been violated, whomever they might be, and whatever the reasons for the violation.¹¹⁴

It is necessary to understand that, in Canadian law about cultural rights, aboriginal peoples are considered to be “protected minorities.”¹¹⁵

There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country, who look to the Constitution of Canada for the protection of their rights.¹¹⁶

Canadian court decisions have begun to adopt the idea that aboriginal peoples have joined the federation, merging or folding their sovereignties into the Crown’s sovereignty and agreeing to look to Canadian laws and not international ones for the protection and recognition of their rights.

Thus, in the “two row” wampum there are two parallel paths. In one path travels the aboriginal canoe. In the other path travels the European¹¹⁷ ship. The two vessels co-exist but they never touch. Each is the sovereign of its own destiny.

¹¹⁴ *Ibid.* paras. 46 and 47.

¹¹⁵ As Joagquisho (Oren Lyons) has maintained, the Haudenosaunee do not consider themselves to be a minority within Canada or the United States, but rather a majority within their own territories.

¹¹⁶ *Reference re Secession of Quebec*, [1998] 2 SCR 217, Para. 269.

¹¹⁷ Arguably, by making the relationship between the “aboriginal” and the “European”, Justice Binnie has taken a political agreement - a treaty relationship – and converted it into a racial one. Racializing rights leaves them vulnerable to being extinguished and superseded, by operation of law or policy.

The modern embodiment of the “two-row” wampum concept, modified to reflect some of the realities of a modern state, is the idea of “merged” or “shared” sovereignty. “Merged sovereignty” asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners... If the principle of “merged sovereignty” articulated by the Royal Commission on Aboriginal peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled...

On this view, to return to the nautical metaphor of the “two-row” wampum, “merged” sovereignty is envisaged as a single vessel (or ship of state) composed of the historic elements of wood, iron and canvas. The vessel’s components pull together as a harmonious whole, but the wood remains wood, the iron remains iron, and the canvas remains canvas.¹¹⁸ Non-aboriginal leaders, including Sir Wilfrid Laurier, have used similar metaphors. It represents, in a phrase, partnership without assimilation.¹¹⁹

The “reconciliation” referred to means, as we have seen, that the constitutionally protected aboriginal and treaty rights will be constantly eroded by “justifiable” laws and legally sanctioned processes of consultation, accommodation and compensation. It is not a two-way street. It is not anticipated that treaty and aboriginal rights will ever get bigger or more powerful. Their legal protection is only a reduced rate of erosion.

¹¹⁸ The statement is itself an assertion of assimilation: in the Haudenosaunee recounting of the Two Row Wampum, the canoe is made of bark.

¹¹⁹ *Mitchell, supra*. Paragraphs 128-130. Justice Binnie goes on to describe Kanentakeron (Grand Chief Mike Mitchell) as a person who “lives with a foot simultaneously in two cultural communities, each with its own framework of legal rights and responsibilities. As Kanentakeron he describes learning from his grandfather the spiritual practices of the People of the Longhouse, whose roots in North America go back perhaps 10,000 years. Yet the name Michael Mitchell announces that he is part of modern Canada who watches television from time to time and went to high school in Cornwall. As much as anyone else in this country, he is a part of our collective sovereignty” (Paragraph 131). Apparently, if lacking technology is evidence that you deserve to have your land taken from you, or that you have no rights, then adopting technology is evidence that you have been assimilated and given up your sovereignty. Yet there has been no suggestion that a Japanese who “watches television from time to time” or a German who attends school in Canada for a couple of years has become a symbol of his nation’s loss of political and legal sovereignty. And is it the television or the content of the shows that brings the loss of sovereignty? If Mike Mitchell watched American rather than Canadian television from time to time, would his “shared sovereignty” be with the United States? And since most Canadians watch more American content than made-in-Canada television...

Other “minorities” in Canada also have constitutional protection against the erosion of their rights.

The Montfort Hospital was the only French-language teaching hospital in Ontario, “the only hospital in Ontario to provide a wide range of medical services in a truly Franco-phone setting.”¹²⁰ The provincial government, as a money-saving and “restructuring” move, proposed to shut the hospital down and transfer its services to other hospitals. The Ontario Court of Appeal concluded that the provincial government should not do so, and the Court found that “unwritten constitutional principles have an important normative function,” extending to empowering the courts to prevent government actions that were inconsistent with those principles.

The hospital’s board characterized the issue as one of assimilation, and the right of a minority to not be assimilated, but to retain and maintain its culture and institutions:

The institutional importance of Montfort to Ontario’s Francophone minority extends beyond the health care and educational needs of the Francophone minority. Montfort, they say, is an institution that embodies and evokes the French presence in Ontario. It is asserted that the French-speaking minority population is constantly faced with the threat of assimilation. The respondents led evidence...to show that a linguistic minority’s institutions are essential to the survival and vitality of that community, not only for its practical functions, but also for the affirmation and expression of cultural identity and sense of belonging.¹²¹

The Ontario Court of Appeal cited another report as a measure of the impact of assimilation on minorities:

¹²⁰ *Lalonde v. Commission de Restructuration des Services de Santé*, Ontario Court of Appeal, December 2001, Para. 4.

¹²¹ *Montfort*, (CA) at Para. 7. One wonders whether the cases involving Canada’s decisions to replace traditional councils in Haudenosaunee communities with ones elected pursuant to the *Indian Act* rather than functioning under the *Kaianeren:kowa* would have been decided differently if this recognition of unwritten constitutional principles and the link between institutions and cultures had been considered. See *Isaac v. Davey* (especially in the Ontario Superior Court, [1973] 38 DLR (3d) 23.) and the Kanesatake cases.

A community becomes assimilated when its language and culture are invisible to its own members and to society in general.¹²²

In *Arsenault-Cameron v. Prince Edward Island*, the Supreme Court of Canada clarified that language rights are only part of the broader concern for cultural protection:

Language rights cannot be separated from a concern for the culture associated with the language.¹²³

The Ontario Court of Appeal agreed:

Language and culture are not separate watertight compartments.¹²⁴

The Supreme Court of Canada has reiterated the link between language and culture in other cases in which it moved to protect language rights – the implication being that cultures, as well, are entitled to protection, and that the protection of language rights is only one aspect of cultural protection:

Language is more than a mere means of communication; it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.¹²⁵

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression: it colours the content and meaning of expression.

¹²² *Montfort (CA)* at Para. 35.

¹²³ *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 SCR 3 at 34. The Court in that case also spoke of the “remedial purposes of the right.”

¹²⁴ *Lalonde, supra* at Para. 162.

¹²⁵ *Mahe*, SCR at P. 362

In *Beaulac*, the Supreme Court of Canada stated that:

Language rights must be given a purposive interpretation, taking into account the historical and social context, past injustices, and the importance of the rights and institution to the minority community affected.¹²⁶

Language rights are a fundamental tool for the preservation and protection of official language communities.¹²⁷

In *Montfort*, the Ontario Court of Appeal decided that the underlying constitutional principle of the protection of minorities and their rights was a stand-alone enforceable tool for the courts.

The idea that the courts are guardians of minority rights is also explicit in Supreme Court of Canada decisions:

A democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make. Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is warranted.¹²⁸

In the *Quebec Secession* reference case, the Supreme Court of Canada looked not only to the express words of the Constitution of Canada, but also to “underlying principles” for its decision:

Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (“have full legal force” as we described it in the *Patriation Reference*)

¹²⁶ *Ford v. AG Quebec*, SCR at p. 748.

¹²⁷ *Beaulac*, [1999] SCR 768 at 791-2.

¹²⁸ *Vriend v. Alberta*, [1998] 1 SCR 493 at 577, per Iacobucci, J.

which constitute substantive limitations upon government action.¹²⁹ These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with powerful normative force, and are binding upon both courts and governments.¹³⁰

Fundamental constitutional values have normative legal force. Even if the text of the Constitution falls short of creating a specific constitutionally enforceable right, the values of the Constitution must be considered in assessing the validity or legality of actions taken by government. This is a long-established principle of our law. Before the advent of the *Charter* and the constitutional entrenchment of rights and freedoms, there can be no doubt that those same rights were fundamental constitutional values. Although they had not been crystallized in the form of entrenched and directly enforceable rights, they were regularly used by the courts to interpret legislation and to assess the legality of administrative action. See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344. The fundamental rights and freedoms of a liberal democracy are very much a product of our British parliamentary heritage. As explained by Rand J. in *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299 at 329, “[F]reedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.” Although these fundamental rights and freedoms had no place in the text of the Constitution until 1982, the courts were entitled to take them into account when deciding cases and interpreting statutes, and when considering the legality of governmental actions.

Similarly, since the enactment of the *Charter*, the application of constitutional values to situations not strictly governed by the text of the Constitution has been recognized and accepted. The *Charter* does not apply as between private individuals, yet *Charter* values are to be applied by the courts in common-law decision making: *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

¹²⁹ Similarly, in *R. v. Lady McMaster* (1928) Ex.C.R., the Court found that the Royal Proclamation of 1763, which included Akwesasne lands in the territory “reserved for the Nations or Tribes of Indians with whom We are Connected, or who live under Our Protection,” continued to have the force and effect of a statute of Canada.

¹³⁰ *Reference re Quebec Secession*, [1998] 2 SCR 217 at Para. 249.

Unwritten constitutional norms may, in certain circumstances, provide a basis for judicial review of discretionary decisions. As Bora Laskin wrote as a professor of constitutional law in “An Inquiry Into the Diefenbaker Bill of Rights” (1959) 37 Can. Bar Rev. 77 at 81, although not entrenched in the Constitution, civil liberties were frequently used “as a means of curial control of administrative adjudication.” More recently, Professor David Mullan commented on the same doctrine in *Administrative Law* (2001) at 114, noting that in the pre-*Charter* era, the Courts were “alert in their scrutiny of the exercise of discretionary power” where civil liberties and freedoms were at stake. The statutory conferral of the power to make a discretionary decision does not immunize from judicial scrutiny the decision-maker who ignores the fundamental values of Canada’s legal order. In “Unwritten Constitutionalism in Canada: Where Do Things Stand?” (2001) 35 Can. Bus. L. J. 113 at 115, Professor Choudhry questions the propriety of using unwritten principles to challenge the validity of legislation, but regards as benign their use to review administrative action: “To the extent that unwritten principles have been used to control executive action, they function in a manner similar to the common law grounds of judicial review of administrative action.”¹³¹

The Ontario Court of Appeal followed this principle in preventing the provincial government from closing the Montfort Hospital:

The Constitution’s structural principal of responsibility for the protection of minorities is a bedrock principle.¹³²

Failure to take into account a fundamental principle of the Constitution when purporting to act in the public interest renders a discretionary decision subject to judicial review. If implemented, the Commission’s directions would greatly impair Montfort’s role as an important linguistic, cultural and educational institution, vital to the minority Francophone population of Ontario. This would be contrary to the fundamental constitutional principle of responsibility for the protection of minorities.¹³³

131 *Lalonde*, at Paras 174-176.

132 *Lalond (supra)* at Para. 125.

133 *Lalonde (supra)* at Para. 179-180.

In the *Reference re Secession of Quebec*, the Supreme Court of Canada reaffirmed the unwritten “bedrock” constitutional principle of the protection of minorities as one of the reasons why unilateral secession was impermissible:

There are a number of specific constitutional provisions protecting minority language, religion and education rights. Some of these provisions are, as we have recognized on a number of occasions, the product of historical compromises.

The courts will intervene to prevent cultural rights, including language rights, from being taken away or injured. But will they take the next step, which is to order compensation if they cannot prevent the taking or injury, or if the injury took place in the past and the resolution of it lies in the present and future?

The explicit protection accorded the French language in Canada establishes the principle of cultural protection. The courts will almost certainly eventually find that there is no difference in principle between protecting French and protecting an indigenous language. Language may be the “aboriginal right” and the aspect of culture that is most easily measured and proven, and the most likely to receive consideration for compensation in cases where it has been damaged or taken away.

The protection of the cultures of minorities in Canada – and especially the Francophone and aboriginal minorities – is a fundamental principle of Canadian constitutional law. Language rights have received active protection. The courts have been clear that their reason for doing so is that language is an integral part of culture. Where governments, by their actions, fail to adequately protect minority cultural rights, or act so as to injure those rights, the courts have the authority and ability to step in to prevent such actions.

7. International Law

The *United Nations Declaration on the Rights of Indigenous Peoples* is an integral part of international law. It represents the culmination of a sustained effort by many indigenous nations, including the Haudenosaunee, over several decades. Shortly after its adoption by the United Nations General Assembly, it was ratified by the great majority of nation-states of the world. Australia, New Zealand, the United States and Canada were the only nation-states that voted against it. All four have since stated their intention to ratify the Declaration, though Canada's statement, in the Throne Speech, indicated that the ratification would take place within the framework of Canada's constitution and laws, reservations which suggest that the ratification will change nothing.¹³⁴ While a Declaration is of less effect than a Convention, is not legally binding, and does not propose to have retroactive application, it is nevertheless a statement of legal standards.

Canada has often been antagonistic toward indigenous international efforts, maintaining that indigenous nations are not even "peoples" in an international law sense (preferring to use the less powerful term "groups") and maintaining that the agreements the Crown made with indigenous nations in Canada are not "treaties" in the international sense.¹³⁵

The Declaration states:

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State (Article 5).

¹³⁴ Australia formally endorsed the Declaration on April 3, 2009; New Zealand announced its intention to do so in July, 2009; the United States has indicated its intention in discussions with Haudenosaunee leaders in mid-2009.

¹³⁵ This last position led to an unusual contradiction: Canada would argue that its relationship with aboriginal peoples was political, not legal, so that Canadian domestic courts could not sit in judgment over its actions; but then it would argue that the relations were not political enough to be the subject of international rather than domestic law. See *Guerin v. the Queen*, Supreme Court of Canada, 1984.

Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. States shall provide effective mechanisms for prevention of, and redress for (a) any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) any action which has the aim or effect of dispossessing them of their lands, territories or resources...(Article 8)

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs (Article 11).

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise used and occupied lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard (Article 25).

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress (Article 28).

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions... (Article 31).

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States and other parties, as well as to effective remedies for all infringements of their individual and collective rights.

Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights (Article 40).

Other international conventions and declarations address some of the above issues, and some of those have been ratified and adopted by Canada. Generally, though, they do not address indigenous peoples directly. International standards are often unenforceable and, unless they are explicitly adopted as domestic law by Parliament, are not considered to be binding by Canadian courts. International tribunals that do bind Canada, such as the International Court of Justice in The Hague and the Inter-American Tribunal on Human Rights, had not addressed these issues directly.

International law has begin to address these issues, but Canada remains the lone holdout against the Declaration on the Rights of Indigenous Peoples, and considers its relationships with indigenous nations to be a matter of internal, domestic concern and not the subject of international law. No international tribunal has yet bound Canada to standards related to land or cultural issues.

8. Measuring Cultural Loss or Damage

It is clear that when the plaintiffs discuss culture, they mean all of the laws, spiritual practices, ceremonies, customs and traditions integral to the Kwakiutl people.¹³⁶

Cultural loss and damage is constant, vicious, unrelenting. It is related to the loss of biological diversity. Wade Davis points out:

There is a fire burning over the earth, taking with it plants and animals, ancient skills and visionary wisdom. At risk is a vast archive of knowledge and expertise, a catalogue of the imagination, an oral and written language composed of the memories of countless elders and healers, warriors, farmers, midwives, poets and saint – in short, the artistic, intellectual and spiritual of the full complexity and diversity of the human experience.¹³⁷

Cultures are not constant, though. They are dynamic. They change. They evolve and adapt, each in their own way. That is one of the difficulties of understanding or measuring damage to culture: the fact that a change might not be a loss, but only a change. When the Senecas acquired draft animals and were able to increase the amount of land an individual could cultivate, that led to a profound change in material culture. It permitted, for the first time, a single-family farm. It meant that instead of groups of women hoeing a garden, one man could plow a field. It changed the respective roles of men and women. It changed the choices of crops that people grew. Certainly it contributed to cultural change. But was this cultural *damage*?

Asking that question, in the context of Senecas and draft animals, leads to one basic criterion of assessing liability for cultural damage. It is that the change or damage must

¹³⁶ *Kwakiutl Nation v. Canada*, [2004] 4 CNLR 82, Paragraph 51.

¹³⁷ *The Wayfinders*, Anansi Books, Toronto, 2009, p. 34.

have been *inflicted* on the people suffering it. If, instead, they voluntarily *chose* the change, then unless there was some other breach of obligation, there would likely be no liability.

That is why the residential school situation lends itself so effectively to claims of cultural damage: because clearly, the children placed in the schools, and their parents, had no choice. Canadian federal law gave the Superintendent General of Indian Affairs the authority to choose the school an Indian child had to attend. It still does. A child who does not attend the designated school is in violation of the law. Nor did the children have any choice as to what they learned, or – un-learned. The curriculum was imposed upon them by administrators and teachers who had power over them, physical as well as emotional and moral power, and the ability and authority to force them to learn a particular way of doing things, or to stop doing a thing (like speaking their people's language or following their religion). The residential school example is like the scientific method: it isolates, and through isolation, it allows specific effects to be measured without interference from natural complexity. That is, in an isolated context, measurement is made much easier. The changes in the children are visible.



Thomas Moore before and after his entrance into the Regina Indian Residential School in Saskatchewan in 1874.
Library and Archives Canada / NL-022474

Cultural damage – or improvement?

Within the residential school environment, there was a deliberate, documented policy of cultural destruction. The policy was to “kill the Indian in the child.” The success of that policy was monitored carefully and reported in writing. If the children arrived at the schools with their language skills intact and left without them; if they arrived with some knowledge and practice of their religion and left without it; and if the records of the schools show that when the children attempted to practice their languages or religions, they were punished or otherwise strongly discouraged, that removes the evidentiary challenges. No factors other than the administrators and teachers in the schools, and the people who gave them orders, were identifiable as reasons for the change or loss. The loss was provable and measurable. The issue then became whether it was compensable.¹³⁸

¹³⁸ See “Reparations for Historical Injustice: Can Cultural Appropriation as a Result of Residential Schools Provide Justification for Aboriginal Cultural Rights?” Celeste Hutchinson, *Saskatchewan Law Review*, (2007) 70 Sask. L. Rev. 425-457.

Modern society is full of things for which compensation is regularly paid and for which there is no clear economic path to calculating compensation. Insurance companies pay individuals specific amounts for the loss of an arm or the loss of an eye – yet it is clear that the individuals would rather not have lost these things, that they would not normally accept compensation in place of them, and that they probably consider the compensation inadequate. More frequent (one bag in 150) is the loss of luggage, for which airlines have limits to compensation – and in virtually every case, especially where items of personal emotional value are lost, the individual feels the cash didn't come close to being fair compensation. Even more frequent is the loss of mail, even registered mail (in Canada, a \$100 limit on what the Post Office will pay for the loss). The point is that all of these instances of compensation have almost nothing to do with the economic value of the thing injured or lost.

Culture loss is difficult to measure, and compensation for culture loss is even more difficult. Taking advantage of that difficulty is one of the strategies of the federal government in court. Both the fact and the extent of the damage can be hard to define and hard to prove. In *Kwakiutl Nation v. Canada (Attorney General)*, in answer to the claim that the Kwakiutl had suffered loss of culture as a result of breaches of their treaties with the Crown,

Canada demands particulars as to the loss of culture, how damages for loss of culture are to be calculated and the quantum of damages for this loss.¹³⁹

Defining and measuring culture loss has been a joint effort by anthropologists and lawyers:

¹³⁹ [2004] BCJ No. 278, [2004] 4 CNLR 82, Paragraph 40. The Court denied this request: “Canada asks how the quantum of damages for loss of culture is to be determined. It is not necessary for the plaintiffs to plead the calculation. The plaintiffs have sufficiently particularized that they seek general damages with respect to this claim.”(Paragraph 53)

The term culture loss addresses two broad but interrelated categories of loss, loss of possession and loss of kinship or belonging (Kirsch 2001). In the former category culture loss includes the loss of possessions such as natural resources and customs such as livelihood practices for which one might claim rights or ownership. As such these losses imply value and property relations that are alienable or more or less amenable to economic compensation in some form. In the latter category, however, relationship to land or resource involves an intimate bond or sense of place, that take on the characteristics of kinship ties and belongingness, which are inalienable. Both possession and belonging, when applied to property, are grounded in the assumption that property is a manifestation of social relations (Rose 1994:227 cf Kirsch 2001:68). Simply put, property does not exist without people to make it meaningful. If the acquisition of property is a social manifestation then so is loss. For example many people possess land by rights given by the state and simultaneously through kinship or as members of a particular group. Thus, assessment and remuneration in cases of culture loss are also socially mediated. The possibility that disparate groups will need to resolve conflicts over resource damage increases as more people are connected across the globe by resource interdependencies.

Efforts to determine appropriate compensation for losses suffered by indigenous peoples practicing traditional subsistence lifestyles test the limits of current social science and institutional arrangements to identify and deliver an equitable solution to resource damages that result in culture loss.¹⁴⁰

Part of the challenge is that the land in question in many cases is the land that an indigenous community selected as “the land to be reserved” – because this particular land is the heartland of its existence, containing permanent residences, sacred places, key natural features, or meaningful places. That is, it is not exchangeable, and if it can’t be replaced by other land, surely cash would be even harder to offer as “compensation.” In a case where the heartland is affected, we have to rethink the meaning and intent of what “compensation” is.

¹⁴⁰ Robert Snyder, Daniel Williams and George Peterson, *Culture Loss and Sense of Place in Resource Valuation: Economics, Anthropology and Indigenous Cultures*, pp. 107-108.

The assumption that “land and assets can be monetized and compensated in cash” does not acknowledge the cultural value of land in contexts that stress the undeviating relationship between men and land. This assumption is linked to a second assumption that “compensation is a finite process.” A negative result of this approach is demonstrated by company-community clashes which occur based on the different views about land held by the company and by the community. The company claims it can do with the land whatever it wants (“a deal is a deal”) whereas local people perceive that they can never be alienated from their land, and therefore it will always belong to them. Their view is that the company is simply using land. Because of these different perceptions, the company risks being accused of “arrogance” or of not caring for local people.¹⁴¹

Land and other natural resources are often valued for their ties to history, identity and spirituality. Some communities feel insulted by the prospect of being compensated with cash or the construction of a building in exchange for use, or destruction, of areas that hold such significance. Companies generally view natural resources as commodities, rather than as sources of personal and community identity and culture. Thus, companies may feel that, by monetary standards, they have made adequate and fair compensation while communities remain distressed by cultural loss.¹⁴²

Measuring cultural damage is difficult, partly because all cultures change, and changes can be positive or negative, depending upon one’s perspective. Thus, the trial judge in *Delgamuukw* concluded that the Gitk’san and Wethsuwelthen had actually benefited from the coming of Europeans, since before that time their lives had been “nasty, brutish and short.” Taking this logic only a short distance further, the court could conclude that the aboriginal people actually should not only be grateful for having their land and resources taken from them without their consent, but perhaps should pay compensation to the governments who have helped them by doing so.¹⁴³

¹⁴¹ *Compensation Policies*, CDA Collaborative Learning Projects, Cambridge, MA, p. 3.

¹⁴² *Compensation Policies*, p. 7.

¹⁴³ The same line of reasoning may be found in Alan Pope’s recommendations that the people of Attiwapiskat would benefit from being moved to the outskirts of Timmins, Ontario.

Sometimes the courts will say that there has not really been any cultural damage, because the practice can be carried on in another way, in another place, or at another time.¹⁴⁴ Thus, in *Dick*, when two men were charged for out-of-season deer hunting, and were hunting to get deer for a particular ceremony in response to an old woman's dreams, the court said that they did not need to hunt at that time, and that frozen deer meat could have been used instead. In *Westbank First Nation*,¹⁴⁵ the applicants had argued that the clear-cutting of the forest would have resulted in the destruction of their ability to trap pine martens. The court concluded that, though the pine marten trapping was relatively recent and of minimal economic value, it had "important cultural value." However, the injunction against the cutting of the martens' habitat was not granted. These cases illustrate, among other things, the difference between the cultures of the judges and the hunters.

The *Montfort Hospital* and *Manitoba Language* cases are instructive. In those cases, the culture of a collective entity – Francophones – was protected. The cases involved remedies of prevention of damage rather than compensation. The cases involved language. This is not a coincidence.

Language is the most measurable indicator of culture. It is shared by the entire culture. Fluency, ability to speak and understand, ability to function in a language are all measurable. At the same time, language goes to the core of a culture, as the courts have said in the *Montfort* and *Manitoba* cases. Loss of language means loss of key abilities to function in and use culture: it brings loss of access to songs, ceremonies, medicine knowledge, and of the ability to communicate with knowledgeable elders. In the

¹⁴⁴ In the *Exxon Valdez* case, remember that the judge concluded that the plaintiffs' culture was so strong and resilient that it could adapt to the loss and therefore suffered no compensable damage. It would flow from this conclusion that the weaker one's culture, or the more endangered it is, the greater the loss that would be occasioned by environmental damage or loss of a key component, and therefore the greater the obligation to compensate. Conversely, people with strong cultures – survivors – suffer less damage or can adapt to it better, and therefore are owed less compensation.

¹⁴⁵ [1997] 2 CNLR 221. Sometimes the suggestion that people can hunt elsewhere is firmly rejected by the courts: in *Mikisew*, Justice Binnie retorted that while the Treaty 8 area was huge, the suggestion that the Cree hunters could go someplace else was tantamount to asking the truffle hunters of central France to seek their mushrooms in the Alps.

residential school system, where the avowed intent was the destruction of culture, one of the key strategies was the destruction of language.

Since loss of language is measurable, and since language is a legally protected element of culture, it is fair to say that if Canadian courts will not compensate groups for loss of language in residential school class actions, the chances of compensation for other forms of cultural loss are slender. However, the fear that compensation for language loss would open a “floodgate” of compensation for other forms of cultural loss probably impelled the federal government and the churches toward a global financial settlement that explicitly excluded cultural loss of any kind, while appearing generous enough (especially considering the length and bitterness of trials) that the settlement was generally accepted. By achieving a general settlement of residential school litigation, Canada avoided the creation of an obligation to make compensation for cultural damage.

Once one gets beyond language, though, the extent and nature of the damage becomes harder to measure. “Culture” is such a broad term that it is hard to measure its extent, and therefore hard to measure damage to its components. Outside a controlled environment like a residential school, there are multiple impacts, and even where they flow from more easily identified policies (like colonialism – which is more of an ideology than a strategy) attributing responsibility for particular aspects of damage is difficult. Even as they identify the nature and sources of damage, and even as they point to the complexity of remedial action, scientists point out the complexity of identifying the specific sources of the damage: in a July, 2009 article in the *Lancet*, researchers in Canada and Australia aimed at health disparities between aboriginal and non-aboriginal peoples as an indicator of (among other things) cultural damage:

The health problems of indigenous peoples around the world are intimately tied to a number of unique factors, such as colonization, globalization, migration, and loss of land, language and culture. These factors remain even after the “typical” social problems facing the poor, such as inadequate housing, unemployment and low education levels are

addressed, according to Dr. Malcolm King, lead author of a paper to be published... in the Lancet, a prestigious UK medical journal...

“...factors like retention of Aboriginal languages, cultural practices, self-determination and respect for Elders are so important,” King continues. “And that’s why we have so much to do to repair the damage done by so many disruptive assimilational practices in the past, such as cutting off children from their families at residential schools, or suppression of cultural practices that conflicted with European ideas.”

Programs to address these issues should be viewed as complex clinical interventions, Dr. King says, with health researchers, social scientists and clinicians working together hand in hand with Indigenous peoples to identify the most pressing needs and most appropriate and workable solutions.¹⁴⁶

Even as this paper identifies cultural loss as a source of damage, it points out the complexity of assigning responsibility. There are so many factors contributing to the loss that single factors, and responsibility for those, are hard to prove. The paper also points to the complexity of remedies: “complex clinical interventions” involving multiple actors. In a legal system that likes things to be simple and clear, cultural damage is complex in its sources, effects and remedies.

One measure of cultural damage has been actively considered. The courts have said that, to be considered at all, the infringement must be “substantial.” That is, an infringement on aboriginal rights that is minor or trivial will not be prevented by the courts.

In *Sparrow*, the Supreme Court said:

To determine whether fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising the

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Canadian Institutes of Health Research, July 3, 2009, press release.

right?... If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

In *Navajo Nation v. U.S. Forestry Service*, the Court of Appeal concluded that, to trigger a right to cultural protection, the interference must be so “substantial” as to actually prevent the people from carrying out their ceremonies. A mere reduction in the quality of the spiritual or cultural experience would not be enough to be “substantial.”

The use of the word “undue” by the Supreme Court in *Sparrow* is another warning that cultural rights will be hard to protect. The word is used in Canadian competition cases, where the courts will intervene when a combine or agreement “unduly restricts competition.” The courts have concluded that this describes a situation in which almost all competition has been destroyed. While it is not defined in *Sparrow*, the word “undue” may become a future battleground.

This principle that damage must be “substantial” was further examined by the Supreme Court of Canada in *Coté v. The Queen*, in which the Algonquins were objecting to a Québec government entry fee to provincial parks where it was also clear that there were Algonquin aboriginal rights to hunt and fish. The Court concluded that, instead of being an infringement of their aboriginal right, the entry fee was actually beneficial to the right because the money would be used for conservation.¹⁴⁷

I accept the general proposition that a regulation may infringe an aboriginal or treaty right under the *Sparrow* test by conditioning the exercise of such a right upon the payment of a user fee to the state. But in light of the surrounding circumstances of this case, I am persuaded that the financial burden in this case does not amount to an infringement of the appellants’ ancestral right to fish for food.

¹⁴⁷ What if the money was not used for conservation? In Ontario, revenues from hunting and fishing licenses have gone into the province’s consolidated revenue fund. What if the fees were used for purposes that benefited other users of the area and were of no benefit to the Algonquins?

The fee in this instance, rather than constituting a revenue-generating tax for the provincial government or the ZEC administration, represents a form of user fee dedicated to the upkeep of the facilities and roads of the ZEC... the access fees actually facilitated access to the ZEC, as the collected funds were spent towards repairing and modernizing the transportation infrastructure of the controlled zone.

As such, given the particular facts of this case,...in my view the access fee, by improving the means of transportation...effectively facilitates rather than restricts the constitutional rights of the appellants.

I find that the *Regulation* does not infringe or restrict the asserted right of the appellants to fish under the terms of the Swegatchy treaty. The *Regulation* only imposes a modest financial burden on the exercise of this alleged treaty right where access is sought by motor vehicle, and under the circumstances, the access fee actually facilitates rather than restricts the exercise of this right.¹⁴⁸

In the case of the Montfort Hospital, the provincial government argued that the hospital did not have an integral role in cultural preservation, and also that the evidence of cultural damage was imprecise and vague – both arguments that aboriginal claimants will inevitably face when arguing about cultural damage:

Ontario submits that hospitals are not institutions that prevent assimilation because people do not frequent them regularly for lengthy intervals. Ontario submits that the experts' analyses of Montfort's broader institutional role is abstract, highly speculative, not firmly rooted in fact, and inextricably linked to the language of politics.¹⁴⁹

The same kinds of arguments are made concerning the application of the principle that aboriginal children should not be placed in adoption or foster care with non-aboriginal families: the evidence is anecdotal, highly speculative, and political.

¹⁴⁸ *Coté*, Paras. 78-80 and 88. Was the court considering the idea that motor vehicles did not exist at the time of the treaty? If so, was it leaning toward the idea that rights are frozen in time?

¹⁴⁹ *Montfort*, Para. 70.

Similarly, in the case of American prisoners who had been forced to work for Japanese companies during World War II, in violation of the Geneva Convention, United States courts responded that they should not succeed in their lawsuits against the Japanese companies because “their suffering has paid off in the form of freedom for our society.”¹⁵⁰

One person’s loss is another person’s benefit. Thus, the people who sought to “educate the Indian out of the child” in the residential schools probably honestly believed they were providing the children with advantages when they prohibited them from speaking their own languages and forced the commercially desirable¹⁵¹ English language upon them. How, they would say, can providing such a benefit be “damage”?

Canada’s protection of the French language has its reflection in damages awarded by the courts. In *Jantz v. Mulvahill*, the British Columbia Supreme Court awarded damages to children for the loss of their mother, and clearly took into account “cultural loss.”

Sylvie Jantz was a very caring and loving mother. The diaries she kept for each of her children is clear evidence of that. As well, the fact that she was French Canadian and very concerned that her children be raised in a bilingual environment is significant. At the time of their mother's death, the children were at a very impressionable stage in their development. This has resulted in a significant cultural loss for the children.¹⁵²

¹⁵⁰ *Tenney v. Mitsui*, U.S. 9th Circuit Court of Appeals, leave to appeal to the Supreme Court denied. The essence of the decision was that the peace treaty between the United States and Japan – signed in 1951, six years after the end of the war, and at a time when the United States was counting on Japanese support in the Korean War, explicitly barred such lawsuits. The court hailed the men as heroes, while denying them any remedy.

¹⁵¹ The field of “socio-linguistics” suggests that there is generally a shift away from languages that are perceived as economically or socially linked with lower classes of people. The evidence, though, is also that the dominant or colonial authorities deliberately pursue policies of suppression of language. Thus, until the 1960’s, children who spoke Provencal in schools in southern France were made to hold a cow in class as a sign that they were peasants; children who spoke Welsh in school in Wales were made to hold a sign that said “Welsh Not”, and to pass it on to the next child who spoke that language – and the holder of the sign at the end of the day was beaten by the other students; children in Hawaii were made to stand in a corner wearing a sign that said “Do not speak Hawaiian to me”.

¹⁵² [1989] BCJ No. 2346 (B.C. Supreme Court).

Sometimes, the “heritage and culture” in question can sometimes be arrogated or adopted so that it is *everybody’s* property. This is an argument frequently used by museums to justify their continued retention of other peoples’ cultural objects,¹⁵³ and has been accepted by the Supreme Court of Canada, it seems:

The Act considers First Nations culture as part of the heritage of all residents of British Columbia. It must be protected, not only as an essential part of the collective memory which belongs to the history and identity of First Nations, but also as a part of the shared heritage of all British Columbians.¹⁵⁴

Once your culture is part of a “shared heritage,” then everybody in the entire larger society shares in its loss. If the loss is felt by everybody, then your own loss ceases to be special. At that point, your entitlement to compensation for the loss becomes lost in the general societal damage. It is very much like the judges in the *Exxon Valdez* case concluding that everyone in Alaska has the right to participate in a subsistence lifestyle. It is a short hop from there to concluding that everyone has the right to participate in aboriginal ceremonies.¹⁵⁵

Finally, it is possible to argue that the damage involved has been so great that it could never be fully paid for. It is not difficult to move from that argument to the suggestion that a thing that cannot be measured because it is so big should actually result in compensation of zero.

In the case of *Oneida Indian Nation of New York et al. v. New York et al.*, the defendant State of New York argued that the court should not hear the case – that the issue was

¹⁵³ For example, the British Museum maintains its possession of the marble friezes from the Parthenon in Athens not only because Lord Elgin, it says, bought them fair and square from the Turks who controlled Greece, but also because the marbles and Classical Athens are part of the heritage of the world, or of all Europeans, so their retention by the British Museum is justified as “part of the heritage of us all”.

¹⁵⁴ *Kitkatla*, [2002] SCC 31, at Paragraph 45. Hints of the same thinking appear in the first paragraph of

¹⁵⁵ The recent situation in Arizona, in which over 60 people were packed into a sweatlodge (at over \$9,000 each) and three of them died, could easily lead to a test of whether non-aboriginal people can use “Indian religious freedom” as protection against liability in lawsuits.

“non-justiciable” – because the implications of an Indian victory in court would be too far-reaching.

The defendants point to the scale of the wrong alleged and the size of the remedy sought as rendering the claims nonjusticiable. We do not doubt that a declaratory judgment declaring the New York treaties invalid could cause substantial dislocations in the affected lands, casting a cloud over all current title holders, and that the impact of a monetary award could be heavy. Yet we know of no principle of law that relates the availability of judicial relief inversely to the gravity of the wrong sought to be addressed.¹⁵⁶

The Australian cases are more useful: cases in which Aboriginal artworks are subjected to unauthorized commercial exploitation give rise to considerations of damages of a uniquely cultural nature. In *Milpururru*, a case in which the court took into account customary Aboriginal laws about the reproduction of sacred images, the court concluded that the damages sustained extended beyond the commercial potential for monetary return. The court acknowledged that the infringements had caused personal distress and potentially exposed the artists to embarrassment and contempt within their communities, if not to the risk of diminished earning potential and physical harm. The judge awarded low damages for copyright infringement, but then an additional sum “to reflect the harm suffered...by the artists in their cultural environment.”¹⁵⁷ One important aspect of the Australian cases is their courts’ willingness to consider events in the unique cultural context of Aboriginal life, rather than seeking to impose the standards of the general populace on the victims. Where the U.S. court in the *Exxon Valdez* case concluded that everyone partakes of a subsistence lifestyle, the Australian courts have considered the impact of the events in the victims’ communities and distinct societies.

¹⁵⁶ *Oneida Indian Nation of New York v. New York*, I.L.R. November 1982 (US Court of Appeals, *per* Mansfield, J.). Two decades later, the Oneidas, using casino profits, had bought 17,000 acres of their original reservation, which they then refused to pay county taxes on. The United States Supreme Court, in *County of Sherrill v. Oneida Indian Nation of New York*, concluded that the unilateral “creation” of Indian country was legally unacceptable because it would be too disruptive of county planning and administration.

¹⁵⁷ [1994] 30 IPR 209.

Measuring the amount of damage is not the same as measuring the value of the damage in economic terms. Part of the confusion is that “damage” and “damages” are different ideas and very similar words. “Damage” is the dent in your fender; “damages” is the \$300 it will cost to have it fixed.

A series of Australian cases acknowledge that injury to an *individual* may result in real loss to the individual in cultural terms – the inability or ineligibility to participate in ceremonies, for example – and that this loss is compensable in cash. These cases consider the effect *within a cultural context* of a particular kind of damage. This is not the same as loss of culture, but the cases acknowledge that a person can suffer a loss that is relevant or exacerbated or increased as a result of the impact of that loss to the person’s ability to function within his or her culture. Thus, a Jewish divorcée or a Muslim widow whose chances of remarrying are lower than a “mainstream” divorcée or widow may be entitled to higher damages; a Gitk’san chief whose ability to perform ceremonies is impaired as a result of an accident and whose prestige is lowered as a result, have suffered real injury in apparently measurable and compensable terms. The compensation they receive takes their unique circumstances into account.

In *Nalapuma v. Baker*¹⁵⁸ in 1982, \$10,000 was awarded for loss of cultural fulfillment to an initiated man of 18 whose head injury meant that he could take no further part in ceremonies.

In *Dixon v. Davies*¹⁵⁹ in 1982,¹⁶⁰ \$20,000 was awarded to a boy of 10 who would not be able to be initiated and would therefore lose status and be unable to participate in ceremonies.

¹⁵⁸ (1982) 29 SASR 192

¹⁵⁹ (1982) 17 NTR 31.

¹⁶⁰ (1984) No. 681, Supreme Court of the Northern Territory of Australia, *per* Rice, J. (Unreported)

In *Mulladad v. Palmer*, an Eastern Aranda man injured in an automobile accident claimed that his ability to participate in ceremonies was significantly reduced; that he was reduced to the role of a passive onlooker at ceremonial dances.

Before the accident he says that he was a keen hunter, particularly of euros. He claims that this was a pleasure and a traditional activity which is now denied to him because of his inability to climb on rocks. In addition, he claims that his leg weakness and limited mobility mean that he is now unable properly to defend himself in the event of fights in the community and that he is restricted in his activity in communal gatherings.

The judge in *Mulladad*, though, found that the evidence was insufficient to support the claim for “loss of amenities”: the plaintiff’s fear of snapping his leg while dancing was not justified; his hunting had been sporadic; his evidence of diminished esteem in the community was uncorroborated. The judge did not reject any of these culturally based kinds of damage as non-compensable: he just found they were not supported by the evidence he had heard.

In *Namala v. Northern Territory of Australia*,¹⁶¹ the plaintiff sued a doctor for negligence in performing a caesarean section during the birth of her son, which resulted in damage to her uterus and a total abdominal hysterectomy. The judge concluded:

A Nanggikurrungu woman, she lived at Daly River Mission and led a lifestyle which included participation in traditional Aboriginal cultural activities and ceremonies. It is clear from the evidence that traditional Aboriginal aspects of her lifestyle were important to her cultural fulfillment in life.

...she gave evidence as to the importance of children in Aboriginal families in that vicinity. She stated that older persons in the community are respected if they have lots of children and grandchildren; and that the children look after their grandmothers and grandfathers, providing them with food and sometimes money.

¹⁶¹ [1996] AILR 87; (1996) 1 AILR, Supreme Court of the Northern Territory.

The plaintiff also testified that it was important for Aboriginal women in that community to have daughters, so that they are able to fully participate in ceremonial women's business. She gave evidence that she felt hurt and sad by not being able to fully participate, and that she was only able to look on.

...The plaintiff also called evidence from Mr. Barber, a consultant anthropologist. ...Mr. Barber...gave evidence that her inability to have more children would reduce her status in the community. In particular, he said that the patriarchal nature of the society meant that major political and economic institutions were in the hands of the men of the community and that, as a woman, the plaintiff would have no power in the community other than through her children. Mr. Barber also gave evidence...[of] the importance of having a large number of children as an aspect of personal protection.

...Fertility is, *prima facie*, an amenity of life; resulting infertility is a loss of an amenity. The effect on the plaintiff's traditional lifestyle is, to some degree, a loss of what otherwise would be cultural fulfillment, and thereby constitutes a form of suffering.

The court's award of \$80,000 included compensation for the loss of cultural fulfillment through the plaintiff's inability to fully participate in traditional ceremonies, as well as the suffering flowing from the cultural importance of having large numbers of children, as well as compensation for physical pain and suffering, the objective loss of the ability to bear children, and the same matter's subjective suffering.¹⁶²

The Canadian case of *Adan v. Davis* in the Ontario Court of Justice covered similar ground. Adan had been sterilized as a result of a misunderstanding by her doctor. The court awarded damages of \$80,000. Canada's multi-culturalism seems to have propelled the reasoning of the court in awarding damages that reflected the importance of

¹⁶² The court found that interest should be paid from the time of the operation, since "by far the greater bulk of the damages were occasioned at that time", but that loss of cultural fulfillment through the plaintiff's inability to fully participate in traditional ceremonies "would accrue gradually", and damages for this should therefore be apportioned between pre-trial suffering and future suffering.

childbearing to Muslim culture: the court stated that “conformity to values and norms [in Canada] is variable.”

Ms. Adan is a Muslim woman who had never used any form of birth control and whose reproductive capacity is fundamental to her status in her society. Sterilization is not permitted under Islamic law. Although the observance of Islamic law can vary, I accept the plaintiff's evidence that, despite Islamic law, she was never prepared to be sterilized. Dr. Hinnawi, who trained as a physician in Jordan and who has a large practice of Muslim patients, testified that he had never known a Muslim woman to undergo a sterilization. I do not suggest that Dr. Davis knew or ought to have known anything about Islamic law or about the plaintiff's particular religious practices. But, we live in a multi-cultural country where conformity to values and norms is variable and where careful inquiry must be made to ensure that our own values and norms are not inadvertently imposed on those who do not subscribe to them. It cannot be assumed that a 28 year-old woman with four children who are very close in age, and who has had a recent delivery by cesarean section, does not want any more babies. There was no careful inquiry here. Dr. Davis made a tragic error...

In this case, Ms. Adan's reproductive capacity is fundamental to her status in her society. In her evidence, she described the effect of the sterilization as "the removal of her most precious parts". Sterilization is opposed to the religious beliefs to which she subscribes, and in addition to denying her, in the words of La Forest J. "the great privilege of giving birth," it is, in her culture, a serious, if not insurmountable limitation on her ability to marry. Ms. Adan testified that her own mother had given birth to 15 children and that, in accordance with her religion and culture, she herself had planned to have "as many children as I can have." In my opinion, and quite apart from my view that previous awards have not fully recognized the loss at issue here, the circumstances here warrant a substantial award. I have taken into account that Ms. Adan was 28 years of age at the time of the surgery, that she planned to have more children, that her ability to reproduce is considered by her and by her culture to be of enormous significance, and that her religious beliefs preclude sterilization.¹⁶³

¹⁶³

[1998] OJ No. 3030 (Ontario Court of Justice), Paragraphs 34 and 50.

If “conformity to values and norms is variable” in considering damages in civil court cases, would that approach not also hold true in cases where land is being taken, and the land would hold different values in different cultures?

A series of Canadian cases have taken into account the obligation in Chinese and other Asian cultures of “filial piety.” A child, and especially an eldest child, has a duty in that culture to make financial contributions to his parents, cited in the cases as between 10% and 20% of the child’s income. The loss of a child would therefore represent a pecuniary loss to the parents, which the courts would take into account. This means that the courts recognize cultural differences in the value placed on a child – based, however, on expert evidence of the *economic* expectations of the child’s conduct. In *Lian v. Money Estate*, the court awarded \$175,000 “representing the present value of future support” because of the “strong and pervasive influence in Chinese culture of the concept of filial piety.”¹⁶⁴ The following year, the British Columbia Court of Appeal noted that “especially in Canada, where western ideas and practices traditional expectations, the practices within any one specific family would be determined by the particular circumstances within that family.” *Lian v. Money Estate* was expressly followed in an aboriginal context in *Cahoose v. Insurance Corporation of British Columbia* in 1997.¹⁶⁵

In British Columbia, a series of cases have considered damages in ways similar to the approaches taken by the Australian courts. Damage to a person’s status within a culture, and damage to a person’s ability to function within that culture, have been the subject of court-awarded remedies. Since some of these cases involve damage within an aboriginal culture, they approach the issue of damage resulting from injury to a culture itself, or

¹⁶⁴ [1996] BCJ No. 18, British Columbia Court of Appeal, Paragraph 15. See also *Lee v. Dawson*, [2003] BCJ No. 1532, 17 BCLR (4th) 80, British Columbia Supreme Court, for similar conclusions about Korean families.

¹⁶⁵ 1997 canLii3067. The victim of the car accident had a close relationship with her mother, was the only child who could converse with the mother in the Carrier language, and intended to “fulfil one of the values of the Carrier culture which is to live with or close to one’s parental elders and care for them in their need.”

damage to a person's ability to practice the culture, which is a different matter. In *Gawa v. Horton*,¹⁶⁶ the court considered the effect of severe injuries to a chief:

Since the accident the plaintiff has been unable to fulfil her role as High Chief of the Frog Clan. In the traditional Gitksan culture a chief had religious as well as political responsibilities. To become a chief it was necessary to hold one of a number of limited names, but a name would only be passed on to someone who was worthy of it. The standing of a name could be increased or decreased by the holder, and would reflect on the membership of the "house" of that chief. Support for a chief acquiring a name would be demonstrated at a feast (potlatch). A "house" is no longer a residential unit, but membership in a house is still recognized and the hereditary chief retains many of his social and economic responsibilities as well as a high social status. The political and economic influence of hereditary chiefs was eroded in the past by band councils and their elected chiefs, but Dr. Cove is of the opinion that recently, with the revival of interest in preserving the language and traditions of the Gitksan, the hereditary chiefs are again becoming more influential.

The effect of a serious injury of the kind suffered by the plaintiff is twofold. First the plaintiff was knocked down by a blow to the head in public: that is a particularly humiliating injury in the Gitksan culture, and according to Dr. Powell results in an extreme lowering in the status of the person affected. Dr. Powell noticed some social ostracism of the plaintiff when he stayed in Kispiox in 1980 and again in 1981; the other hereditary chiefs of comparable age and status to the plaintiff did not visit her. When Dr. Powell visited the plaintiff he found a profound change in her outlook and attitude compared to before the accident: then she had been confident, humorous and outgoing; after the accident she appeared withdrawn, introverted and insecure. It was apparent to him that the people were not eagerly socializing with her any more, and her disabilities prevented her from moving from her home except for necessary purposes.

The second effect of the plaintiff's injuries is that she is now forgetful and an object of pity. Dr. Cove said that the Gitksan consider a person who is pitied as a person who is subordinate, weak and unable to live up to his obligations. This is the antithesis to the

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[1982] BCJ No. 1620 (B.C. Supreme Court), Paragraphs 12-16 and 19.

qualities that are desired for a Gitksan chief being the qualities of leadership, counsel and knowledge of Gitksan laws, language and custom.

It was argued for the plaintiff that this shame could be erased and the status of the plaintiff restored if she were to give a special feast (potlatch) called 'TLOX', and in particular a special category of that feast for those who suffer the humiliation of a public head injury. This feast is called "wiping away the blood." Dr. Powell, Mrs. Mary Mckenzie and Mrs. Mary Johnson (another chief) told of the history and significance of this feast and its cost which was estimated at approximately \$15,000.00. Counsel also argued that the plaintiff's loss of status as a chief should be considered when assessing damages for loss of amenities. Diplock L.J. in *Fletcher v. Autocar and Transporters Ltd.* (1968) 2 Q.B.D. 322 said this at p. 340:

"High though his deprivation ranks, I cannot think that it ranks any higher because the plaintiff, before the accident, was a rich man. Had an ordinary working man, who like the plaintiff had led before the accident a full, active and useful life in his own sphere, sustained the same injuries with the same physical and mental results, he would in my view have been entitled to monetary compensation of the same order as the plaintiff for the transformation of his life into a passive, empty and useless existence."

The rank considered in that case was established by wealth, and the injuries prevented the plaintiff from enjoying an unusually wide variety of activities.

...I can take into account the plaintiff's loss of status in the community, her inability to perform the ceremonial functions as chief that she used to perform and her social ostracism under the principles expressed by Lord Pearce in *H. West and Son Ltd. v. Shephard* (1964) A.C. 326, when he said at page 365:

"If there is loss of amenity apart from the obvious and normal loss inherent in the deprivation of the limb -- if, for instance, the plaintiff's main interest in life was some sport or hobby from which he will in the future be debarred, that too increases the assessment...These considerations are not dealt with as separate items but are taken into account by the Court in fixing one inclusive sum for several damages."

I have no doubt that the plaintiff's injuries have debarred her from many interesting and worthwhile activities, and the plaintiff's loss of enjoyment of life has thus been severely diminished. I do not believe under those principles that I can add to the award the cost of holding a special feast to "wipe away the blood" and so decline to take that cost into account in this assessment. In any event her loss of status has already been considered, and if I were to allow a sum to enable her to regain her status, I would be awarding double compensation. For pain, suffering, and loss of enjoyment of life and loss of amenities in the past and in the future I award \$40,000.00.

In *Forsythe v. Collingwood*, a native woman was falsely accused of shoplifting. In awarding her damages, the court considered cultural remedies that added to the damages owing: where the judge in *Gawa* avoided awarding the damages to cover the cost of the feast, in *Forsythe*, the court accepted the need for the feast and part of its cost:

Mrs. Forsythe has an unusual but not unique claim for damages (*Gawa v. Horton* (1982), 37 B.C.L.R. 130). According to her custom she must hold a feast for her clan to absolve herself of the shame cast upon her by these circumstances - a shame which lies upon her despite her obvious innocence. The customary feast was not disputed, nor was the cost, \$2,000. However an undetermined but small part of this sum would be borne by clan members. That feast will absolve her of shame within native society but she is entitled as well to damages for her humiliation in front of non-native persons as well.¹⁶⁷

In *Lee v. Dawson*, the court considered a Korean perspective:

The plaintiff's facial disfigurement has been a source of shame and embarrassment to him and his family. The shame is much greater by virtue of Korean cultural values than North American cultural values.¹⁶⁸

In *Williams v. Mould*, the court was asked to consider the cost of a headstone for the grave of the high chief of the Fireweed Clan of the Gitk'san.

¹⁶⁷ [1987] BCJ No. 40 (County Court).

¹⁶⁸ *Lee v. Dawson*, [2003] BCJ No. 1532, Paragraph 17.

I have heard evidence before me that the requirement for the erection of a headstone has significant cultural and hereditary factors. It is done to perpetuate the name of the high chief and his crest and at this ceremony the successor takes on such a name and crest...

I consider the fact that the deceased, Stanley Williams, held a high stature in his community, that he was a high chief and that it is customary for such an activity. It is not an expression of sentiment but it is an obligation imposed by reason of these special significances that I mentioned. Therefore, notwithstanding the position of Mr. Halfyard and the cases he cited to me where memorial markers or certain ceremonies that were expressed in foreign countries based upon sentiment were disallowed, I find that those factors are not present before me. This is not, I repeat, an expression of sentiment by the family. It may be incorporated.¹⁶⁹

In *Lian v. Money Estate*, the court also recognized a need for “particular sensitivity” in burial, awarding additional damages for providing the deceased potentially restless soul with additional burial room.¹⁷⁰

In Canada, the cultural aspect of damages has also been considered in cases involving the traditional Jewish divorce, the *get*. *Bruker v. Marcovitz*, decided by the Supreme Court of Canada on December 14, 2007, is about a kind of damage unique to a culture, and that is not quite the same as cultural damage or loss – but it is related. The case involved a Jewish couple who had undergone a civil divorce. In their civil settlement, the husband had also agreed to provide his wife with a *get*, a religious divorce. Without that, she could not remarry¹⁷¹ and any children she would have would be considered illegitimate under Jewish law. When the husband refused to provide the *get*,¹⁷² the wife sued for damages.

¹⁶⁹ [1991] 3 CNLR 186. While allowing the cost of the headstone, the judge did not grant the cost of a fence around the grave, because he had not heard evidence that it was “part of the hereditary and cultural requirements.”

¹⁷⁰ *Lian v. Money Estate*, [1996] BCJ No. 18, British Columbia Court of Appeal, Paragraph 53.

¹⁷¹ “For those Jewish women whose religious principles prevent them from considering remarriage unless they are able to do so in accordance with Jewish law, the denial of a *get* is the denial of the right to remarry.” *Bruker v. Marcovitz*, para. 82.

¹⁷² Though he argued that the issue of the *get* was religious and therefore beyond the consideration of Canadian courts, his reasons for refusing the *get* were not religious: “[she] harassed me, she alienated my kids from me, she stole some money from me, she stole some silverware from my mother...” (Para. 68).

The Supreme Court of Canada considered decisions by a number of other courts to award damages in cases where a husband had refused to provide his ex-wife a *get*. The European Commission of Human Rights had supported a French court's decision to award such damages; French courts had several times distinguished between the obligation to provide a *get* and freedom to exercise religious rights. British courts "have recognized that the inability to remarry within one's religion represents a serious compensable injury."¹⁷³ And an Israeli court, addressing "*get* recalcitrance," awarded aggravated damages: "the object of the relief applied for is to indemnify the wife for significant damages caused by long years of *aginat*, loneliness and mental distress that were imposed on her by her husband."¹⁷⁴

These damages are not for loss of culture, strictly, but they are damages for losses unique to a culture, and of a cultural nature. That is, her loss occurred *within* her culture, and would not have been the same kind of loss to someone outside that culture. The Supreme Court of Canada characterized the damage as representing "an unjustified and severe impairment of her ability to live her life in accordance with this country's values and her Jewish beliefs...[with a] disproportionate disadvantaging effect on Ms. Bruker's ability to live her life fully as a Jewish woman in Canada" and her loss as "the ability for 15 years to marry or have children in accordance with her religious beliefs."¹⁷⁵

The minority of the Supreme Court declared that that the husband's promise to provide the *get* was a "religious undertaking" which, under Quebec law, is a moral and not a civil obligation, and therefore not justiciable.¹⁷⁶ More important, from the perspective of any approach to seeking damages in Quebec for cultural loss, the minority felt that the "object

¹⁷³ *Brett v. Brett*, [1969] All E.R. 1007, English Court of Appeal: the court ordered an additional lump sum support payment if the husband refused to deliver a *get* by a certain date. (*Bruker*, para. 86). Australian courts had followed the same reasoning (*Bruker*, para. 87). The Supreme Court of Canada's minority viewed *Brett* as reflecting Canadian courts' inclination to increase support where dependency was increased, and receded from the more cultural aspect of the decision, noting that it now lacked rabbinical support in England (para. 140-141).

¹⁷⁴ *Doe v. Doe*, Jerusalem Family Court, 2004; *Bruker*, para. 89.

¹⁷⁵ *Bruker*, paras. 93 and 96.

¹⁷⁶ *Bruker*, para. 118 and 120. "only her religious rights are in issue, and only as a result of religious rules" (para. 131).

of the contract” – in this case, to obtain a religious divorce – was not a “juridical operation.” It was not

...a mechanism capable of legal characterization; it must be capable of juridical consequences. Sale, service, lease and loan are some examples of juridical operations. Is the operation at bar a juridical operation? Obtaining a religious divorce is not capable of legal characterization. The rabbinical authorities are not responsible for civil divorce in the way that certain religious authorities are for marriage. The act they perform or the judgment they render is not recognized in civil law. Neither the undertaking to consent to a religious divorce nor the religious divorce itself has civil consequences....the parties did not agree on an operation recognized in civil law. Since the parties did not envisage a juridical operation, it must be concluded that one of the essential elements of contract formation is missing.¹⁷⁷

The minority concluded that the obligation undertaken by the husband in the divorce settlement was not contractual but “based on a duty of conscience alone... a purely moral obligation that may not be enforced civilly.”¹⁷⁸ The significance of this? It is a reminder that the inflexibility of Quebec civil law to envisage new or different forms of court action, especially where they involve non-commercial or non-economic aspects, may lead to the courts’ rejection of a right to remedies.

The minority of the court, having refused the action on the grounds that it was not founded in a valid contract, then briefly considered the issue of damages. It concluded that recognizing the wife’s disadvantaged status under Jewish law – but not under Canadian law – “requires recognition of a legal situation that is contrary to the rules of Canadian and Quebec family law,” since under the latter systems, divorced people are freely entitled to remarry, and “children are treated equally whether they are born of a marriage or not.”¹⁷⁹ To order damages because of the husband’s failure to honour his moral undertaking would be to “sanction religious law,” and Canadian courts must

¹⁷⁷ *Bruker*, para. 174.

¹⁷⁸ *Bruker*, para. 175.

¹⁷⁹ *Bruker*, para. 179.

“maintain a neutrality that is indispensable in a pluralistic and multicultural society. It allows them to focus on conformity to the civil standard without having to decide between various customs or practices...[in Canada, all religions] are entitled to receive the same protection, but not, I believe, to be provided with weapons.”¹⁸⁰

The *Bruker* decision suggests that, where a loss suffered occurs within the context of a particular culture, and would not be considered to be a loss in Canadian society in general, the majority of the Court would consider compensation. But the minority of the Court raises the spectre of the unenforceability of “moral obligations,” and the entire Supreme Court of Canada tended to view the matter within the context of a multicultural Canada – not one in which a right to remain a distinct society receives any strong respect.

In *Kaddoura v. Farez*, the British Columbia Supreme Court considered damages similar in effect to the *Bruker* damages, but in a Muslim context:

Because she is Muslim, the plaintiff's situation insofar as divorce and remarriage are concerned, is different from that of most Canadian women who are widowed at age 19. Dr. Hobart, who is a professor emeritus in sociology with a special interest in families...put the plaintiff's chances of remarriage at 33 percent. He readily conceded, however, that this number is somewhat arbitrary and, in many respects, an educated guess. By comparison, the average very young Canadian widow has an approximate 80 percent chance of remarriage...

The plaintiff...did tell the court what the death of her husband meant to her from a practical point of view. In her culture, she is expected to stay home and grieve the loss of her husband. She is not supposed to wear bright clothes, laugh or joke or go to parties. She would be subject to severe criticism if she violated these strictures. The most that she can now do is to go to a movie or for coffee with one of her girlfriends. Insofar as the Lebanese community is concerned, she remains David Akbar's wife and part of his family. Because she is a single woman she is not allowed to live on her own and, as a consequence, she presently lives with her father. She did not say that she would never

¹⁸⁰

Bruker. Para. 181.

marry, but indicated that she could not conceive of that happening. There are two reasons. One is that she is still grieving the loss of her husband and is simply not interested in other men, and the other is that in her culture, remarriage is unlikely. Her evidence is buttressed by that of Dr. Hobart, who says that in the Muslim culture a man may marry outside the Muslim religion, but a woman is not permitted to do so and that men are, for cultural reasons, disinclined to marry women who are widows. I have concluded, therefore, that the plaintiff's chances of a divorce were somewhat higher than that of the average Canadian woman in her age group, and that her chances of remarriage are lower than it would be for the average 21-year-old widow, but not necessarily as low as Dr. Hobart suggests for the possibility remains that she will once again marry a member of her faith or as time goes on reject some of the restrictions put on her by her religion and marry someone outside her religion.¹⁸¹

The court adjusted the damages to reflect the reduced possibility of remarriage. The principle of considering the damage an individual suffers within that individual's culture seems to have been taken for granted.

If the *Brucker* decision considers the measure of individual damage within the context of a particular culture, and the Australian cases extend that thinking in the same manner, courts nevertheless struggle with the many non-economic factors – the cultural and ceremonial aspects – that arise when considering the connection between aboriginal people and their land.

A similar approach – respecting spiritual connections with land, and preventing the use of practices which might interfere with those connections – was taken by the United States Federal Court in *Navajo Nation v. United States Forestry Service*.

Compensation may be far-reaching, assessing losses from social, spiritual and broader cultural deprivation which will necessitate relationships with valuation, anthropological and

¹⁸¹ [1994] BCJ No. 1553.

archaeological disciplines. Spiritual interaction (with the land) has deep psychological connotations that are difficult to measure.¹⁸²

In Australia, the idea of compensation for the loss or taking of aboriginal title is more recent than in Canada, but the thinking about the true extent of the loss seems to be more generous and imaginative. Canadian courts recognize the important “non-economic aspect” of loss, but fail to consider how to address this in terms of appropriate compensation. Australian thought considers “the full extent of the loss” of aboriginal title to land in more than economic terms:

Providing a scheme of compensation assumes that damage done to Indigenous people through the extinguishment of their title is a harm that can be adequately remedied through compensation. It is difficult to understand how a value can be put on the loss of freedom to exercise human rights and the loss of the ability to exercise traditional cultural lifestyles and the destruction of traditional cultural, social, economic, political and religious systems. The fact that the *Native Title Act* talks in terms of “just terms of compensation” and the possible right to other titles in exchange does not resolve this difficulty...

Nevertheless, where an entitlement to compensation arises, it is imperative that the full extent of the loss to Indigenous people is taken into account... I believe that to deprive people of property without just and fair compensation amounts to an arbitrary deprivation of property contrary to Article 17 of the *Universal Declaration of Human Rights*. Both the *Draft Declaration of the Rights of Indigenous Peoples* and *ILO 169* speak in terms of “*fair and just*” compensation. Compensation for the extinguishment of, or interference with, Indigenous native title rights will be neither fair nor just if the spiritual and cultural attachment to land is not taken into account. This requires more than mere tokenism in the determination. There must be recognition of the value of those interests to Indigenous people and account taken of the *sui generis* nature of

¹⁸² Raewyn Fortes, *Compensation Modes for Native Title*, Pacific Rim Real Estate Society Conference, Melbourne, Australia, January 2005, p. 7.

native title. What amounts to full non-discriminatory compensation of *sui generis* native title rights and interests is a matter that will undoubtedly be the subject of future disputes between Indigenous peoples and governments...

While not fully remedying the injustice and infringement on human rights resulting from extinguishment, compensation...will at least allow those dispossessed to have some chance of rebuilding their lives...

In determining what “*just terms*” would be for the loss or impairment of native title, it would be a mistake to place undue emphasis on western concepts of land values as determined by economic factors. Such a reliance is unlikely to be sufficient to deal with the spiritual attachment to land that Indigenous peoples have. To overcome the inequity that would arise, spiritual attachment to land and consequential cultural loss must be taken into account. To do otherwise would not deliver genuine equality to Indigenous peoples for the loss or impairment of their native title lands. As Silas Roberts, the first chairperson of the Northern Land Council, has pointed out:

It is true that the people who belong to a particular area are really part of that area and that if that area is destroyed they are also destroyed. In my travels throughout Australia, I have met many Aborigines from other parts who have lost their culture. They have always lost their land and by losing their land they have lost part of themselves.¹⁸³

“Rebuilding their lives” hearkens back to the basic legal principles of compensation by the courts: the victim should be placed in a position of equal advantage to that in which he would have been had the loss not occurred.

In considering whether a claim for compensation for loss of culture was “novel,” the British Columbia Supreme Court had an opportunity to review many of the cases cited

¹⁸³ Michael Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner. *Native Title Report January – June 1994: Compensation*. Human Rights and Equal Opportunity Commission. AustLii Reconciliation and Social Justice Library.

here. It distinguished between loss of status within a culture, loss of culture by an individual (where the culture continues to exist) and loss of the culture itself.

In the cases discussed above, individual plaintiffs argued for damages flowing from loss of status within a culture or a loss of connection with their culture. The Australian cases have described such a loss as a loss of culture. The culture itself continues to exist but the plaintiffs' identity within the culture has been eroded.

I note that a claim for loss of culture was advanced before the Court of Appeal in *W.R.B. v. Plint*, [2003] B.C.J. No. 2783, 2003 BCCA 671 ("Plint") but the court dismissed the claim because it was not pleaded at trial. As with the aforementioned cases, the claim was one in which individuals argued they had lost some connection with their culture; in that case, as a result of the residential school system.

In the present case, the claim is not that individuals have lost connection with their culture but that the culture itself, or significant parts of it, has been lost. Clearly, the claim in this case differs from the claim advanced in *Gawa*, *Plint* and *Cubillo*. I can find no case law in which such a claim has been recognized...¹⁸⁴

Discussing culture loss in a legal context has become complicated because it involves so many different ideas. Having had no difficulty with that idea that the same physical loss can have greater economic consequences in one culture than another, the courts have also had no trouble finding that there are some losses that are unique to particular cultures. The problems arise when the law is asked to address cultural loss by an individual – not just loss within a culture, like loss of status, but actual loss of an aspect of culture, like loss of the ability to speak the language¹⁸⁵ or loss of eligibility to belong to a protective medicine society. And while Canadian courts will move firmly to protect collective cultural rights – as in the case of the Montfort Hospital – they are reluctant to confirm that appropriate compensation is owed when a collective group has suffered not only loss within a culture, but loss of aspects of the culture itself. As for the loss of culture as a

¹⁸⁴ *Kwakiutl Nation v. Canada*, *supra*. Paragraphs 43-47.

¹⁸⁵ "Removing that which was Indian from the Plaintiff": Tort Recovery for Loss of Culture and Language in Residential Schools Litigation, Zoe Oxaal, *Saskatchewan Law Review*, (2005) 68 Sask. L. Rev. 367-40.

consequence of loss of land, while Canadian courts have recognized a unique cultural aspect of the value of land to indigenous peoples, they have not yet acknowledged that the loss triggers a right to compensation.

Cultural loss is measurable. It is not as easily measured as many other forms of loss, both because the law is more used to measuring those losses and has developed patterns and formulas for doing so, and because those losses often take more precisely measurable forms, in economic terms. The lack of precedents will hamper the first few cases, and it is likely that the first court decisions on cultural loss will involve language and religious loss in residential schools, because those are easiest to prove.

Individuals can suffer loss within their culture. They can also suffer loss of part of their culture. When a group of people suffer that kind of loss, they are losing part of the culture itself.

9. Proving Cultural Damage

Since there is no statute – no Act of Parliament or a provincial legislature – that has set out rules for either liability for, or measurement of, cultural damage, the way that damage enters Canadian law is through development in court. That is, the courts will conclude that cultural damage is compensable, and will develop the principles for measuring and proving it.

We have seen that the United States Federal Court (in the *Navajo Nation* case) has suggested that new approaches will be required to arrive at a calculation of *compensation* for loss of culture – “assessing losses from social, spiritual and broader cultural deprivation which will necessitate relationships with valuation, anthropological and archaeological disciplines. Spiritual interaction (with the land) has deep psychological connotations that are difficult to measure.”¹⁸⁶ But before one gets to compensation and its complexities, one needs to recognize that *proving* the loss, and proving who is to blame for the loss, will also be far-reaching, complicated and difficult.

Court, in Canada, is adversarial. The defendants in any cultural damage lawsuit would put up a series of defences, much as a mediaeval city might rely on a series of ring-walls that their enemies would have to breach before taking the citadel.

The first ring of defence would likely be technical.¹⁸⁷ The defendant would argue that the plaintiff has waited too long to bring the matter to court, or that the plaintiff has failed to enforce his or her rights for so long that they are now unenforceable. The defendant may argue that the group of defendants is not one that can be certified as a “class,” because each has suffered a different kind of damage. The various defences offered by the

¹⁸⁶ Raewyn Fortes, *Compensation Modes for Native Title*, Pacific Rim Real Estate Society Conference, Melbourne, Australia, January 2005, p. 7.

¹⁸⁷ A “technical” defence is one that does not address the substance of the matter before the court. It would also be called “procedural.”

defendant churches and the federal government in the residential school cases are good examples of the technical, or threshold, issues that courts would consider.¹⁸⁸

Technical defences also involve endless argument at the stage of the pleadings – the legal documents that get the case into court. In *Calder v. Attorney General of British Columbia*, the seminal aboriginal title case in 1973, the Supreme Court of Canada refused to deal with aspects of the merits of the case because the plaintiffs had failed to file a document at the pleadings stage of the case. In *Kwakiutl Nation v. Canada (Attorney General)*, the federal government argued that because culture loss was a “novel claim,” it was necessary for the plaintiffs, in their pleadings, to provide a greater particularity of material facts. However, Canadian procedural rules prohibit entering evidence in the pleadings. Finding the balance between detailed pleadings and avoiding adducing evidence is difficult.

Bonaparte v. the Queen was litigation about Canada’s residential schools policy. There were several classes of plaintiffs: the estates of people who had been sent to the schools; adults who had attended the schools (“primary plaintiffs”); the children of people who had attended the schools (“secondary plaintiffs”). The federal government argued that the secondary plaintiffs had no proper claim, because “they were not yet in existence at the time” their parents attended the schools. The claims were clearly aimed at Canada’s policy of forced assimilation: the secondary plaintiffs asserted that Canada had a fiduciary duty to protect their aboriginal rights, including language, culture and way of life. The Ontario Court of Appeal summarized:

They allege that, by reason of the application of government policy, they have been deprived of the full benefit of the transmission of their Indian culture from their parents, the

¹⁸⁸ To a defendant, even if these defences don’t work, they are worth raising, because they tend to stretch out the litigation. That weakens the plaintiffs financially, wears down their patience and their hopes, makes them more amenable to lower settlements, and, spread over enough time, with older defendants, tends to keep the litigation going long enough for them to die off. See also: Feldthusen, Bruce, “The Baker Did It: tort law and Sexual abuse in Indian residential schools”; paper presented at the annual meeting of the Law and Society Association, Berlin, Germany, July 25, 2007. www.allacademic.com/meta/p173538_index.html. The victims are seldom believed in contested litigation, and the law fails to take into account the totality of the residential school experience in assessing damages, and courts tend to reduce damages.

primary plaintiffs, and they have been denied the opportunity to achieve a full and normal family, social, and economic life, as has been afforded to other Canadians, and as would have been the case except for the application of the policy.

They allege that the residential schools were established to implement a governmental policy, the objective of which was to bring about the eradication of the aboriginal culture, past, present and future. Hence they submit that it was foreseeable, if not intended by the Crown, that the long-term consequence of its actions would deprive not only the primary plaintiffs, but also their generational descendants, of their culture, history and status as a nation. In these circumstances, they submit that the fiduciary obligations arising from the Crown's actions extended not only to the residents of the schools but also to themselves as the members of the next generation.¹⁸⁹

The plaintiffs spent several years arguing about the pleadings rather than the substance of the cases.¹⁹⁰ With its unlimited resources, the federal government was able to stretch out the preliminary phases of the case, while the plaintiffs, many of them elderly, died off. Part of Canada's strategy, though, had always been to prevent liability for intergenerational damage. The settlement of residential school cases was always with the "survivors," and did not address the damage alleged by their children.

In *W.R.B. v. Plint*, the plaintiffs sued a sexual predator, two churches and the federal government for a number of abuses they had suffered in residential school. These included damages "flowing from loss of their native language and culture as a result of being required to attend the residential school and by the rules and treatment to which they were subjected while there."¹⁹¹ The problem was British Columbia limitation laws, which protected rights of action based on sexual abuse but barred other claims. The other

¹⁸⁹ *Bonaparte v. The Queen*, Ontario Court of Appeal, 2003, Paragraphs 23-26.

¹⁹⁰ It would be wrong to describe the obstacles to winning cultural loss cases without mentioning the issue of costs. In Australia, the government announced that it would not, in an appeal, seek the return of the money that had been awarded to Bruce Trevorrow, the only successful plaintiff to date in the "lost generations" litigation. However, this did not seem to prevent the government from seeking costs on appeal, and the costs exceeded the award.

¹⁹¹ [2003] BCJ No. 2783, British Columbia Court of Appeal, Paragraph 76.

problem, the Court of Appeal said, was the plaintiffs' failure to properly plead cultural damage:

[The plaintiffs have attempted] to bring the matter of loss of language and culture within the scope of damages for sexual abuse, but it is clear that the basis for the claim is essentially an attack upon the system of residential schools and its overall effect on all students. The attempt to link that subject to sexual abuse, the only cause of action in respect of which in this province there is no limitation, is strained at best.

It is not open to the plaintiffs to raise these issues at this stage. They say that they are not seeking to advance loss of culture and language as an independent cause of action, but that is clearly the substance of what they seek to do. That might have been done by an appropriate pleading before trial to which the defendants no doubt would have pleaded the Limitation Act and the plaintiffs would have responded by raising the constitutional issue.¹⁹²

Assuming you can get a cultural damage issue to trial, though, the main problem will be neither the principle that damage ought to be compensated for, nor that damage actually took place, but rather proving the nature and extent of the damage, the cause of the damage, the source of the damage, the results of the damage. Proof – and the evidence that will provide the proof – will be the key issue.

In a pollution case – an environmental damage matter – the defendants generally resort to a series of defences based on the plaintiff's failure to prove on the balance of probabilities that the damage was caused by the defendant's actions or property, or mainly by them. The defendants will argue that the damage could have been caused by some other source or in some other way, that is:

1. the damage could have occurred naturally;

¹⁹² *WRB v. Plint, supra.* At Paragraphs 79 and 82.

2. there may have been some other source of the pollutant;
3. other pollutants may have caused the damage;
4. there is no way to tell what damage was caused by the defendant's pollutant and what was caused by other peoples';
5. the plaintiff knew or should have known this was bad stuff and should have voluntarily stopped ingesting it. He was the author of his own misfortune.

Thus, when Ojibway fishermen and their families in the Kenora area of northwestern Ontario showed symptoms of mercury poisoning – known as “Minamata disease” because of its appearance in Minamata Bay in Japan – the paper companies responsible for putting the mercury into the water used all those arguments. They argued that the sickness was the result of alcoholism. They argued that the mercury occurred naturally. They argued that the fishermen consumed the fish voluntarily, and therefore had caused the damage themselves. They argued that it was impossible to measure what aspects of the sickness were due to particular pollutants, or which mill might be their source. These were arguments aimed at questioning the sources of visible, physical damage to individuals.

1. It is harder to prove damage to a group than to an individual.
2. It is harder to prove damage over time than damage linked to a single catastrophic event (like, say, the *Exxon Valdez* oil spill).
3. It is harder to prove damage that takes place immediately than damage that takes years to manifest itself.
4. It is harder to prove damage from several sources than from a single source.

5. It is harder to prove damage that takes place in several places than damage that happens in only one place.
6. It is harder to prove damage that is broad in nature than a single concentrated kind of damage.
7. It is harder to prove consequent or indirect damage than it is to prove direct damage.
8. It is harder to prove damage when no everybody suffers the damage to the same extent or in the same way.
9. It is harder to prove damage where it is not easily measurable.
10. It is harder to prove particular damage when the individual is suffering several kinds of damage at once – for example, malnutrition, pollution, culture loss and a degradation of his habitat. What aspect of the collapse of his health is attributable to what source?

In Canadian civil law, “causation” and “remoteness” are complex issues that affect whether a court will find liability. Basically, a person is liable for the reasonably foreseeable results of his actions. As the results become more remote or less foreseeable, the likelihood of a finding of liability decreases.¹⁹³

¹⁹³ In the *Wagon Mound* cases, decided by the Privy Council but originating in Australia, a repairman painting the inside of a ship dropped a tool which set off a spark which ignited oil in the ship’s hold. The ship burned. It burned the pier to which it was docked. That fire spread to an oil slick, and as a result a ship nearly a mile away also burned and sank. At what point was the damage so remote, so unforeseeable, that there should be no finding of liability?

Cultural damage shares with environmental damage a serious weakness in court. While the damage may be provable, it is often more difficult to prove the source of the damage.¹⁹⁴

In environmental damage, it is necessary to show in court not only that the damage has taken place, but also that it can be attributed to a particular source. In Akwesasne, for example, both Reynolds Aluminum and General Motors suggested that responsibility for pollution-related damage came from other sources, in the atmosphere, in Canada, and each suggested that the other was mainly responsible. In cultural damage, unless the plaintiff is in a controlled environment (like a residential school), it is possible to argue that a variety of sources caused the damage.

Sometimes damage can have several components: economic, environmental and cultural. The perch fishery at Akwesasne is a good example of this. It is very clear that there are fewer perch today than in the past, and also that there are fewer fishermen. Some of the people who made a living, or part of their living,¹⁹⁵ from the perch fishery, no longer engage in the fishery. But how much is their abandonment of the fishery the result of the reduction in perch numbers; the reduction in the quality of the perch as a result of diseases; changes in prices paid for perch; the availability of better-paying work for less effort nearby; or simply a change in family tastes?

How would one go about proving that losing a large amount of land was more than just economic loss? If the land was taken over a century ago, how can the necessary evidence that would persuade the court of the extent, nature and cause of the loss be found or produced? The farther back the events took place, the harder it will be to prove them to

¹⁹⁴ Akwesasne is particularly sensitive to the difficulty of proving sources of environmental damage. While it was clear that both people and animals on Cornwall Island were suffering from the effects of chlorine and other pollutants and emissions from industrial plants, there were (and are) at least three possible sources upstream and upwind: General Motors, Reynolds and Domtar. The difficulty of proving which of the three had contributed what proportion of the damage was a major challenge in any court case. The matter was settled out of court.

¹⁹⁵ The fishery is seasonal. Men who would fish perch in season would also trap or hunt, garden or farm, make baskets and work in factories, depending on the season.

be the source of the loss. Aboriginal oral tradition is useful in court, but recent cases have seen it restricted to situations in which the evidence has been recited or performed in public. Loss is not only hard to measure: it can be hard to prove, even if it is obvious.

Governments, unlike private individuals, have a legal obligation as protectors of rights, and these obligations cannot be delegated, nor do private individuals or corporations carry those rights.¹⁹⁶ It would logically follow that the same governments could be legally liable for any damage caused by their failure to protect the rights, and such failure could give rise to a right to damages.

However, Canadian courts have more recently taken pains to distinguish between their general fiduciary relationship with aboriginal peoples and the specific fiduciary duties or obligations that arise when specific land-related transactions occur. The Department of Justice routinely argues that the fiduciary relationship alone does not give rise to obligations, and that the obligations, to be fiduciary, must be linked to specific documents or transactions in which aboriginal property is placed under Crown control. Earlier court cases do not distinguish between “fiduciary relationship” and “fiduciary obligation.”¹⁹⁷

Rules of evidence relating to historic events and losses can often be “relaxed”, while what needs to be proved becomes increasingly difficult.¹⁹⁸ The relatively recent emergence of the “honour of the Crown” as a distinct element in litigation may see some openings in cases where proof might otherwise be difficult. As the Supreme Court of Canada said in 1895:

Had the rights of the Indians been in question here...courts should make every possible intendment in their favour and to that end. They would, with the consent of the Crown and of all of our Governments strain to their utmost limit all ordinary rules of

¹⁹⁶ *Haida Nation* 2004 SCR

¹⁹⁷ In *Sparrow*, the Supreme Court stated that “the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action can be justified”.

¹⁹⁸ *R. v. Marshall, R. v. Bernard*, [2005] 2 SCR 220.

construction or principles of law – the governing motive being that in all questions between Her Majesty and “Her faithful Indian allies” there must be on her part, and on the part of those who represent her, not only good faith, but more, there must be not only justice, but generosity. The wards of the nation must have the fullest benefit of every possible doubt.¹⁹⁹

“Generosity” has not been a principle or term used by Canadian courts in the 21st century, either with respect to accepting evidence or with respect to interpretation of the rules of law. Cases like that of the *God’s Lake First Nation* suggest that the days of liberal interpretation of statutes in favour of Indians are a thing of the past rather than the future.²⁰⁰

Where the claim is for cultural loss alone, the challenge for the first cases to address the issue may not be whether it is compensable, but whether the loss can be proven, and whether the source of the loss can be proven.

To prove the existence of aboriginal rights or aboriginal title, a combination of oral tradition evidence, the evidence of both elders and younger leaders who live the cultures, and of academic experts, including historians and anthropologists, is used to provide a detailed, comprehensive explanation of the history and culture of the people to the court. The same combination is true in cases involving damage to culture, and in cases involving special damage that exists in a cultural context other than that of mainstream Canada. Thus, in *Gawa v. Horton*, the court heard from anthropologists as well as Gitksan elders, and was careful to list the qualifications of the anthropologists whose evidence it accepted.²⁰¹ In *Namala*, the court accepted the evidence of a consulting

¹⁹⁹ *St. Catherines Milling and Lumber Co. v. The Queen*, [1895] 25 SCR 434 at 535 (*per* Sedgwick, J.).

²⁰⁰ *McDiarmid Lumber Ltd. v. God’s Lake First Nation*, [2006] 2 SCR 846.

²⁰¹ *Gawa v. Horton*, *supra*. At Paragraph 15: “Dr. John Cove, an Associate Professor of Anthropology at Carleton University, testified at the trial. He has undertaken special studies of the Gitksan and Tsimshian, and has published articles and papers on his findings. Dr. Powell, to whose evidence I have already referred, made a special study of the Gitksan culture through their language; he is Associate Professor with the Faculty of Anthropology at the University of British Columbia, and has stayed in the

anthropologist. In *Kaddoura v. Farez*, the court accepted, with a little hesitation, the evidence of a professor emeritus in sociology. In *Lian v. Money Estate*, the trial judge “accepted the opinion of a witness who was qualified to testify to the importance Chinese culture places on the family unit in general, and in particular, upon the duty of support Chinese children owe parents, referred to as filial piety.”²⁰² It is ironic that the courts tend to accept the evidence of Euro-Canadian academics and professionals about cultures to which those witnesses are outsiders, in preference to the evidence of people who actually live within the cultures themselves.

In part because of these difficulties, but mainly because the courts lack the tools to craft imaginative, flexible settlements, the Supreme Court of Canada has stated explicitly that negotiation, not litigation, is the proper way to resolve matters between aboriginal peoples and the Crown in Canada. In *Delgam’uukw*, the Chief Justice made this abundantly clear (where, a generation before, in *Calder*, a split decision by the court was interpreted as a directive toward negotiation, but was not encouraging enough). The new Specific Claims Tribunal, with its restriction to cash compensation, likewise seems intended to make negotiation more attractive, even as it can only be accessed as a result of failed or rejected negotiations. Nevertheless, it is part of Canadian law that negotiation is the most likely and most appropriate way to determine compensation in these cases.

area with various members of the Gitksan tribe in the course of his research. He has published books and articles on his findings.”

²⁰² [1996] BCJ No. 18, BCCA, Paragraph 27. See also *Sum Estate v. Kan*, [1997] BCJ No. 2645, British Columbia Court of Appeal; (1995) 8 BCLR (3d) 91, BCSC. In *Yu v. Yu*, [1999] BCJ No. 2801, the Supreme Court agreed that proof of the death of the child and the fact that the family is of Chinese descent is not enough: there must be evidence to persuade the court that “there is a possibility that the child would have followed the traditional practices.” In *Lai v. Gill*, [1980] 1 SCR 431, Vancouver Registry #B771133, loss of expectation of pecuniary benefit from filial piety was also included as an element of damages.

Proving cultural damage or loss in court will often be difficult – and often the difficulty will be proving the source of loss of culture, as a matter of evidence. Unless what is damaged is a cultural object, or there is an individual catastrophic event (like an oil tanker running aground), most cultural loss is gradual. Sometimes there are multiple sources: only in truly sad circumstances, like the residential schools, are people so isolated that there is only one source of the damage they suffer. Courts have pointed strongly toward negotiated resolutions to these essentially political and truly complex issues.

10. Conclusions

Canadian law recognizes that, for aboriginal peoples, land contains important non-economic components, and that these are often of a cultural nature. The courts have said that this, combined with the near-impossibility of replacing the land, means that the Crown should especially avoid damaging or taking such lands. Canadian courts have not yet provided a clear explanation of the approaches to compensation that should be taken if these special lands are taken or damaged by the Crown, though they have indicated that compensation based on economic use or value would be inadequate or inappropriate.

Where aboriginal lands have been taken or damaged unlawfully or improperly by the Crown, appropriate compensation would include an element that would address the *unique cultural component of the land*. The fact that this element of loss will be difficult to measure does not mean that it should be ignored: it means that the courts will make use of broader, more imaginative resources in determining compensation. Both international law and principles increasingly used in Canadian law point to restitutionary, remedial, flexible redress.

The need for flexibility, in turn, points toward negotiated solutions. Indeed, the Crown and the claimants may be obliged, by law and by treaty, to seek negotiated solutions before resorting to litigation. Procedural treaty rights entitle Haudenosaunee communities to direct, good-faith, government-to-government negotiations of matters of concern, and these treaty rights are probably enforceable in court.

The absence of rules for compensation for the cultural component of aboriginal lands is actually an advantage, in the sense that it permits a greater degree of flexibility for negotiators to apply imagination and to seek more appropriate restitutionary and remedial measures rather than just money.

In some cases, aboriginal people may find themselves arguing that the taking of land or resources cannot be justified because appropriate or fair compensation is not available. This part of the *Sparrow* process has not been tested. It is dangerous because it is a kind of “all or nothing” approach: the courts might find their way to imposing a set of values for compensation, much as in *Delgam’uukw* the Supreme Court mused that providing reduced stumpage or license fees might be compensation for the taking of land or trees.

Canadian courts have recognized that losses are different for different cultures in Canada. Courts award higher damages in cases where a traditional Chinese family has suffered the loss of an eldest son, because the parents lose the economic benefit flowing from the principle of filial piety. Courts award higher damages to the Jewish divorcee or the Muslim widow because of their lower likelihood of remarriage. These are losses viewed within the context of culture. Courts will also award damages in ways that recognize that some kinds of damage are more significant to some cultures than others, and require more expensive or unique remedies: the special surgery to repair the disfigured face of a young Korean; the feast required to restore the integrity of a Gitk’san girl; the special headstone needed for a deceased chief. In considering cultural differences, courts will go beyond culturally unique economic damages to consider culturally unique forms of pain and suffering: the loss of status suffered by a chief whose memory is injured; the loss of eligibility to join medicine societies suffered by a woman who has been sterilized. And the courts will consider loss of culture itself: for example, the reduction of the chances of children to learn French once their Francophone mother has been killed. The courts will protect cultural rights: it is not difficult to see how they would compensate individuals for unjust taking of, or injury to, those rights.

Cultural damage or loss as a result of the loss of land is a separate issue. People who are forced to move away from the community, for example, because the loss of land has meant that there is not enough viable farm land, may as a result lose contact with the community and its culture and language. While a cultural component to aboriginal lands

is assumed by the courts to exist and therefore requires attention in discussions about compensation, resulting cultural damage or loss needs to be proved separately.

In the context of negotiations rather than litigation – the preferred route for resolving the outstanding land issues of aboriginal peoples in Canada, and the path required as a matter of procedural treaty rights – the parties are pointed toward remedial and restitutionary ways of addressing cultural damage or loss.

The honour of the Crown is always engaged in processes, including negotiations toward the resolution of disputes or claims, that take place in a treaty context. While this concept is still evolving, it is clearly a distinct head of Crown responsibility. It requires a standard of conduct of the Crown that is inconsistent with vigorous defences in court that make use of technicalities and artificial limitations. The honour of the Crown requires Canada's officials to act in good faith, honestly and effectively, and to seek to redress legitimate matters of concern, but it does not require them to agree to all the demands and positions of their treaty partners. The relationship also varies according to the terms of treaties, so that there is no single prescribed set of Crown rules or responsibilities or processes. The elements of respect, trust and friendship that form the essence of the Covenant Chain relationship provide the Crown with an opportunity to engage in open discussions about remedial and restitutionary paths to resolution. These paths are also consistent with the emerging standards of international law – though these are contained in a Declaration that Canada has opposed on other grounds.

In summary, there are two distinct aspects of cultural loss linked with situations where land has been improperly taken or lost. The first is the unique cultural component of the land, and that requires attention as an element of negotiated compensation. The second is the consequent cultural loss following the taking of the land, and that may be the subject of compensation once it has been proven in an open and honourable process, linked to the procedural rights of the treaty partners.