IN THE COURT OF APPEAL OF BELIZE AD 2011
CIVIL APPEAL NO 27 OF 2010

(1) **THE ATTORNEY GENERAL OF BELIZE**
(2) **THE MINISTER OF NATURAL RESOURCES AND THE ENVIRONMENT** Appellants

v

(1) **THE MAYA LEADERS ALLIANCE and**
(2) **THE TOLEDO ALCALDES ASSOCIATION both on behalf of the Maya villages of the Toledo District**
(3) **JUAN POP on behalf of the Maya village of Golden Stream**
(4) **DOMINGO CAL on his own behalf and on behalf of the Maya village of Aguacate**
(5) **LUCIANO CAL on his own behalf and on behalf of the Maya village of Bladen**
(6) **ALBERTO HUN on his own behalf and on behalf of the Maya village of Blue Creek**
(7) **CANDIDO CHO on his own behalf and on behalf of the Maya village of Crique Jute**
(8) **LUIS CHO on his own behalf and on behalf of the Maya village of Crique Sarco**
(9) **PEDRO CUCUL on his own behalf and on behalf of the Maya village of Dolores**
(10) **MANUEL CHOC on his own behalf and on behalf of the Maya village of Indian Creek**
(11) **ALFONSO OH on his own behalf and on behalf of the Maya village of Jalacte**
(12) **MARIANO CHOC on his own behalf and on behalf of the Maya village of Jordan**
(13) **EDWARDO COY on his own behalf and on behalf of the Maya village of Laguna**
(14) **PABLO SALAM on his own behalf and on behalf of the Maya village of Medina Bank**
(15) **ROLANDO AGUSTINE PAU on his own behalf and on behalf of the Maya village of Midway**
(16) **LORENZO COC on his own behalf and on behalf of the Maya village of Otoxha**
(17) **SANTIAGO COC on his own behalf and on behalf of the Maya village of Pueblo Viejo**

(18) **SILVINO SHO on his own behalf and on behalf of the Maya village of San Antonio**
(19) **IGNACIO TEC on his own behalf and on behalf of the Maya village of San Benito Poite**
(20) **GALO MENJANGRE** *(sic)* **on his own behalf and on behalf of the Maya village of San Felipe**
(21) **FRANCISCO CUS on his own behalf and on behalf of the Maya village of San Marcos**
(22) **MARCOS ACK on his own behalf and on behalf of the Maya village of San Miguel**
(23) **JUAN QUIB on his own behalf and on behalf of the Maya village of San Vicente**
(24) **LIGORIO COY on his own behalf and on behalf of the Maya village of Santa Anna** *(sic)*
(25) **ELIGORIO CUS on his own behalf and on behalf of the Maya village of Santa Theresa** *(sic)* Respondents

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Brian Alleyne	Justice of Appeal

L M Young SC and I Swift, Crown Counsel, for the appellants.
A Moore SC for the respondents.

17, 18, 21, 24 and 25 March and 8 June 2011, and 25 July 2013.

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I - Introduction: the term 'indigenous'

[1] The ordinary meaning of the adjective 'indigenous', as it relates to people, is said by *The Concise Oxford Dictionary of Current English*, 8th ed, to be 'born in a region'. According to the Internet website known as Alanmacfarlane.com, however, 'indigenous peoples', as a technical term used in the discipline of Anthropology, means 'culturally distinct peoples who have occupied a region longer than peoples who have colonized or immigrated to the region'. By section 6(q) of the Evidence Act, every judge is required to take judicial notice of the meaning of English words.

[2] In Chapter 1 (headed 'Habitat of the Southern Mayas') of his famous publication, *Ethnology of the Mayas of Southern and Central British Honduras* [Belize's former name] (Chicago, Field Museum of Natural History, 1930), J (afterwards Sir) Eric

Thompson, the pre-eminent British archaeologist, anthropologist, ethnohistorian and epigraphist, wrote, at p 35:

> 'Despite the richness of the soil, the abundant rainfall, the large number of edible species of fauna, and the good communications supplied by the rivers, there is no indigenous population, although at one time there must have been a considerable population as the large number of ruins demonstrates. Besides the two large sites of Lubaantun and Pusilha numerous small ruins are found scattered through the western half of the [Toledo] district, stretching up to the Maya Mountains. The aboriginal population, that today exists in this area, is entirely immigrant, having crossed over from Guatemala in the course of the last forty odd years.
>
> These immigrant Mayas are of three stocks, Kekchi, Kekchi-Chol, and Mopan Maya.' [Emphasis added.]

The conclusions of this distinguished Maya scholar (as stated in the above quotation) as to the absence of an indigenous population in southern Belize and as to the Maya of southern Belize in question being immigrants lie, as I see it, at the heart of the present appeal.

II - Background

A Previous litigation: the 2007 claims

[3] The appeal is from the decision of Conteh CJ in Claim No 366 of 2008 ('the 2008 claim'), in which those who are now appellants and respondents were, respectively, defendants and claimants. (I shall refer to them, respectively, as 'the appellants' and 'the respondents' in the remainder of this judgment.) Before, however, proceeding any further into discussion of such appeal, it is convenient to refer to, and make certain observations upon, two previous claims and the decision in them, which latter, to my

mind, profoundly influenced the judgment which is the subject of the present appeal ('the 2010 judgment'). The claims in question are those of, first, *Cal and others v The Attorney General and another* and, secondly, *Coy and others v The Attorney General and another*, Claims Nos 171 of 2007 and 172 of 2007, respectively, which were consolidated and heard together ('the 2007 claims'). The first of the 2007 claims was brought by the alcalde of the Maya village of Santa Cruz, Toledo District and four residents of that village, called 'members' of the village by Conteh CJ in the judgment delivered in such claims on 18 October 2007 ('the 2007 judgment'). The second of the 2007 claims was brought by the alcalde and three residents of the Maya village of Conejo, Toledo District. The claimants in the 2007 claims, represented in court by experienced counsel Mrs Moore (since elevated to the status of Senior Counsel), claimed reliefs similar in nature, or otherwise related to, those later claimed by the respondents in the 2008 claim, which has given rise to the present appeal. (Mrs Moore has also represented the respondents in the 2008 claim and the instant appeal.) The reliefs claimed in the 2007 claims are set out, as reproduced by Conteh CJ at para 9 of the 2007 judgment, in the Annexe to the instant judgment.

[4] Appreciation of Conteh CJ's opening sentence in the 2010 judgment, viz:

> 'In a material sense the instant claim which is the subject of this judgment [ie the 2010 judgment] is a direct sequel of the judgment of this court in Claims Nos 171 and 172 of 2007 delivered on 18th October 1007 [ie the 2007 judgment].'

is effortlessly achieved on a review of the orders made by him at the end of the day (for which, see para 126 of the 2010 judgment).

[5] Those orders I shall set out in due course as I proceed with the instant judgment. What is of greater use at this point is to note that, in the 2007 claims, the appellants, represented by Ms Cho and Mrs McSweeney McKoy (both, on any view, counsel of

limited experience at the time), filed a defence which Conteh CJ saw fit memorably to comment upon as follows:

> 'It must be said that the Defence originally filed on 4th June 2007 in these proceedings was, to say the least, terse and laconic and was almost an admission of the claimants' case. It was lacking in particulars that would enable the claimants to knows why their claims were being resisted. I pointed this out to Ms Nicola Cho, the learned attorney for the defendants. Eventually, on the last day of the hearing on 21st June 2006 *(sic)* with the leave of the court, and no objection from Mrs Antoinette Moore, the attorney for the claimants, a more substantial defence was filed.' [Emphasis added.]

[6] Equally worthy of note is the manifest imbalance in terms of the numbers of witnesses relied upon by the respective parties in the 2007 claims. This is brought out by Conteh CJ at para 13 of the 2007 judgment, where it is pointed out that the respondents filed 13 affidavits, in addition to five 'expert reports in affidavits', and also called nine witnesses to the witness-box, whilst the defendants limited themselves to filing nine affidavits and calling but one witness to the witness-box (one whose sole purpose was to tender a silent video in evidence). This marked imbalance was evidently not only quantitative but, more seriously, also qualitative, Conteh CJ observing at para 27 of the 2007 judgment that none of the officials who gave affidavit evidence for the appellants 'could claim any expertise in Maya history, culture, sociology or land usage and custom'. The aura of mystery inevitably created by the self-imposition of this severe handicap is heightened by the striking disclosure made by the eminently qualified and locally well-known Belizean archaeologist/anthropologist, Jaime Awe, PhD, on the hearing of the 2008 claim. Dr Awe, then and now no less than the Director of Archaeology in Belize's National Institute of Culture and History, deposed, at para 9 of his affidavit sworn on 29 May 2009, as follows:

> ‘9. During the Maya Lands Rights claim in 2007 [an obvious reference to the hearing of the 2007 claims], for reasons unknown to me I was not called upon to provide any information or make any statements. My contribution in this present case came about because of my meeting the [appellants’] attorney-at-law on another matter and her questioning me for information and my views.’

[7] At the end of this strangely lopsided contest, Conteh CJ, at para 136 of the 2007 judgment, granted to the respondents all the reliefs they had sought. The decision, which from beginning to end had proceeded on the assumption that Kekchi and Mopan Maya presently inhabiting southern Belize, being Maya peoples, are *ipso facto* indigenous peoples of this country, was, predictably, not appealed. General elections were, to use a popular figure of Belizean speech, ‘behind the door’. In March 2008, those elections were held and their result was that a PUP administration was replaced by a UDP one.

B First known inhabitants

[8] It is of fundamental importance to keep in mind throughout this judgment that there is no dispute or doubt amongst the parties as to who were the first known inhabitants of what is today the independent nation of Belize. As the highly-respected British historian, DAG Waddell, wrote in his book (not quoted below or in this Court) *British Honduras: A Historical and Contemporary Survey* (London, Oxford University Press, 1961), at page 1:

> ‘Although the history of British Honduras as a distinct entity began in the second half of the seventeenth century with the establishment of more or less permanent British logwood-cutting activities around the mouth of the Belize River, the British were by no means the first inhabitants of the area

which now forms the colony. The earliest inhabitants of whom anything is known were the Mayas.'

C A basic misconception to avoid

[9] So to state, however, is not to fall into the serious error of thinking that the Mayas comprise a single ethnic group. Conteh CJ was undoubtedly of the view that they do, given what he stated in the 2010 judgment, para 7 of which opens with the following sentence:

> 'It is clear therefore, that all [the respondents] whether as individuals or as a collective in the Maya Leaders Alliance or the Toledo Alcaldes Association belong, for want of a better word, to an ethnic or cultural group known and referred to as the Maya.' [Original emphasis.]

Such a view is, I regret to have to opine, dangerously incorrect. The true position is that there are a number of 'ethnically and linguistically distinct Maya groups', as is pointed out by John S Henderson, Professor of Anthropology at Cornell University in the United States, in his book, *The World of the Ancient Maya* (Ithaca, Cornell University Press, 1997), at p 41. Richard R Wilk, PhD, to whom I shall refer at greater length later in this judgment, in the first of his affidavits filed by the respondents in the 2008 claim, himself refers (at para 15) to the Mopan Maya and the Manche Chol as constituting distinct ethnic groups in their own respective rights.

III - The 2008 claim

A The nature of the claim as set out in the claim form

[10] The claim in the court below may now be focused upon. Its nature was identified in paras 6 – 14 of the relevant fixed date claim form, which was dated 30 June 2008 and stated as follows:

‘6. The [respondents] bring this claim for redress for violations of sections 3, 3(a), 3(d), 4, 16, and 17 of the Belize Constitution. These violations arise from the government’s failure to identify and protect the [respondents’] customary land rights, which are based on the traditional land use and occupation of the Maya people.

7. Maya customary land rights constitute property, which like other property interests in Belize, are protected by the Constitution. In particular, the customary land rights of the Maya people of southern Belize have been recognised and affirmed by the October 18, 2007 judgment of the Supreme Court in the Maya Land Rights case [ie the 2007 judgment].

8. The Supreme Court also held that the failure to extend recognition and protection of Maya customary title does not accord with the protective regime of the Constitution regarding property, and is a violation of the constitutional guarantee against discrimination, and right to life, liberty, security of the person and protection of the law.

9. In particular, the constitutional right of property and non-discrimination impose an affirmative duty on the government to provide a statutory or administrative mechanism through which Maya land rights can be identified, demarcated, and titled. This duty includes an affirmative duty to extend protection over the lands the [respondents] use and occupy until such a mechanism exists.

10. Nevertheless, the government has not yet established an administrative or statutory mechanism under which Maya land rights can be identified and protected. Instead, the government

continues to behave as though these rights do not exist or do not merit legal protection.

11. In response to the Maya Land Rights judgment [ie the 2007 judgment], the government did issue a directive protecting lands in Toledo against interference. The government also indicated that it intends to create a framework for the demarcation and registration of customary title, and has initiated discussions with Maya representatives towards that end. Nevertheless, the government subsequently revoked that directive, and specifically stated that "existing licences, permits and concessions … shall be permitted to resume."

12. In the absence of such protective measures and of any mechanism to identify and protect Maya customary title, the government, and in particular the Ministry of Natural Resources and Environment, continues to issue and threaten to issue leases, grants, and concessions to lands – without bothering to ascertain whether Maya customary rights may already exist on those lands. The [respondents] justifiably fear that without affirmative recognition and protection of their lands, their property, livelihoods, cultural integrity, health, and lives are at risk.

13. In light of this refusal of government officials to respect or often even acknowledge the existence of the [respondents'] customary property rights, the guarantees contained in sections 3, 16 and 17 of the Constitution are rendered meaningless unless the state adopts affirmative measures to identify and protect those rights.

14. Thus, the government's failure to provide the [respondents] with the mechanism or protection necessary to exercise their rights to property fully and equally with other Belizeans, where those property rights are asserted but not yet proven in court, is a violation of the right to property under sections 3 and 16, the right to non-discrimination under sections 3(d) and 17, and the right to life, liberty, security of the person and protection of the law guaranteed under sections 3(a) and (4) of the Belize Constitution.'

B The reliefs sought as set out in the claim form

[11] The respondents' claim form sets out the reliefs being sought by them as follows:

'(a) A declaration reaffirming that Maya customary land tenure exists in the Toledo District, and that where it exists, it gives rise to collective and individual property rights within the meaning of sections 3(d) and 17 of the Belize Constitution;

(b) A declaration that the [appellants'] failure to adopt affirmative measures to identify and protect rights based on Maya customary tenure violates the [respondents'] rights to property and non-discrimination under sections 3, 3(d), 16 and 17 of the Belize Constitution;

(c) An order that the [appellants] develop the legislative, administrative, or other measures necessary to create an effective mechanism to identify and protect Maya customary property rights in accordance with Maya customary laws and land tenure practices, and in consultation with the affected Maya people;

(d) An order that, until such time as there exists an effective mechanism to identify and protect Maya customary property rights, the [appellants] cease and abstain from any acts that might lead the agents of the government itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people of Toledo unless such acts are pursuant to their informed consent and in compliance with the safeguards of the Belize Constitution. This order should include, but not be limited to, directing the government to abstain from:

1. issuing any leases or grants to land or resources under the National Lands Act or any other Act;

2. registering any interest in land;

3. issuing any regulations concerning land or resources uses;

4. issuing any concessions for resource exploitation, including concessions, permits or contracts authorizing logging, prospecting or exploration, mining or similar activity under the Forests Act, the Mines and Minerals Act, the Petroleum Act, or any other Act; and

(e) Damages for violations of the [respondents'] constitutional rights;

(f) Costs; and

(g) Such further and other remedy as [the Supreme Court] deems just.'

C The appellants' defence

[12] In an amended defence dated 14 January 2009, it was pleaded on behalf of the appellants, amongst other matters not relevant for purposes of this judgment, that the respondents have no customary land rights which the appellants have failed to identify and protect (para 7). The appellants further pleaded (para 8, as I understand it) that no ancestors of the present-day inhabitants of the villages represented by the respondents were in occupation of land in what is today the Toledo District (a) before or at the time (in 1540) when Spain asserted sovereignty over the Settlement which is today a part of Belize or (b) at the time when Great Britain asserted sovereignty over such Settlement. In those circumstances, the appellants denied by their pleading that they were in violation of sections 3, 3(a), 3(d), 4, 16 or 17 of the Belize Constitution (para 10). The defence ended with a general denial of entitlement on the part of the respondents to any of the reliefs sought by them.

D The issues in the court below and their resolution

[13] The issues in the court below in the instant case, unlike those in the 2007 claims, were identified by Conteh CJ himself rather than being agreed upon by the parties. Conteh CJ acknowledged as much in the 2010 judgment, saying, at para 31:

> 'Although there were no issues identified or agreed by the parties for the trial of the instant case, I am persuaded that the issues brought to the fore in this case from the statements of case of the parties resonate with the issues the parties in [the 2007 claims] fought over.'

He proceeded to isolate the following four issues (paras 37 – 40):

i) 'Does there exist in the Maya villages in the Toledo District in this action Maya customary land tenure system and if so, do members

of these villages have rights and interests in land based on Maya customary land tenure?'

ii) 'What, if any, are the constitutional implications or purport of these rights and interests?'

iii) 'Can [the respondents] show links to and with the original inhabitants of the lands occupied in Toledo District for the purposes of establishing continuity to ground their claim to customary rights and interests to these lands?' [Emphasis added.]

iv) 'Has there been in fact and or *(sic)* in law extinguishment of any claim to rights or interests in the lands by [the respondents] by the assertion of Spanish sovereignty over the area in 1540 and in any event, upon later assertion of British sovereignty over the area?'

Conteh CJ's resolution of issues (i), (iii) and (iv) was as follows:

i) '[T]here is in existence in the Maya villages in the Toledo District, Maya customary land tenure by which the villagers have rights and interests in the village lands.' (See para 84.)

iii) '[O]n the evidence there are historical, ancestral, social and cultural links between the original inhabitants of what is today Toledo District and [the respondents].' (See para 99.) [Such] continuity … entitles [the respondents] to customary rights and interests in land in the area.' (See para 101.)

iv) Although this was, strictly speaking, a non-issue as the appellants were estopped from agitating it in the light of its resolution in the 2007 judgment (para 103), the answer was that there has been no extinguishment as 'change or acquisition of sovereignty does not, in and of itself, displace the rights of the inhabitants in the area to their lands.' (See para 118.)

Dealing last with issue (ii), Conteh CJ held that:

> 'It is undoubted from [the 2007 judgment] and the conclusions on the issues discussed in this judgment [ie the 2010 judgment], that [the respondents] possess constitutional rights and interests in respect of their lands in the several villages in Toledo District which entitle them to avail themselves of the protection of the Belize Constitution through the courts.' (See para 122.)

Having thus resolved the issues, Conteh CJ granted to the respondents all the reliefs they had sought (set out at para [11] above), save for damages for the violation of constitutional rights, with costs.

IV - The appeal and the respondents' notice

A What is sought

[14] On appeal to this Court, the appellants have advanced five grounds of appeal and seek orders setting aside all orders made by the Chief Justice in the court below. The respondents, for their part, having first given and filed due notice under Order 11, rule 5(1) of the Court of Appeal Rules, have contended before this Court that the decision of Conteh CJ should be varied so as to include an award of damages in favour of some, or all, of them for the violation of their constitutional rights.

B The appellants' crucial and dispositive grounds of appeal

[15] Consistently with what I have stated at paragraph [2] of the present judgment, I consider that the crucial grounds of appeal of the appellants are the first and second ones, which are, in my view, interrelated and, as well, dispositive of the appeal.

C The scope of the judgment

[16] I propose, therefore, to confine myself in this judgment to a consideration of relevant elements of grounds 1 and 2, which grounds read, respectively, as follows:

> 'The learned Chief Justice erred in law in failing to identify the legal requirements for indigenous title and to direct his mind to whether the evidence of [the respondents] satisfied these legal requirements. As a consequence the learned trial judge fell into error when he found that the Respondents are entitled to indigenous title and to rights thereunder.
>
> The decision is against the weight of the evidence [in] that the learned trial judge failed to evaluate the facts as against the criteria for indigenous title, and failed wholly to evaluate the evidence of the appellants in relation to current land usage practices in Toledo.'

V - Remarks on the hearing below preliminary to consideration of grounds 1 and 2

A By way of preface

[17] These grounds, taken together, constitute, in my opinion, a formidable attack on Conteh CJ's resolution of the third of the issues identified by him in the 2010 judgment and stated by me earlier in the instant judgment. For convenience, I here set out again, respectively, Conteh CJ's formulation of this issue and its resolution. The issue was:

> ‘Can [the respondents] show links to and with the original inhabitants of the lands occupied in Toledo District for the purposes of establishing continuity to ground their claim to customary rights and interests to these lands? [Emphasis added.]

And the resolution was:

> ‘[O]n the evidence there are historical, ancestral, social and cultural links between the original inhabitants of what is today Toledo District and [the respondents]. [Such] continuity … entitles [the respondents] to customary rights and interests in land in the area.’

[18] As is instantly revealed by the above quotation of grounds 1 and 2 in their entirety, the attack thereby mounted by counsel for the appellants had a broad base, indeed, an unnecessarily broad one, in my respectful view. Hence, the indication given by me above that I propose to confine myself to relevant elements of these interrelated grounds. In my opinion, it is a sufficient basis for the attack under grounds 1 and 2 that, as a matter of fact and without questioning Conteh CJ’s conclusions on pertinent law, his finding that the respondents are entitled to indigenous title and rights under the same, being based on an erroneous conclusion, viz that the respondents had proved links to and with the original inhabitants of lands occupied in the Toledo District thus establishing continuity, ran, and runs, contrary to the overall weight of the evidence, the reason for such incongruity being serious failure on the part of the learned judge properly to evaluate the pertinent evidence before him.

B Conteh CJ’s treatment of the evidence

(i) Prefatory note

[19] The 2010 judgment, as I read it, demonstrates wholesale and unquestioning acceptance by the Chief Justice of the evidence of three principal witnesses upon

whose expert knowledge the respondents heavily relied. An unquestioning approach to the evidence of a claimant's witnesses has to be especially fraught with peril in a case, such as the instant one, where important expert witnesses demonstrate no awareness of the need to avoid expressing opinions as to what is merely possible, the standard of proof being that of the balance of probability rather than possibility. I refer here to two examples of this, the first of which is to be found in the evidence of Dr Wilk, who deposes at para 19 of his affidavit that '[i]t is quite possible that Kekchi, mixed Kekchi Chol, or mixed Kekchi-Mopan habitation of Toledo goes back to the 1500s.' The second occurs at para 59 of Dr Jones' first affidavit, where he deposes that 'natives' said to have been met by a Charles Swett in southern Belize in 1867 (see para [64], below) were possibly of Itza or Mopan descent, although Dr Wilk, at p 55 *of Household Ecology: Economic Change and Domestic Life Among Kekchi Maya in Belize* (Tucson, The University of Arizona Press, 1991), acknowledges, rightly in my view, that the term 'natives' could have been used to refer to 'Creoles or mestizos'.

(ii) Dr Grandia's evidence

[20] In the order in which their evidence was adverted to by Conteh CJ, the first of these principal witnesses was Elizabeth (Liza) Mara Grandia, PhD, who at the time of trial described herself as an Assistant Professor of Anthropology in the Department of International Development, Community and Environment at an American university, viz Clark University in Worcester, Massachusetts. Dr Grandia obtained her PhD in Anthropology from the much more well-known University of California, Berkeley in 2006. (Her other degree is a BA in Women's Studies.) Conteh CJ dealt with her evidence primarily in paras 93 – 94 of the 2010 judgment, into which he squeezed no less than four paragraphs of quotations from her affidavit (headed 'First Affidavit of Elizabeth Mara Grandia'). In one of those quoted paragraphs, Dr Grandia deposes that:

> '16. The historic settlement of various Maya groups in Belize is well-documented by Richard Wilk, Richard Leventhal, Grant Jones and

Bernard Q. Nietschmann in their published writings and in their affidavits for a related petition to the Inter-American Commission on Human Rights in 1998. I concur with their conclusions that, long before the arrival of the British or Spanish in the region, various Maya peoples had organized settlements in what would later become the nation-state of Belize. At the time of contact with the Spanish, both the Mopán and the Manché Ch'ol indisputably lived in the Toledo District, as there is clear documentation from colonial records that the Spanish forcibly resettled both these groups from Toledo to different areas of Guatemala. The Q'eqchi' intermixed with both these groups, blurring the distinctions between them.'

(Dr Grandia's spelling of the word Kekchi is the result of her adoption of orthography endorsed through the Academy of Maya Languages of Guatemala: para 8 of her affidavit.) In the next such paragraph, Dr Grandia further deposes:

'17. In the period after contact with the Spanish, the Mopán Maya lived in Toledo until the Spanish removed them against their will to Petén, Guatemala. The Manché Ch'ol also lived in the Toledo region until the Spanish removed them to Verapaz, Guatemala, where they became extinct as a discernible ethnic group. My research shows that during the Spanish colonial period, the Q'eqchi' Maya intermixed with both these groups. They intermarried with the Mopán who had been relocated to San Luis, Peten and together these Mopan-Q'eqchi' families organized a return to Belize in the 1880s. the *(sic)* Q'eqchi' Maya also intermixed with the Manché Ch'ol' people in two regions; (1) in highland Verapaz where the Spanish relocated some of the Manché Ch'ol' and (2) with remnant populations in the regions north and northwest of Cahabón. The Q'eqchi' people who

> migrated to Belize at the end of the nineteenth century and afterwards were clearly fleeing political and economic repression to *(sic)* Guatemala. I would reiterate here that the political and demographic chaos cause *(sic)* by the Spanish conquest resulted in widespread ethnic intermixing and cultural fluidity among all Maya groups.'

Conteh CJ having found this latter paragraph of Dr Grandia's affidavit worthy of reproduction, without critical comment, in the 2010 judgment, I am left to infer that he found it to be of some value in arriving at his pertinent conclusion in favour of the respondents. I do not, however, find myself in the same happy position. My own doubts as to whether such a Maya group as could be called Kekchi-Mopan came to Belize in, say, the 1880s shall be elaborated upon later in the instant judgment: see paras [70] – [73]. As regards the Kekchi-Chol, I am prepared straight away to state my view that Dr Grandia demands too much of her reader in circumstances where she has given too little. She has, after all, spoken of intermarriage between Kekchi and Chol in two distinct locations in what is today Guatemala, viz (i) highland Verapaz and (ii) regions north and northwest of Cahabón, without indicating which of the two resulting groups of Kekchi-Chol later came to what is now southern Belize. The crucial importance of this is that the Chol in highland Verapaz either consisted entirely of or included (Dr Grandia does not tell us which) Chol said to have been taken there from what is present-day Toledo District, whilst the Chol in the regions north and northwest of Cahabón appear to have been Chol not so taken there (if for no other reason than that Dr Grandia does not say they were so taken). Thus, the Kekchi-Chol of the former group would have a connection with Chol who had once inhabited southern Belize but those of the latter would not. Dr Grandia is silent as to which of these two groups of Kekchi-Chol eventually reached Belize. In those circumstances, a reader can hardly be expected to take what would have to be a leap of faith, as it were, to the conclusion that it was the Kekchi-Chol of the former group who did so.

(iii) Dr Jones' evidence

[21] The second of the three principal witnesses for the respondents whose evidence was accepted without qualification by the learned judge was Professor Emeritus Grant D Jones. For some reason, Conteh CJ, after having referred to Dr Jones as being of the masculine gender throughout the 2007 judgment, did just the opposite (erroneously, as I strongly believe) throughout the 2010 judgment. Dr Jones described himself in his affidavit evidence as former Chair of the Department of Anthropology and Sociology and former Charles A Dana Professor of Anthropology at an American university, viz Davidson College in Davidson, North Carolina. Dr Jones holds bachelor's and master's degrees as well as a PhD, all in Anthropology, the master's degree and PhD having been obtained from Brandeis University.

[22] Conteh CJ's treatment of the evidence of this witness is to be found at paras 95 – 97 of the 2010 judgment. The learned judge, whilst noting Dr Jones' authorship of the book, *The Conquest of the Last Maya Kingdom* (Stanford, Stanford University Press, 1998), does not seem fully to have appreciated the leading role played by this witness at trial and indeed throughout the crusade of many years for the betterment of the lot of the Maya peoples in Belize, in the courts of Belize, as well as before the Inter-American Commission for Human Rights, nor the degree of influence exerted by his research and conclusions on the views of other witnesses with expert knowledge testifying in the court below. As in the case of the evidence of Dr Grandia, Conteh CJ largely restricted himself to setting out in the 2010 judgment certain paragraphs, viz paras 65 – 73, extracted from the affidavit sworn by Dr Jones (headed 'First Affidavit of Grant D. Jones') and relied upon by the respondents at the hearing below. The paragraphs thus reproduced by Conteh CJ occur in Part V of Dr Jones' affidavit, in which the latter seeks to make the case that, in his words, taken from his para 65, '… Mayas in Toledo identified as Kekchis have strong ancestral roots among both Chol and Mopan Maya speakers who once inhabited Toledo and adjacent Peten, Guatemala'. In the paragraphs quoted from Dr Jones' affidavit by Conteh CJ, the former takes the position

that it is wrong to say that, before and at the time of first contact with Europeans, the only inhabitants of the area which is now southern Belize were Chol speakers. He contends that there were also Mopan speakers. He does not seem, however, prepared boldly to assert that Kekchi speakers were also present in the region in question at this time. What he says, instead, is that the Kekchi-speaking Maya of present-day Toledo District have 'strong ancestral roots' amongst both the Chol and Mopan Maya speakers who were found in that area by the Spanish in the sixteenth century. (See, however, at paras [42] and [45], respectively, of the instant judgment, the 1997 position attributed to him both in the *Maya Atlas: The Struggle to Preserve Maya Land in Southern Belize* ('*The Maya Atlas'*), and in Dr. Wilk's first affidavit.) Having stated that position, he goes one step further and (muddying the waters, as it were) suggests that, as a matter of fact, there were others speakers of Maya languages present in what is now southern Belize from even before the arrival of the Spanish. It was, according to this suggestion, not only the Chol and Mopan Maya speakers who were there. The scholars who came before Dr Jones and had other views were all, he would have us believe, quite mistaken. In another of the paragraphs quoted by Conteh CJ, Dr Jones cites the formidable authority of J Eric Thompson and claims such support for his own (Dr Jones') position as is, in his view, to be derived from it. He there deposes (referring to *Ethnology of the Mayas of Southern and Central British Honduras*):

> '67. In his 1928 – 1929 [1927 – 1929 is more accurate] ethnographic study of the people of San Antonio Toledo, Sir Eric Thompson [he was not yet knighted] characterized the Maya-speaking population of the district as follows [at p 36]:
>
> > "These immigrant Mayas are of three stocks, Kekchi, Kekchi-Chol and Mopan Maya. The Kekchi-Chol are the most numerous. They are immigrants, or descendants of immigrants, who have crossed into British Honduras [now Belize] from Cajabon, and the adjacent area to the northeast. The Cajaboners [meaning *Cajaboneros*] are

> of mixed Kekchi and Chol blood, but they speak the Kekchi language with certain modifications, and in a somewhat sing-song manner …" '

At para 68, which Conteh CJ also included in the 2010 judgment, Dr Jones acknowledges, indirectly, an advantage enjoyed by J Eric Thompson over Maya ethnohistorians who have come after him, and one of which J Eric Thompson himself was keenly, indeed painfully, aware (as I shall later demonstrate). Dr Jones there states:

> '68. While we probably cannot now reconfirm his claims of locational origins, Thompson's observations support the conclusion that many people in Toledo who call themselves Kekchi are descended in part from people who once spoke Chol …'

(Of course, the far weightier, nay overshadowing, point made by J Eric Thompson on this page of his book – see para [2] of the present judgment – was that the Maya people living in the Toledo District at the time of his three sojourns in Belize during the period 1927 – 1929 were not indigenous, but rather immigrants and their descendants.)

[23] The remaining paragraphs extracted from Dr Jones' affidavit by Conteh CJ and reproduced in the 2010 judgment are concerned with what the former sees as the ancestral relationship between the Kekchi people living in the Toledo District today and Mopan-speaking Maya who, as he claims, inhabited that area before and at the time of the arrival of the Spaniards in the early sixteenth century. The paragraphs in question are numbered 69 – 73. At para 69, Dr Jones deposes:

> '69. On the basis of the evidence presented above, we may conclude without any doubt that the Mopan population of the Toledo District has

ancestral roots in the area that long predate British colonial claims over the territory …'

This is, in my view, worthy of note for the reason that none of this 'evidence presented above' is reproduced or even summarised by Conteh CJ in the 2010 judgment. This approach is consistent with unreserved acceptance on his part of both the evidence in question and Dr Jones' conclusion from it, viz that Mopan-speaking Maya people were in occupation of the Toledo District before and on the arrival of the Spanish there. (I propose later to consider for myself both such evidence and the conclusion drawn from it by Dr Jones.) The deponent sets out to show that the Kekchi-speaking people of Toledo are not just plain ordinary immigrants. There is, for Dr. Jones, something special about these immigrants, viz that they bear an ancestral relationship not only to the Chol-speaking Maya found in what is now the Toledo District by the Spanish but also to the Mopan-speaking Maya who, as he contends, were also found there by the Spanish. There has, he believes, been intermarriage between Kekchi and Mopan Maya going back many years, even beyond the latter part of the nineteenth century, when the records show migration of those two Maya groups into Belize, and specifically the Toledo District, to have occurred.

[24] In paras 71 – 73 of his affidavit, the last of such paragraphs to be reproduced by Conteh CJ in the 2010 judgment, Dr Jones deals with research done by him amongst baptismal records in Flores, Petén, Guatemala. These records, dating back to the late eighteenth and early nineteenth centuries, indicate, to him, that Mopan and Itza peoples dominated the population of San Luis, Guatemala at that time. That, he says, is a reflection of (a) the removal of these groups from the Toledo District by the Spanish in the seventeenth century and (b) a longstanding indigenous population of Mopan Maya in San Luis. The records also show, according to Dr Jones, that people with Chol and Kekchi surnames began migrating from Verapaz, Guatemala to San Luis and inter-marrying with the local population during the 1770s. I shall consider the limited utility of this data at para [70], below.

[25] Dr Jones concludes that the evidence of intermarriage contained in the baptismal records at Flores, Petén 'demonstrates with remarkable clarity' why so many Mopan-speaking people in the Toledo District, whose ancestors were from San Luis, bear Kekchi or Kekchi-Chol names today. He does not seem to consider it possible that the explanation for the bearing of such names may be intermarriage between Kekchi, Kekchi-Chol and Mopan Maya taking place in the Toledo District itself at some stage after the first wave of immigration of Kekchi, Kekchi-Chol and Mopan in the 1880s. Why, however, would such a possibility not exist? I note, in this connection, that Dr Wilk writes in his *Household Ecology*, at p 59: 'Three villages in the hill zone west of San Antonio today have mixed Kekchi-Mopan populations, and this mixing may have begun during the first movements.' [Emphasis added.] Dr Jones further reasons in the same paragraph that the evidence contained in the baptismal records, presumably of the migration during the 1770s of people with Chol and Kekchi surnames from Verapaz to San Luis, confirms that Chol people forcibly removed from what is now the Toledo District to Verapaz intermarried with Kekchis there. Again, Dr Jones seems for some reason not to accept that it is equally possible that such intermarriages occurred in San Luis itself, rather than in Verapaz, and thus involved Chol other than those forcibly removed from what is today the Toledo District. In other words, the people with Chol and Kekchi surnames who are said to have moved from Verapaz to San Luis could have intermarried in San Luis.

(iv) Dr Wilk's evidence

[26] The third in the trio of witnesses with expert knowledge relied upon by the respondents and dealt with by Conteh CJ in the 2010 judgment is Dr Wilk, (erroneously referred to as Wilks in the 2010 judgment), who described himself in his first affidavit, headed 'First Affidavit of Richard R. Wilk' and sworn on 18 December 2008, as a Full Professor of Anthropology at Indiana University in Bloomington, Indiana, USA. Like Dr Jones, Dr Wilk is the holder of bachelor's and master's degrees, as well as a PhD, in Anthropology, the master's degree and PhD having both been obtained at the University

of Arizona. He gave affidavit evidence, swearing a total of three affidavits, but was also, unlike Dr Grandia and Dr Jones, called to the witness-box and gave *viva voce* evidence. Conteh CJ commented upon the evidence of this witness in a single paragraph of the 2010 judgment (para 98), noting that he referred in his first affidavit to what he regarded as the historical and ethnic fluidity among the Mopan Maya, Kekchi and Manche Chol groups in the area that later came to be known as the Toledo District. The learned judge's attitude and approach to the testimony of Dr Wilk is, to my mind, revealing. He said, in this regard, at the end of para 98:

> 'I find no difficulty <u>believing</u> his testimony on the ancestral and cultural continuity between [the respondents] and the original inhabitants of what is today Toledo District.' [Emphasis added.]

A court receiving the evidence of witnesses such as Dr Grandia, Dr Jones and Dr Wilk on matters within their expert knowledge must, unlike the court dealing with eyewitness evidence in a murder trial, be concerned not so much, if at all, with their truthfulness (which, in all but the exceptional case, may safely be assumed), as with the question whether their reasoned views stand up to analytical scrutiny, of which, I respectfully opine, there was none in the 2010 judgment. For the judge below to have brought such an erroneous attitude to bear on the evidence of the sole expert to give *viva voce* evidence before him creates, to my mind, a difficulty which is not easily overestimated.

(v) The appellants' witnesses' evidence

[27] The evidence of the witnesses for the appellants which is pertinent to Conteh CJ's third issue, most notably that given by Dr Awe, was dismissed out of hand by the judge in two short sentences (para 100 of the 2010 judgment) in the terms following:

> 'The assertion by [the appellants] that [the respondents] or their ancestors are mostly immigrants from Guatemala is not borne out by the evidence

> and is unsustainable in the face of the evidence [the respondents] have led in this case. Such an assertion is the product of a mind-set that does not fully appreciate the historical, social and cultural evolution and development of what is today Toledo District.'

I regret to have to say that the last of these sentences is wholly unseemly and inappropriate in its utter lack of tact towards, and basic respect for, Dr Awe and the high office he holds. One is not sure that the judge was aware of the legitimacy and propriety, to begin with, of the concern that those claiming to be indigenous to a particular region should be able to establish that they are, in fact, descendants of the original inhabitants of such region. I have already referred above to a widely-accepted definition of the term 'indigenous peoples' as used in the field of Anthropology. I would further allude to a quotation contained on page 30 of the *Petition to the Inter-American Commission on Human Rights submitted by The Toledo Maya Cultural Council on behalf of Maya Indigenous Communities of the Toledo District against Belize*, a document dated 7 August 1998 and made a part of the record of the present appeal: see Vol 1, at pages 48 – 95. The quotation is taken from Chapter 26 of 'Agenda 21' of the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992, UN DOC A/CONF 151/26. The quotation reads:

> 'Indigenous people and their communities have a historical relationship with their lands and are generally descendants of the original inhabitants of such lands.' [Emphasis added,]

Having expressed the above lack of certainty, I ask myself whether the judge at any stage considered that scrutiny of the total of 28 affidavits filed by the individual alcaldes who were parties to the 2008 claim reveals that no less than 14 of them have or had at least one parent, and two more have or had grandparents, whose native land was stated to be Guatemala.

[28] Earlier on in the 2010 judgment, after setting out the issue now under discussion in the present judgment as, in my opinion, determinative of the instant appeal, Conteh CJ had laconically said of the evidence adduced by the appellants, at para 88:

> 'The evidence for the defendants on this issue is in the affidavits of Dr Jaime Awe and Mr Jose Cardona and the several exhibits annexed to these affidavits. The thrust of this testimony is that the original inhabitants of what is today Toledo District, were the Manche-Chol, an undoubted Maya group, but now said to be extinct. This group, according to [the appellants'] thesis were nearly all rounded up by the Spanish during the sixteenth century and taken to what is today Guatemala. According to Dr Awe: "… the original inhabitants of the Toledo District were Manche-Chol … (who) were forcibly removed and wiped out from southern Belize by Spanish colonizers." Drawing upon evidence from scientific archaeological, linguistic, ethno-historic and anthropological investigations, Dr Awe asserts that 'The data … shows that the modern Maya of southern Belize, consisting of the Mopan and Kekchi groups, are more recent immigrants to the Toledo District." ' [Emphasis added.]

[29] I am of the opinion that Conteh CJ is shown in the 2010 judgment to have been too quick and ready to accept the evidence of the witnesses for the respondents and that, indeed, his approach to, and treatment, of such evidence fails to typify the analytical method. I am further of the view that, from the 2010 judgment, he comes across as having given insufficient consideration to the evidence adduced by the appellants, particularly that of Dr Awe.

VI - Consideration of grounds 1 and 2: analysis of the evidence for purposes of the instant appeal

A Dr Awe's evidence

[30] For ease of presentation, I would first address the evidence of the appellants, as pertinent for present purposes, in the court below. Primarily, it was given by Dr Awe, who described himself in his affidavit (headed 'First Affidavit of Jaime Awe') as Director of Archaeology in the National Institute of Culture and History of Belize. Dr Awe is renowned in Belize, his native land, his love of which, like his pride in his Belizean parentage, is manifest from his affidavit, in which he understandably proclaims (at para 2):

> 'I was born in San Ignacio Town, Cayo District, Belize in 1954. My father's name is Jorge Awe and my mother's name was Elena Galvez Awe, both born in Belize.'

[31] Dr Awe's academic qualifications are in both Anthropology and Archaeology. He holds bachelor's and master's degrees from a Canadian university, viz Trent University in Peterborough, Ontario, and a PhD in Archaeology from the University of London. I note, in passing, that no claim to a degree in Archaeology is made by Dr Grandia, Dr Jones or Dr Wilk.

[32] Dr Awe's position on the question of whether the Mopan and Kekchi people now living in the Toledo District are indigenous to the area is clearly stated in the section headed 'The Claim by the Mopan and Kekchi to be the indigenous people of the Toledo District' of his affidavit, sworn on 29 May 2009. Paras 5 – 7 may usefully be reproduced in this connection:

> '5. With this witness statement I seek to provide evidence from scientific archaeological, linguistic, ethnohistoric and

anthropological investigations, that demonstrates that the original inhabitants of the Toledo District were Manche-Chol (Chol for short), and that the Manche Chol people were forcibly removed and wiped out from southern Belize by Spanish colonizers. The data further shows that the modern Maya of southern Belize, consisting of the Mopan and Kekchi groups, are more recent immigrants to the Toledo District.

6. I along with several distinguished colleagues in Archaeology (see references below), have held this position for years. In early November 2008 [ie more than a year after the 2007 judgment] when interviewed by Adele Ramos for the Amandala Newspaper in connection with Belize going to the International Court of Justice [concerning a different matter, viz the Guatemalan claim to Belize], I again stated my views thus:

> "The original inhabitants of Toledo were not the Maya who live there today. They were the Manche-Chol (or Chol for short) whereas the present-day Maya are Mopan and Q'eqchi."

A copy of the interview published in the Amandala Newspaper on 8th November 2008 is now produced and marked J.A.2.

7. In 2005 I published "101 Questions and Answers on the Ancient Maya of Belize" and wrote at page 37, Question 100 as follows:

> "100. Are the Maya who live in Belize today related to ancient Maya who lived here before?

> Linguistic and archaeological data suggest that during the Classic and early post-conquest period Yucatec and Chol Maya occupied the northern and southern parts of the country. Many of these people died from introduced diseases and others were resettled in Mexico and Guatemala by the Spaniards. The modern Maya of Belize are mostly recent immigrants to the country. The Kekchi originate in the eastern highlands of Guatemala, in and around the Department of Alta Verapaz. The Yucatec of Succotz and San Antonio in the Cayo District, and those of northern Belize immigrated to this area just before, during, and after the Castle *(sic)* Wars of Yucatan in the 1800's." '

A copy of Question 100 of "101 Questions and Answers on the Ancient Maya of Belize" is now produced and marked J.A.3.' [Original emphasis.]

Dr Awe is emphatic that his is a mainstream position amongst archaeologists. To quote from para 58 of his first affidavit:

> 'There is no dissent among Maya archaeologists that the people who originally occupied the southern Maya lowlands extending from the southern Peten regions of Guatemala into southeastern Belize, throughout the Classic (300 to 900 AD) to Post Classic (AD 900 – 1500) periods were the Chol. They spoke the Cholan language.' [Emphasis added.]

[33] What Dr Awe has set out in the paragraphs of his affidavit quoted above resonates with what Belizeans had been taught in school and had been coming across in their general reading for decades upon decades. Those of us who attended primary school in the 1950s and 1960s, for example, were, and are, familiar with a relatively slim publication known as the *Brief Sketch of British Honduras*, written by the colony's then

Archaeological Commissioner, Mr A H Anderson, the 1958 edition of which had this to say, by way of general introduction to the ancient Maya people, at page 87:

> 'It is now generally believed that the Maya migrated into the New World, possibly by way of the Behring Straits, as primitive, nomadic hunters. Whatever their origin they built up an amazing civilization which reached its zenith somewhere around the 8th or 9th Century A.D. and then suddenly collapsed. Although lack of metals restricted them to stone tools they shaped building stones, erected massive masonry buildings, carved intricate designs on stone monuments and wooden lintels, levelled off hilltops for ceremonial sites, erected pyramids – some 150 feet high – and topped them with masonry temples and other buildings. They were skilled potters, weavers, basket makers, lapidaries and agriculturists. Their astronomy was good and they evolved a complicated but accurate calendric system, a time count, a glyphic system of writing and positional mathematics incorporating the zero many centuries before it was invented in the Old World. They made paper codices, filling the pores of the paper with fine clay and painting thereon intricate polychrome vignettes and glyphs. There are many theories as to why their building and other cultural activities suddenly ceased in Meso America and even large ceremonial centres were apparently abandoned. The jungle soon moved in when a site was abandoned, roots tore buildings apart and termites, bush fires, rot and other destructive agents took heavy toll of perishable materials.' [Emphasis added.]

[34] Not too many years later (*circa* 1966), another locally popular and highly readable history book, viz *A Survey of our National History*, written by an anonymous Jesuit history scholar (in consultation with Mr Leo Bradley Sr, another history scholar of local renown) and published by Saint John's College, the firmly established and prestigious local Jesuit institution of secondary and tertiary education, dealt with the

specific subject-matter of the above-quoted paragraphs from Dr Awe's affidavit thus, at pages 13 – 14:

> 'We have already read about the great Maya civilization of our past. Most of these Maya Indians left our country in the ninth or tenth century, but undoubtedly some did remain behind. The Maya of our Northern districts [not to be confused with the Maya of the Toledo District] came as a result of the Indian Wars [a reference to the Caste War in neighbouring Yucatan in what is today Mexico]; the town of San Antonio in the Cayo District [a district in western Belize] was also settled by Indians from Yucatan seeking peace. Most of the other Maya and Mestizo [Maya mixed with Spanish] settlements of the area of San Ignacio and Benque Viejo del Carmen were settled by Maya and Spanish-Indian peoples coming across from the Peten area of Guatemala. One of the largest groups of Maya people in our country is that found in our Southern or Toledo district. The Indian people of this district are of two sub-tribes of the Maya, the Mopan who are usually called simply Maya, and the Kekchi.
>
> The Kekchi are originally from the area near Coban in the Alta Vera Paz department of Guatemala. Most of them came to Belize about five generations ago as labourers for the Kramer Estates. These were German owned plantations in the Temax and Sarstoon valleys. In 1914 when Great Britain and Germany went to war, the Kramer Estates were forced to close; but instead of returning to Guatemala, most of the Kekchi settled down to found small farming communities along the Sarstoon, Temax, and Moho Rivers. The Maya people [a reference to the Mopan Maya] of the South are also originally from Guatemala, and came to Belize in 1883.' [Emphasis added.]

[35] I pause here frankly to acknowledge that neither the *Brief Sketch of British Honduras* nor *A Survey of our National History* was quoted from by any of the witnesses in the court below or even referred to in evidence, whether oral or in the form of affidavits. There was, on the other hand, allusion on the part of Dr Wilk to the *Report of the Interdepartmental Committee on Maya Welfare*: *10th November 1941* (Belize City, Government Printer, 1942), which document was, in fact, placed before the court below as exhibit RW2 - 14 to his (Dr Wilk's) first affidavit and which, dealing with the subject of, amongst others, the Indian inhabitants of the south-western portion of the Toledo District in 1941, reads, at para 4:

> 'The present-day Indian inhabitants are, without exception, the descendants of immigrants from the neighbouring republics since the early days of British settlement ... The immigrants into Toledo were Mopan Maya, Kekchi or Kekchi-Chol from Guatemala who entered and settled in an unoccupied portion of the district during the last eighty years ... They are ... of unmixed blood and less affected by the civilization of other races.' [Emphasis added.]

My purpose in drawing material from the *Brief Sketch of British Honduras* and *A Survey of our National History* is not to introduce new and extraneous evidence but to seek to demonstrate why the attitude and reaction of a Belizean such as I am to the evidence of the anthropologists and archaeologist/anthropologist in this case is bound to differ sharply from the attitude and reaction of one not born and bred in Belize such as the judge below. And I go to these lengths in fairness, and out of respect, to that learned judge. My attitude and reaction to the evidence and position of Dr Grandia, Dr Jones and Dr Wilk simply cannot be one of uncritical acceptance. At the same time, I am altogether unable to dismiss out of hand the evidence and position of Dr Awe.

B Dr Grandia's evidence

[36] I turn then to consider the evidence of Dr Grandia. Conteh CJ placed this witness, together with Dr Jones and Dr Wilk on a pedestal, so to speak, as full-fledged expert witnesses, whilst effectively denying Dr Awe a similar pedestal on the flimsy technicality that he was not put forward as an expert witness and making much of the fact that Dr Awe stated that he is employed by the Government of Belize.

[37] To my mind, Dr Grandia's strength, if any, as a witness can only have been as regards the question of the existence of a system of customary land tenure in the Toledo District. That question related to the first issue identified and resolved by Conteh CJ in the court below (for which, see para [13], above). In the present appeal, however, my concern is with the third of the issues in the case (also set out at para [13], above); and, in my view, Dr Grandia was, in regard to this issue, content to express agreement with the position taken by others whom she named in her affidavit. It is convenient to reproduce the relevant paragraph of her affidavit here although it has already been set out above (at para [20]):

> '16. The historic settlement of various Maya groups in Belize is well-documented by Richard Wilk, Richard Leventhal, Grant Jones and Bernard Q. Nietschmann in their published writings and in their affidavits for a related petition to the Inter-American Commission on Human Rights in 1998. I concur with their conclusions that, long before the arrival of the British or Spanish in the region, various Maya peoples had organized settlements in what would later become the nation-state of Belize. At the time of contact with the Spanish, both the Mopán and the Manché Ch'ol indisputably lived in the Toledo District, as there is clear documentation from colonial records that the Spanish forcibly resettled both these groups from

> Toledo to different areas of Guatemala. The Q'eqchi' intermixed with both these groups, blurring the distinctions between them.'

[38] I shall now deal with the four Maya scholars named by Dr Grandia in the paragraph just reproduced. Neither Dr Bernard Q Nietschmann nor Dr Richard Leventhal gave evidence in the 2008 claim; and therefore, in my view, Dr Grandia ought to have referred the court below to the specific pages of (i) the published writings and (ii) the affidavits placed before the Inter-American Commission on Human Rights at which the conclusion in question is supposedly stated by each. It is the case, however, that an affidavit sworn by Dr Nietschmann in Supreme Court Action No 510 of 1996 was rather ingeniously placed before the court below in the form of an exhibit to the affidavit of a Cristina Coc sworn on 3 July 2009. From that affidavit, it appears that Dr Nietschmann, by then, sadly, deceased, had been a professor of Geography at the University of California, Berkeley (the university, as already noted above, from which Dr Grandia obtained her PhD) and that it was through a mapping project facilitated by him that *The Maya Atlas* was created. *The Maya Atlas* itself was also placed before Conteh CJ in the court below in the form of another exhibit to Ms Coc's affidavit in question.

[39] Exhibited to this affidavit, sworn on 25 July 1997, of Dr Nietschmann is a report which he described in such affidavit as one 'setting forth my opinion on matters involving the system of customary practices that are part of the distinctive cultural tradition of the Mopan and Ke'kchi Maya in southern Belize'. Not surprisingly, therefore, most of the report is concerned with matters relating to the first of the issues resolved by Conteh CJ in the court below. There is, however, on pages 12 – 13 of the report a section headed 'Historical Data' which could be said to relate in a way to the third of those issues. The section opens with the following paragraph:

> 'It is clear from the responses to the questionnaire that the Mopan and Kek'chi Maya in Southern Belize have a sense of history and ownership of the land they have lived on and use. The evidence collected during the

> Maya Atlas Project provides oral historical documentation about the arrival of the Spanish in what is now Belize and their efforts to subdue and/or re-locate the Maya. Many families reported stories of ancestors who resisted the Spanish … and who lost their land to outsiders … Several families said that their ancestors were asked to leave … Here too the oral histories show that the ancestors of the respondents [ie the persons responding to the questions of researchers] resisted. For example, when asked whether there were any stories of his ancestors being asked to leave these lands, a man from Aguacate said, "[t]hey were tried to move, but still left some." Many report ancestors who were killed by outsiders and by sickness …'

The third and final paragraph of this short section at the end of Dr Nietschmann's report reads:

> 'There is evidence that many people among the Maya believe that some of the direct descendants of their ancestors – most often referred to by them as 'Chol' – still exist in the Toledo District today. Respondents from 12 Maya villages (35%) testified to having some current contact with living descendants of the Chol Maya who occupied what is now Belize many centuries ago … The stories are remarkably similar. For example, several people from Laguna said that the Chol live in caves around the village and would come in the old days to exchange cocoa for salt. One man said that he had seen them walking at night. Another said he hears them hunting at night. A man in San Pedro Columbia told the village researcher that the Chol "… live in ruins. In Otoxha we met them. He (sic) is short and wearing hat. We never see where it went." A respondent in Santa Teresa reported that the Chol "… live in caves, and for a long time exchange salt with meat with the present-day villagers." In San Jose one household said, "They truly exist. They live in caves … Sometimes people

meet them on dogs or other animals." Another man from that village has heard them beating their drums.'

[40] It is to his eternal credit, in my view, that Dr Nietschmann drew no conclusion from the unspecific, imprecise and insubstantial material set out in the two paragraphs just quoted. The conclusion stated at the end of his report seems to me to be drawn from the rest of the report and to be germane only to the first of the issues addressed by Conteh CJ in the 2010 judgment, an issue upon which (as already noted) Dr Grandia gave key testimony; and I am unable to rule out, for my own part, the possibility that it is with that conclusion of Dr. Nietschmann that Dr Grandia meant to express concurrence in her own affidavit. That conclusion, for the avoidance of doubt, was that the Maya in the Toledo District live today according to a system of customary practices that are a part of a distinctive and long-standing cultural fabric. I consider it helpful to recall, in this connection, the following words of Dr Grandia as to her remit at para 10 of her affidavit:

'I was asked to provide a report on Maya customary land tenure patterns in Toledo, and the history of Maya-British relations with respect to land use and the alcalde system. I agreed to do so.'

[41] It does not appear that any affidavit sworn by Dr Leventhal in earlier litigation was placed before Conteh CJ at the hearing below. There is, however, at page 3 of *The Maya Atlas*, the following reference to a report prepared by him for use in the court below in unspecified proceedings (presumably Supreme Court Action No 510 of 1996):

'Anthropologist and Mayanist Dr. Leventhal wrote a report for the Supreme Court of Belize supporting our claim to our land. In it he states that Maya were living in what is now the Toledo District of Belize when the Spanish first arrived here. "There is clear reference [in the 16th century] to small numbers of Maya people living within the Pusila River area of this Toledo District region of Belize. These people are described as Manche-Chol

> Maya living in very small communities, perhaps of not more than 10 – 20 people in each cluster." ' [Emphasis added.]

[42] It will be noted that this quote from Dr Leventhal includes no mention of the Mopan Maya as being inhabitants of southern Belize on first contact with the Spanish. The same paragraph of *The Maya Atlas* just quoted from goes on immediately to deal with them, relying, however, on the authority of another (not unfamiliar) scholar:

> 'Mayanist Dr. Grant Jones stated to the Supreme Court in support of our lawsuit, "The principal inhabitants of the Toledo District during the 16th through 18th centuries were Mayas who spoke Yucateca languages, Chol, and Mopan. Peoples of Kekchi Chol ethnicity may have been moving in and out of the area long before the well-known migrations from Guatemala during the late 19th century." '

That Dr Jones should be the expert so quoted is hardly coincidental. One wonders who else could have been quoted. He is very much a trail-blazer in this area. In his own affidavit in the 2008 claim, which shall be considered in detail later, he states, at para 75:

> 'The Mopans … are one of the least well known, both historically and geographically, of all lowland Maya peoples …I believe they were a far larger and more widely spread group than has formerly been thought'. [Emphasis added.]

One authority which *The Maya Atlas* could certainly not rely upon was that of Dr Wilk's *Household Ecology*, for the position taken in that 1991 book (for which, see for example, pp 54 – 55) leaves no room for the proposition that any group at all, let alone the Mopan, inhabited the forests of Toledo from the late seventeenth century to the end of the third quarter of the nineteenth century: see also para [55] below.

C Dr Wilk's evidence

(i) Some key features as relevant in this appeal

[43] The position of Dr Jones, as I have just indicated. shall be focused upon later in this judgment. For the moment, the evidence of Dr Wilk requires attention as I continue referring, in turn, to the experts with whom Dr Grandia concurred or purported to concur in her affidavit (at para 16, as already shown above, at para [37]). Dr Wilk stands out amongst all witnesses testifying for the respondents for his singularly immodest claim in his first affidavit (sworn, as already indicated, on 18 December 2008), at para 3, that:

> 'I am familiar with almost every published source on Toledo District's history, economy, and ethnography, including works on the Kekchi, Mopan (also called Maya), Garifuna (also called Garinagu, Caribs, and Black Caribs), East Indian, and Creole population of the area.'

Deposing in his affidavit in question under the heading 'History of the Maya people in the Toledo District' and the sub-heading 'Pre-colonial settlement in present day Belize', he makes the following important initial acknowledgment, at para 4:

> 'The general settlement history of Toledo District is not very well known by outsiders and historical documents are incomplete. There are many gaps in our knowledge, and a good deal of history is based on very skimpy sources, especially for the time up until the late 19th century. Aside from periodic raids or expeditions, neither the British nor the Spanish were able to establish a government presence in the Toledo region during the 16th, 17th, and 18th centuries. For this reason there are no regular administrative records or other documentation of the indigenous inhabitants of the area until British colonial administrators established a government presence in the interior of Toledo District in the 1880s, in

response to the founding of two plantations by the Anglo-German Cramer family.' [Emphasis added.]

(It is noteworthy that Dr Wilk saw fit to make this statement even after, as a matter of fact some 10 years after, the publication of Dr Jones' *The Conquest of the Last Maya Kingdom*.)

[44] But Dr Wilk goes on to assert, at the end of the same paragraph:

> 'Nevertheless, there is sufficient evidence to demonstrate that Maya peoples have continuously occupied Toledo since pre-contact times.' [Emphasis added.]

The reference here to 'Maya peoples' is, of course, as unspecific as that of Conteh CJ to 'the Maya', to which I have pointedly directed attention at para [9], above.

[45] At para 8, Dr Wilk echoes *The Maya Atlas* in its quotation of Dr Jones, deposing:

> '… Jones (1997) notes that the principal inhabitants of the Toledo District during the sixteenth through the eighteenth centuries were Mayas who spoke the Yucatecan languages Chol and Mopan, and may also have included Kekchi speakers. In the 16th century when Spanish visitors first passed through southern Belize it was partially under the political control of the Itzá Mayan state centered in the Peten *(sic)* region of Guatemala. Parts of southern Belize were independent, and were identified by the Spanish as being inhabited by a group of people they called the "Manche Chol", though they also appear in Spanish records under many other names (perhaps family names) in 16th century Spanish documents examined by Feldman (1975).'

[46] What should be clear by now is that whilst, as shown earlier in the instant judgment (at para [32]), Dr Awe speaks of the Manche-Chol, and the Manche-Chol only, as being, demonstrably, the original inhabitants of Belize (ie at 'Spanish contact', a phrase defined at para 20 of his affidavit), other scholars testifying for the respondents (and invariably citing the work of Dr Jones) speak of other Maya groups, besides the Manche-Chol, as being amongst such original inhabitants; and, most importantly, they include Mopan-speaking people amongst such other Maya groups. The last quotation from Dr Wilk's affidavit leaves the analytical reader, however, with legitimate burning questions. On what basis, to begin with, does Dr Jones note in 1997 that Mopan-speaking Mayas were there in what is now southern Belize with Chol-speaking Maya when the Spanish first arrived? On what basis, furthermore, does Dr Jones think that the inhabitants of what is today southern Belize 'may' have even included Kekchi speakers? It will also be noted that, as was adumbrated at para [22], above, whereas the position of Dr Jones in his affidavit (ie in 2009) is that Kekchi-speaking Maya of present-day Toledo District have 'strong ancestral roots' amongst both Chol-speaking and (as he contends) Mopan-speaking Maya found in that area by the Spanish in the sixteenth century, the position attributed to him in *The Maya Atlas* (published in 1997) in the context of the 1996 litigation already mentioned above is the rather more far-reaching one that people of Kekchi-Chol ethnicity may have been moving in and out of the area in question long before the late nineteenth century migrations. And the position so attributed to Dr Jones in *The Maya Atlas* seems essentially the same as that which, according to Dr Wilk, was being held by Dr Jones in 1997. Was Dr Jones' position, then, somewhat watered down after 1997?

(ii) Comment on credibility of the ethnohistorian's source: History versus Archaeology

[47] Dr Wilk goes on to add, at para 9 of his affidavit under consideration:

> 'The sixteenth-century Chols were employed in the production of cacao, as described by members of [Hernán] Cortes' 1525 [Dr Wilk describes it

> as a 1524 – 1525 expedition in his book *Household Ecology* (abbreviating the title for convenience) at p 43] expedition [from Mexico to Honduras] through their territory near or possibly in the Toledo District. [Waddell, op cit, p 3, cites the distinguished American archaeologist, Sylvanus G Morley, *The Inscriptions of Petén* (5v, Washington, Carnegie Institution, 1937 – 8) i.18, as proponent of the suggestion that Cortés actually crossed 'the extreme south-west corner' of what is now Belize on his famous overland march.] The Chols and Mopans continued to produce cacao and vanilla in orchards throughout the seventeenth century. The Spanish observer who described such orchards on what is today the Guatemalan side of the Belize-Guatemala border reported hearing that such cultivations extended all the way east from the Manche Chol region in Peten to the Caribbean coast – thus incorporating the Toledo District. (Jones 1997:2). [Emphasis added.]

(The last citation in round brackets is of the work of Dr Jones.)

[48] Nothing, of course, is known of the credibility of the 'Spanish observer' concerned (mentioned also by Dr Jones at para 17 of his first affidavit), let alone of the person, if any, who gave him the information in question on Chol and Mopan cultivation inside territory which is today Belizean. To what extent this circumstance concerns the ethnohistorian is difficult for me to say. The courts, however, cannot abdicate their responsibility to weigh evidentiary material on the basis of such factors as credibility. (I distinguish here between the credibility of an expert witness, such as Dr Wilk, and that of a person quoted by an expert witness, such as this 'Spanish observer'.) Archaeologists, too, whilst appreciating the work of ethnohistorians, appear to be only too conscious of its limitations. Dr Awe, for one, although himself (unlike Dr Grandia, Dr Jones and Dr Wilk, as already noted above) an archaeologist as well as an anthropologist, manifestly is, his deposition at para 10 of his affidavit being as follows:

> ‘It is my respectful view that it is not as helpful to understanding the ancient Maya, to acquire information from single sources and to apply the direct historical approach. In the latter approach it is assumed that because something was written by say, a Spanish missionary in the 17th century or even the 19th century, then it has to be true. Or, if this was the case in the 19th century then it had to be so during the early contact period or prehistoric times.’

And he goes on immediately to quote the eminent American archaeologist, Diane Z Chase, on the need for Maya scholars to compare and contrast the data of ethnohistory with other data (at para 11):

> ‘As my colleague Diane Chase cautions in her publication “Postclassic Maya Elites: Ethnohistory and Archaeology” (1992) [contained in *Mesoamerican Elites: An Archaeological Assessment*, edited by Diane Z Chase and Arlen F Chase (Norman and London, University of Oklahoma Press, 1992)], “Ethnohistory is useful, but it must be critically compared and contrasted with other data – particularly archaeological – when dealing with such difficult topics as social or site organization … Historic period information about the structure of Maya society also hits snags in archaeological verification.” ’

[49] Dr Awe defends his own approach, the scientifically archaeological, as follows, at para 12:

> ‘Scientific archaeology avoids this trap by comparing data from multiple sources and by examining whether information derived from one source is substantiated by information derived from other sources.’

[50] The topic of History versus Archaeology is touched upon by Diane Z Chase and Arlen F Chase in the above-cited *Mesoamerican Elites*: *An Archaeological Assessment*, in which they state, at pages 310 – 311:

> 'Because archaeology provides us with only the remnants of past activities, we often not only rely on analogy with living peoples, but also look toward historic information to augment the archaeological record … Both disciplines [ie history and archaeology] are concerned with the chronological ordering of events; however, each has a data base with distinctive benefits and limitations … When used to address the same problem, history and archaeology would be combined in a conjunctive approach where neither discipline nor data base would dominate interpretation; rather, the different kinds of data could be tested against each other to get a balanced picture. Unfortunately, in practice, this is rarely the case; when both history and archaeology are available, one is generally given precedence over the other.'

(iii) Interwoven state of the evidence of Dr Wilk and the respondents' other expert witnesses

[51] Since Dr Wilk, like Dr Grandia, as I understand their respective testimonies, shares the opinion of Dr Jones as regards the presence of Mopan Maya in what is today southern Belize at the time of first contact and also indicates that the material on which Dr Jones bases his opinion is solid, I shall, when I come to consider his evidence in the court below, be indirectly dealing further with Dr Wilk's evidence as well, of course, as with that of Dr Grandia.

(iv) Impact of the witness's article in *Science and Engineering Ethics*

[52] I shall now address a matter drawn attention to, somewhat tangentially perhaps, by Dr Wilk in his testimony below. Apart from the 79 paragraphs of matters he deposed

to, Dr Wilk placed before Conteh CJ almost 3 pages of 'References Cited' (amongst which is properly included *Ethnology of the Mayas of Southern and Central British Honduras*) and a most impressive 24-page curriculum vitae. The latter contains a lengthy list of 'Journal Articles and Chapters in Books' authored by this exceptionally prolific writer. In this list (at p 6) is an article entitled 'Whose Forest? Whose Land? Whose Ruins? Ethics and Conservation', which is there said to have appeared in a publication called *Science and Engineering Ethics 5* (3): 367 – 374. (The same title appears again at p 17 in a list of 'Papers and Lectures Presented', where there is an apparent reference to proceedings of the American Association for the Advancement of Science at Philadelphia, Pennsylvania on 14 February 1998.)

[53] Before turning to specific passages in this article, it is useful, I think, to set out the following abstract which immediately precedes it in *Science and Engineering Ethics* (1999) 5, at p 367:

> 'ABSTRACT: The stakes are very high in many struggles over cultural property, not only because the property itself is valuable, but also because property rights of many kinds hinge on cultural identity. However, the language of property rights and possession, and the standards for establishing cultural rights, is founded in antiquated and essentialized concepts of cultural continuity and cultural purity. As cultural property and culturally-defined rights become increasingly valuable in the global marketplace, disputes over ownership and management are becoming more and more intense. Using the example of a recent lawsuit over logging on Mayan Indian reservations in the Central American country of Belize, this paper argues that cultural essentialist positions are no longer tenable.
>
> Assigning exclusive ownership of globally important resources to any group or entity on purely cultural grounds is likely to prolong conflict

> instead of creating workable management structures. The author instead advocates a concept of "stakeholding" which acknowledges the legitimate interests of diverse individuals and groups.'

I note, in passing, that in the instant case, Dr Wilk testified on behalf of parties, one of whose stated goals is to obtain title (see, eg para 9 of the respondents' claim form, set out at para [10], above) in respect of 'globally important resources' in the form of vast tracts of land containing forests and petroleum deposits (see the reference to the Petroleum Act in the quote from the claim form at para [11], above) in southern Belize.

[54] In the introductory part of his article, Dr Wilk states that it is one of the most fundamental of ethical principles in Anthropology that the anthropologist should avoid actions that hurt or harm informants: p 367. He goes on in that same part to say that his own research has been used to harm the people he works with, 'the ones I am obligated to protect': p 368. He then briefly discusses the concept of culture and refers to fieldwork he did in the 1970s in Belize 'among a group of people that anthropologists call the Kekchi Maya'. In the next part of his article, headed 'The Real World', he directs attention to 'the land rights case I have been involved with in Belize', undoubtedly a reference to Supreme Court Action No 510 of 1996 (*Toledo Maya Cultural Council and Toledo Alcaldes Association v The Attorney General*), to which Conteh CJ adverted in the 2007 judgment, at paras 15 – 16, a case which lamentably fell, from all indications, into a 'black hole'.

[55] Dr Wilk proceeds to state as follows:

> 'The people now called the Kekchi were the subject of my dissertation research in 1979 and 1980. As part of my research I traced the history of their settlement in the Toledo district of Southern (*sic*) Belize, and of other groups of people who had lived there from before the conquest. The picture I pieced together, from very skimpy sources, went something like

> this; people speaking the Chol Maya language had probably lived there before the arrival of the Spanish and British in the area. Many of these people, who appear by various names in the Spanish records, were rounded up and deported to the highland Guatemala (*sic*) in the late 17th Century, leaving southern Belize ostensibly uninhabited It was recolonized in the 19th century by people we call the Garifuna moving up the coast from Honduras, by a group called the Mopan Maya from San Luis in Guatemala, and by the Kekchi. There are good documents attesting to Kekchi arrivals in the 1880s. The British colonial authorities responded to the arrival of an Indian population by setting up reservations, where they regulated their own political affairs and land use with little interference. By the 1930s, a substantial part of the Indian population had moved off the reservations into adjacent areas which the government called "forest reserve". '

I would make two comments here. First, Dr Wilk's use of phrases such as 'pieced together' and 'very skimpy sources' should not lull the reader into the drawing of the conclusion that this 'dissertation research' was not high-level investigation. Having regard to the years specified and the content of Dr Wilk's curriculum vitae, this was, in all likelihood, doctoral dissertation research. Secondly, the observation that southern Belize was left ostensibly uninhabited after the deportation in question would have put Dr Wilk in the exclusive company of J Eric Thompson himself: see the latter's *The Maya of Belize: Historical Chapters Since Columbus* (Belize, The Benex Press, 1972), pp 4, 20 and 34.

[56] Dr Wilk continues his narrative making mention of the granting of logging concessions by the government of Belize for almost half of the Toledo District in the mid-1990s and of an ensuing outcry from conservationists and indigenous activists which led to the commencement of a lawsuit in the Supreme Court. He comments, at p 372, that:

> 'While the legal issues have yet to be decided, the government has been intransigent.'

He then goes on to say, *ibid*:

> 'The Kekchi and Mopan claim to be descendants of the ancient Maya civilization that occupied Belize in the 10th century A.D. … The government's brief filed before the Supreme Court argues that the Kekchi and Mopan Maya are recent immigrants [as indeed Dr Wilk's above-mentioned research had revealed] who have only been allowed to use land on sufferance. They cite my own research and publications as scientific evidence that the true aboriginal inhabitants of the area, the Chol, were wiped out, and replaced only in the last century by immigrants from Guatemala.'

[57] Dr Wilk's somewhat chagrined perception that his research was thus used to harm the very people he was under a duty to protect has already been noted above (at para [54]).

[58] What immediately follows in the article is revealing and, thus, of help in ensuring that the analysis in the present judgment of the remainder of the evidence so wholeheartedly and without question accepted by Conteh CJ in the court below is sharply focused. It explains, to my mind, the subsequent careful closing of ranks behind Dr Jones' affidavit evidence that is manifested by the testimonies of Dr Grandia and Dr Wilk in the 2008 claim. The pertinent passage in the article reads thus:

> 'In preparing a deposition for the case [the 1996 action] before the supreme court last year, I had the chance to go back and reexamine the evidence for the historical continuity of Mopan and Kekchi Maya in Belize, along with archaeologist Richard Leventhal [referred to as an

> Anthropologist in the *Maya Atlas*, p 3] and ethnohistorian Grant Jones. Jones in particular has found much more material from the eighteenth century which suggests that some indigenous groups remained in the area long after the Spanish had supposedly depopulated the region. But who were they, and what is their relationship to the modern inhabitants?' [Emphasis added.]

[59] The discussion reaches a high point at the end of the next paragraph with an acknowledgment which seems to overflow with candour, at p 372:

> 'On the one hand we have shown that it is possible to improve our knowledge through further research [an obvious allusion to the research of Dr Leventhal and Dr Jones just mentioned above], and the right kind of archaeology could be very informative too. But more information has just deepened the fundamental contradictions in the idea of cultural continuity being disputed in the courts. Perfect ethnographic knowledge of the 18th Century people of Toledo District, even direct observation with a time machine would not tell us if they were the "true" cultural ancestors of the modern Kekchi or Mopan.' [Emphasis added.]

[60] This is a far cry indeed from celebration over the fruits of the researches of Dr Leventhal and Dr Jones. It is, to my mind, a painful recognition of the impossibility of the task at hand. Accordingly, it may instructively be juxtaposed with para 92 of the 2010 judgment, at which Conteh CJ adverts to the 'compelling expert evidence' which proves 'a satisfactory historical, ancestral and cultural continuity and links between the original inhabitants of what is now Toledo District and [the respondents]'.

[61] In the concluding part of the article, Dr Wilk, having earlier, as I have noted above (at para [56]), accused the government of Belize of intransigence in their dealings with the Kekchi and Mopan Maya, declares himself, to all intents and purposes, on the

side of these peoples, irrespective of the merits of their case in the courts, when he states, at p 373:

> 'The Kekchi [and presumably also the Mopan Maya] have rights to self-determination, and some control of the land where they live, regardless of whether they have been in Belize for fifty years or five hundred.'

(Another instance of Dr Wilk taking sides is to be found in his second affidavit, of 18 December 2008, at para 78.)

[62] The article ends with Dr Wilk once more usefully baring his soul, at p 374:

> '… the present system [is one] where anthropology is supposed to determine who the "real' owners are … [A]nthropology as a science is "incapable of making this determination; we can certainly exclude some stakeholders (we can surely say that Australian aborigines have no special stake in the rainforests of southern Belize), but no more.'

[63] I have introduced material from Dr Wilk's article in question in the conviction that it is right so to do. The stakes are high in this case for all the people of Belize – not only the litigants whose names, offices and collective descriptions appear in the title of the present appeal. The respondents, through this erudite witness, have brought to the attention of the Court a wealth of sources of information mentioned in affidavits and material exhibited to them. The Court should be, and in my opinion is, at liberty to acquaint itself with, and make use of, any such material that appears from, say, its title, to contain matter which is of relevance and interest.

(v) Closing comments on accuracy

[64] A few final comments of a general nature need to be made as to the evidence of Dr Wilk, which evidence (in the 2008 claim) comprised three affidavits and *viva voce* evidence. I am inclined to believe that sufficient time and care were not taken in the preparation of the affidavits. I have quoted at para [47], above from Dr Wilk's first affidavit, in which he specifies 1525 as the year of Cortés' famous overland march, whilst his book, *Household Ecology* states, at p 46, that it extended from 1524 to 1525. A second random example of inaccuracy in the former is the allusion to the supposed meeting between an American citizen, Charles Swett, and 'natives' living in certain villages in what is today southern Belize. At para 38 of his second affidavit (sworn, like the first, on 18 December 2008), Dr Wilk states that this contact occurred near the mouth of the Rio Grande in 1868. But in *Household Ecology*, at page 55, Dr Wilk says the contact was reported by Swett in 1867 and was said to have occurred in the forests near the Moho River. Then there is the matter of a statement to be found in his second affidavit, sworn on 18 July 1997, in Supreme Court Action No 510 of 1996, to which I have referred earlier in this judgment. That affidavit was introduced into the 2008 claim as an exhibit to Dr Wilk's third affidavit (of 22 April 2009) in the latter proceedings. Crossing swords, so to speak, with Mr. José Cardona, who swore an affidavit on behalf of the Attorney General in the 1996 action, Dr Wilk stated that he had re-evaluated the evidence since writing *Household Ecology* and had come to think that J Eric Thompson was right and that the modern Kekchi of Toledo are in fact descendants of 'the "Kekchi-Chol" whom (*sic*) Thompson thought had inhabited Toledo in the 18th and 19th centuries'. [Emphasis added.] Unfortunately, Dr Wilk did not indicate where or when J Eric Thompson expressed such a thought. What can, on the other hand, be readily recalled is that, writing on this subject in the evening of his life in 1972, J Eric Thompson stated:

> 'The musical chairs of conversion [of the Chol to Christianity] and apostasy continued until the determined and successful drive in 1696 –

> 97, with one [Spanish] army moving southward from Campeche [in present-day Mexico] and the other northward from Cajabon [in present-day Guatemala], crushed the Itza and established Spanish rule throughout Peten [now a department of Guatemala]. At that time such of the Manche Chol as could be caught were shipped off to the highlands of Guatemala; those who escaped were for the most part wiped out by diseases.' [Emphasis added.]

This quotation is taken from *The Maya of Belize: Historical Chapters Since Columbus*, at p 20, but see also pp 4 and 34.

[65] It is further to be recalled that, dealing in 1930 with the history of the immigrant southern Mayas, in general, and of the Kekchi-Chol in the Toledo District, in particular, in *Ethnology of the Mayas of Southern and Central British Honduras*, J Eric Thompson wrote with his accustomed force and clarity, at pp 35 – 36:

> 'The Kekchi-Chol are the most numerous. They are immigrants, or descendants of immigrants, who have crossed into British Honduras from Cajabon, [in the department of Verapaz, Guatemala] and the adjacent area to the north-east.' [Emphasis added.]

Bearing in mind J Eric Thompson's conclusion in 1930, referred to at, amongst other paragraphs, para [2], above, that the aboriginal population of southern Belize (in which he includes the Kekchi-Chol) 'crossed over from Guatemala in the last forty odd years', ie in the 1880s, Dr Wilk's claim that J Eric Thompson further said that the Kekchi-Chol were also occupying the Toledo District in the eighteenth century is very surprising; and, in the absence of support for it in the form of an actual citation from the work of J Eric Thompson, I have to doubt its accuracy on the ground of probable error.

[66] I am afraid that Dr Wilk also seriously misquotes J Eric Thompson at para 16 of his first affidavit, of 18 December 2008. Dr Wilk there deposes as follows:

> 'The renowned Maya historian, Eric Thompson, stated that the Spanish formed a "reduccion" (town) of Manche Chol people at Campin on the Monkey River in Belize, but the Spanish apparently failed to maintain control of the settlement and so the Chol people faded back into the forests of Toledo. (Thompson, 1972)'

But what J Eric Thompson actually said in his 1972 work, *The Maya of Belize: Historical Chapters Since Columbus*, at page 20, was that Campin was one of the most important centres of 'the Chol Maya of coastal Belize'. Hence it was the farthest thing from a Spanish '*reducción*'. Dr Awe echoes this assertion of J Eric Thompson in his own affidavit (at para 87).

D Dr Jones' evidence

(i) Introductory

[67] This brings me, finally, to my examination of the evidence of Dr Jones himself. I would note by way of introduction that it is evidence with which both Dr Grandia and Dr Wilk (more so in the witness-box and in his affidavit evidence than in his other writing) have associated themselves, and on which they have leaned, as I have already observed above. Conteh CJ, as I have also shown above, gave it fulsome commendation and embraced it without reservation or, and I say this with both respect and regret, analysis. Dr Wilk, of course, as demonstrated above by reference to, and reliance upon, his article in *Science and Engineering Ethics*, whilst he refers to certain pertinent research by Dr Jones (and Dr Leventhal), frankly considers that, because of inherent defects in the system under which the Kekchi and Mopan must present their ancestral claims, the results of such research do not go far enough to provide the proof that is required. Dr Awe, whose affidavit shows him, in my opinion, to be a tactful and

responsible person who will keep his indignation in check, has, I believe, read the work of Dr Jones in which the research under consideration has been made public, viz *The Conquest of the Last Maya Kingdom*. (Dr Jones deposes in his affidavit, at para 4, that much of its contents is drawn from that book.) I so believe because Dr Awe not only refers to the book in his affidavit but also provides an extract from it in an exhibit. It is my view, therefore, that Dr Awe, having duly informed himself, is even less impressed than Dr Jones' ally, Dr Wilk, by the former's research under consideration. Dr Awe, I am confident, was fully aware on swearing his own affidavit that, in the final analysis, there was a clash here between his opinion and that of Dr Jones, as supported, with differing levels of enthusiasm, by Dr Grandia, on the one hand, and Dr Wilk on the other. It is undoubtedly in this awareness that, with evident and admirable restraint and tact, and having briefly reconstructed the prehistory of southern Belize, he deposes, at para 52:

> 'This then is a brief and concise reconstruction of the prehistory of southern Belize. It is based on various sources of data that are derived from equally diverse disciplines and methods of enquiry. It is not based on revisionist history which is by nature flawed and too often used to serve personal, ideological, or corporate agendas. An example of this type of revisionist history can be found in the Maya Atlas [referred to earlier in the present judgment] that was produced and published in 1997. [Emphasis added.]

(Dr Awe's ensuing scholarly discussion of the example given above is not material for present purposes.) Dr Awe is undoubtedly only too well aware that, as it is put in *A Handbook of Practicing Anthropology*, edited by Riall W. Nolan:

> 'There is a long tradition of anthropologists serving as advocates for the people with whom they work.'

(ii) General outline and overview

[68] With that regrettably not-so-short introduction to the task at hand, I proceed to my own analysis of the evidence of Dr Jones, for which, of course, there can be no substitute (in the form of the views of others).

[69] As has been indicated above, Dr Jones, in paragraphs of his affidavit highlighted by Conteh CJ in the court below, disagrees with the view that, before and at the time of first contact with the Spanish, it was only Chol-speaking people who inhabited the area which is now southern Belize. It is his contention that there were also Mopan-speaking inhabitants at that time; but he does not, as I have noted at paras [22] and [46], above, seem to be prepared, since 1997 at least, to go so far as to suggest that Kekchi speakers were also amongst those early inhabitants. This, of course, puts the position of Dr Jones in a direct, head-on collision with that articulated by Dr Awe. As I have pointed out above, the latter is firmly of the opinion that the original inhabitants of the Toledo District were Manche-Chol and, furthermore, that the Mopan Maya and Kekchi people now living in that district are more recent immigrants. Dr Awe goes a step further and tells the court below (and, of course, this one) that his position is one that he has shared with several distinguished colleagues in the field of Archaeology for years. Whilst Dr Jones, an anthropologist, does not make a corresponding statement to the courts, it is manifest that Dr Grandia and Dr Wilk are behind him, though not necessarily to the same extent; but there can be no denying that all three of them have, with others (named at para 16 of Dr Grandia's affidavit), been united and in the forefront, over the years, in an inexorable struggle for advancement of the cause of Maya peoples. There is room, therefore, in my view, for a dose of healthy judicial skepticism in approaching the conclusions advanced by Dr Jones in his affidavit evidence, which, as he points out, largely reflects research published and positions taken by him in his 1998 book, *The Conquest of the Last Maya Kingdom*. There can be no excuse for swallowing his controverted and at times eyebrow-raising evidence 'hook, line, and sinker', without so much as an attempt at analysis. (I must however point out, in fairness to Dr Jones, that

his participation in the struggle in question, is not known to border, like that of another member of the trio, on activism.)

(iii) Parts of affidavit reproduced by Conteh CJ

[70] I propose now critically to consider, as promised at para [43], above, the paragraphs of Dr Jones' affidavit which were reproduced by Conteh CJ in the 2010 judgment and which he obviously found entirely persuasive and worthy of his full acceptance. At para 96, Conteh CJ referred with approval to Dr Jones' claim that there is sufficient evidence to conclude that many people in the Toledo District who call themselves Kekchi are more accurately Kekchi-Chol or Kekchi-Mopan. That may well be the case. But it is, to my mind, quite another matter to say that such people are the direct descendants of the Maya people who were inhabiting what is now southern Belize at the time of first contact with Europeans. Conteh CJ goes on in the same paragraph of his judgment to quote from paras 65 – 73 of the first affidavit of Dr Jones. At para 65, Dr Jones promises to explain that Mayas in present-day Toledo District who are identified as Kekchis have strong ancestral roots amongst both Chol and Mopan Maya speakers who once inhabited Toledo and adjacent Petén, Guatemala, his main thesis in support of the Kekchi, as I see it, in the 2008 claim. At para 66, Dr Jones seeks to make a point which is clearly critical in the development of this thesis, stating:

> '… Chols were removed [from southern Belize] to various communities in Verapaz, Guatemala, where they gradually intermarried with Kekchis, resident Chols (especially in and around Cajabon), other Chols removed from the Manche Chol communities of southern Peten [in Guatemala, of course], and probably other groups as well.'

For my part, I have no difficulty with the conclusion that the Kekchi of Verapaz would have intermarried with the Chol removed from Belize. But, surely, the Kekchi in Verapaz would not have been biased against the other two groups of Chol people

mentioned by Dr Jones in the passage just reproduced above, viz (i) Chol already resident in Verapaz and (ii) Chol brought to Verapaz from southern Petén, Guatemala. Surely, they would have intermarried with those two groups of Chol just as well. But, if they so did, as seems entirely natural and logical, how can one be satisfied, to the required standard, that the Kekchi-Chol group which resulted from the intermarriage of Kekchi and Chol and which later moved to places such as San Luis in El Petén, Guatemala before crossing over into southern Belize, in fact consisted of, or even included, descendants of Chol who had once been removed by the Spanish from Belize? Dr Jones' reasoning is, I am afraid, not sufficiently close to persuade me. Furthermore, I find it unsatisfactory that Dr Jones would leave unexplained how, given that Chol removed from southern Belize to Verapaz intermarried not only with the Kekchi but also with the other two groups of Chol just mentioned above, the Manche Chol could have, to use his own words at para 66 of his affidavit, 'disappeared as a language group'. (This, of course, is not to say I question such disappearance.)

[71] Dr Jones then proceeds at para 67 to seek to invoke the authority of J Eric Thompson in his support, setting out a passage which is found at pp 35 – 36 of the latter's *Ethnology of the Mayas of Southern and Central British Honduras* and which has already been reproduced in part, at para [22] above. I however opine, with the greatest respect for Dr Jones, that the invocation is an unavailing one. For convenience, the passage is here once more reproduced (as quoted by Dr Jones);

> 'These immigrant Mayas are of three stocks, Kekchi, Kekchi-Chol and Mopan Maya. The Kekchi-Chol are the most numerous. They are immigrants, or descendants of immigrants, who have crossed into British Honduras from Cajabon and the adjacent area to the northeast. The Cajaboners (*sic*) are of mixed Kekchi and Chol blood, but they speak the Kekchi language with certain modifications, and in a somewhat sing-song manner. Even in historical times it would appear that Cajabon was Chol …

> The Kekchi immigrants are fewer in numbers, (*sic*). They hail for the most part from San Pedro Charcha (*sic*), a small town lying a little to the east of Coban, and there are a few Kekchis scattered throughout (*sic*) the villages of the Toledo District from Coban itself.' [Emphasis added.]

(The errors I have identified in this passage do not appear in the book.) I fear that this crystal clear statement holds two major inconvenient truths for Dr Jones. The first, manifest in its very opening sentence, is that, simply put, the statement contains no reference to such a group as the Kekchi-Mopan. It specifies, incontestably, three groups only, viz the Kekchi, Kekchi-Chol and Mopan Maya. Are readers being asked simply to assume that the perspicacious intellect of the author of *The Rise and Fall of Maya Civilization* (Norman, Oklahoma, University of Oklahoma Press, 1954; London, Gollancz, 1956) somehow failed to detect the presence of a Kekchi-Mopan group in southern Belize? If, as seems more likely, the group only came into being sometime after the late 1920s, of what significance can its existence possibly be in the context of the instant case? The second such inconvenient truth held by this statement of J Eric Thompson is that it makes it as plain as possible that the Kekchi-Chol, together with all other Maya people found by him in southern Belize in the late 1920s, were all 'immigrants, or descendants of immigrants'. As he puts it in the pellucid, immediately preceding paragraph of his book, at p 35 (a passage already quoted above, at para [2]:

> 'Despite the richness of the soil, the abundant rainfall, the large numbers of edible species of fauna, and the good communications supplied by the rivers, <u>there is no indigenous population</u>, although at one time there must have been a considerable population as the large number of ruins demonstrates … The aboriginal population, that today exists in this area, is <u>entirely immigrant</u>, having crossed over from Guatemala in the course of the last forty odd years.' [Emphasis added.]

[72] I, for my part, am quite unprepared to underestimate the fact that in the very Preface to this important work of J Eric Thompson which Dr Jones saw fit to cite (ostensibly in his own support), the former speaks of having sojourned amongst the Mopanero Mayas of San Antonio in the Toledo District during three of his four famous visits to what was then known as British Honduras: see p 29. Nor can I be unmindful of the disadvantage (created by the onward march of time) which Dr Jones himself freely acknowledges at para 68 of his first affidavit, to which I have already referred above, at para [22]. (Dr Jones, it will be recalled, there comes to terms with the probability that reconfirmation of J Eric Thompson's claims as to locational origins is no longer possible.) J Eric Thompson made somewhat poignant, if indirect, reference to his own relative advantage, albeit lamenting its evanescent nature, when he wrote in his Preface to the work here under consideration, at p 30:

> 'The ethnological material gathered is somewhat meager. Had the work been initiated twenty years earlier, much fuller results would have been obtained. A few embers of the fire of Maya culture still continue to glow dimly. It has been my aim to gather these isolated sparks before all is trampled out by the backward rush of what we, in our insularity, call progress.'

(It is to this significant, nay inestimable, advantage enjoyed by J Eric Thompson over those who came to Belize later on, including, respectfully, Dr Jones, that I have alluded at para [22], above; and the demonstration there foreshadowed of the former's painful awareness of such relative advantage is my above quotation of the short passage from his Preface to *Ethnology of the Mayas of Southern and Central British Honduras*.) Putting it a little differently, it seems to me that, looking not only at what is quoted by Dr Jones from *Ethnology of the Mayas of Southern and Central British Honduras* but also at the other passages from that work which I have reproduced above, it is neither safe nor sound to conclude that, on a balance of probabilities, such Kekchi-Mopan people as may have appeared in southern Belize at some stage in the past were there as early as

even the late 1920s, when J Eric Thompson conducted his much-acclaimed ethnological study of the Mopan Maya. The greater probability would seem to me to be that the group in question only came into being at some later stage, ie after the 1920s. And as to the Kekchi-Chol, whilst there can be no denying that such a group was found in southern Belize by J Eric Thompson, there is the dual difficulty, considerable in my view, that a Maya scholar of his immense stature was firmly of the opinion (at a time, unlike the present, when nothing depended on it) that they are not an indigenous people and that this is an opinion no less firmly held today by a widely-respected Belizean anthropologist and archaeologist in the person of Dr Awe. (Recognition is accorded by Dr Jones to the greatness of J Eric Thompson and by Dr Wilk to his renown: see Dr Jones' first affidavit, at para 84, and Dr Wilk's, at para 16.) And I consider, having regard to what Dr Awe deposes to at para 4 of his affidavit, that there is no justification for perceiving him to be out-of-touch and every reason, on the contrary, to regard him as very much abreast of developments in his field.

[73] It seems to me to be of some relevance to this discussion of a very early Kekchi-Mopan presence in the Toledo District to reflect on what Dr Grandia, who testified to having done fieldwork in Belize in 2003 and 2004 and claimed proficiency in 'the native language of my research subjects, the Q'eqchi' Maya' (para 8 of her first affidavit, sworn on 3 May 2009), points out at para 19 of such affidavit, namely that:

> 'Throughout my research, Q'eqchi' people repeatedly asked me if "Maya" (referring to Mopan peoples, known as "Maya Mopan" in Belize or sometimes simply "Maya") were the same as Q'eqchi'.'

(Dr Grandia, of course, blames this state of affairs on the government, which she accuses of imposing ethnic divisions when taking censuses.) The fact, however, (if it be a fact) that Kekchi people commonly ask such a question in present-day Toledo is, to my mind, far more consistent with the correctness of J Eric Thompson's observations in question than with the correctness of the view (if, indeed, such there be) that there has

been a Kekchi-Mopan group in southern Belize from before the well-known migration of the 1880s. I find it baffling indeed that Kekchi people in present-day Belize should be asking whether Mopaneros are the same as Kekchi in a situation where there has allegedly been a fusion of the two groups on the scale suggested by Dr Jones and over a period time that, as he further suggests, is of significance for present purposes.

(iv) Other parts of the affidavit

(a) Prefatory remarks

[74] I have already noted, in passing, above, at para [23], that Conteh CJ, whilst quoting para 69 of Dr Jones' affidavit, where the latter deposes that:

> '69. On the evidence presented above, we may conclude without any doubt that the Mopan population of the Toledo District has ancestral roots in the area that long predate British colonial claims over the territory …',

did not deem it necessary to reproduce, or at least summarise, for the reader of the 2010 judgment this supposed 'evidence presented above'. It seems to me to be a reasonable inference that, given his acceptance of Dr Jones' conclusion and his own decision not to identify the evidence to which Dr Jones was referring in para 69, Conteh CJ in fact accepted such evidence. In keeping with the intention I expressed at para [23] of the present judgment to consider both such evidence and conclusion for myself later, I turn now to deal with the evidence in question.

[75] I propose in this exercise to concentrate on four main areas of evidence (to be identified at (b), (c), (d) and (e), below) in which I find it difficult to follow the path down which Dr Jones would lead his reader.

(b) The memoranda of Father Joseph Delgado and the invocation of the authority of J Eric Thompson and Karl Sapper

[76] The first of these centres around the accounts left behind by the Dominican friar, Father Joseph Delgado, of his truly heroic and gruelling overland seventeenth century journey from Cajabón, Verapaz in what is present-day Guatemala to Mérida, Yucatán in what is today Mexico, a journey which took him through parts of what is now Belize. At both paras 36 and 37 of his affidavit, Dr Jones deposes that this journey was made in 1687. I believe this to be an error and that J Eric Thompson, who wrote at p 22 of *The Maya of Belize: Historical Chapters Since Columbus* that it was made in 1677, is correct. Father Delgado set out on foot from Cajabón and found himself in due course in what is today the Toledo District (for convenience, 'the Toledo District' rather than 'what is today the Toledo District' in the remainder of this discussion). That much is uncontroversial, as is the assertion that he met Manche Chol Maya living in the Toledo District. The difficulty, for me, begins with the following statement at para 36 of the affidavit:

> 'Among the substantial populations [Father Delgado] found, there were both Chol and Mopan Mayas and in at least some cases, these groups lived in the same communities.'

Dr Jones goes on to comment in his next sentence that:

> '[J Eric] Thompson, and [Karl] Sapper before him, established on the basis of [Father] Delgado's report that, without question, Mayas were living throughout much if not all of the Toledo District during the late 17th century.' [Emphasis added.]

He cites in this regard J Eric Thompson's, *The Maya of Belize: Historical Chapters Since Columbus*, at pp 20 – 21 [the correct reference is p 22], 32. But it is necessary to consult for oneself the relevant passages in this important work of J Eric Thompson to

ascertain what degree of support, if any, they provide for the conclusion that Mopaneros specifically, rather than Maya people of some other ethnic group, eg the Manche Chol, were found by Father Delgado in the Toledo District.

[77] In the work which is under consideration at this point in the present judgment, J Eric Thompson gives considerable attention to what he refers to as the 'memoranda on his journey' left for posterity by Father Delgado. But it is useful to take account as well of the former's general remarks made elsewhere in his book, in parts of it where he deals with 'the big picture' in the whole of Belize at the end of the day, so to speak. There is, eg the following passage at p 4:

> 'The Maya of Belize fell into three groups: Yucatec Maya in the north, with their important capital of Chetumal; a loose group I call Chan Maya, with whom Yucatec Maya later mingled, in the centre, extending to the Sittee river and perhaps a little south of it; and the Manche Chol who occupied the Toledo District from the Monkey to the Sarstoon Rivers.' [Emphasis added.]

Mention of the Mopan Maya as having also been in occupation of the Toledo District is conspicuous in its absence from this passage. The omission is not, in my view, the result of an oversight on the part of J Eric Thompson but, rather, a deliberate one. It is clear to me from a reading of the available extracts from this book that, whilst the author found Father Delgado's memoranda to be extremely helpful, he was also very much aware of their limitations. Thus he comments at p 22 that:

> '[Father] Delgado left four different memoranda on his journey, and it is not easy to reconcile their variations …'

and expressly states that the details he shall proceed to provide are derived chiefly from the first and second of these memoranda, in which, if I may adopt his words of caution, 'distances are highly exaggerated'.

[78] J Eric Thompson provides a translation of portions of the memoranda in question. At p 24 there is a translation of what Father Delgado was supposedly told by some Spaniards he met at the *paraje* (ie quite small settlement: see p 27) of a Martín Petz, which J Eric Thompson presumed to be somewhere in the vicinity of Meditation Falls in the southernmost part of the Toledo District. According to these Spaniards, if Father Delgado is to be believed, a young man who was to be found in a place called Golfo (taken by J Eric Thompson to be a reference to Golfo Dulce, which as Dr Wilk and Dr Mac Chapin point out at p 10 of *Ethnic Minorities in Belize: Mopan, Kekchi and Garifuna* (Benque Viejo del Carmen, Cubola Productions, 1990), is in Guatemala) had a sound knowledge of the forests and 'had penetrated as far as the Indians called Mopan'. For my part, however, I do not regard this as a clear and reliable indication of the presence of Mopan Maya people in the Toledo District at the time. Given that there was in fact in southern Petén, Guatemala a place called Mopan at which the Spanish authorities were later, *circa* 1704 – 1706, to see fit to re-establish a *presidio* (ie a fortress) from which their troops were to make 'forays into Mopan territory' (footnote 21, first affidavit of Dr Jones), it may well be that what was being said to Father Delgado was that the young man in question had penetrated as far as this place in Guatemala called Mopan which was obviously situated in a region inhabited by Mopan Maya people. The account of Father Delgado fails, after all, to specify the forested area or areas of which the young man in question had a sound knowledge. (It needs to be noted that Mopan, according to J Eric Thompson, was situated at or near the site of the modern San Luis in Guatemala: *The Maya of Belize: Historical Chapters Since Columbus*, p 23. This accords with what is shown on the map annexed as exhibit "GJ 3' to the first affidavit of Dr Jones, at p 1045, Record.) Even, however, if there were in the work in question the clearest indication of the presence of Mopan Maya people in the Toledo District at the time, the fact remains that, not only in his earlier publication of

1930 (see, eg, para [2], above), but also in the 1972 work in question (see para [81], below), J Eric Thompson perspicuously described the Mopan he found in Toledo in the late 1920s and, by necessary implication, those living there in 1972, as immigrants of the late nineteenth century and their descendants, from which it follows that he did not regard them as descendants of earlier pre-(British) colonial Mopan inhabitants of this district.

[79] In a passage found, in translation, at pp 25 – 26 of the book under consideration, Father Delgado gives a second-hand report of the existence of some form of road from the *ranchería* of Martín Petz to 'the rancherías of the Mopan and Itza', the Dominican friar's source being Petz himself. Of particular interest, for purposes of the present appeal, is the location of this *ranchería* of the Mopan. It is to be gathered from Father Delgado's second-hand calculations that, in order to reach the 'Ah Mopan' people's *ranchería*, said to be at a place called Tisonte, one would need to travel a total of four days by foot. It is worthy of note that Father Delgado's second-hand report (derived, it must be borne in mind, from what his host, Martín Petz, told him) indicates that another four days' travel would take one from Sonte (presumably the shortened form of the name Tisonte) to the place of the Ah Itza, enemies of the Ah Mopan. (Dr Jones, quoting from his book *The Conquest of the Last Maya* Kingdom, at para 75 of his first affidavit, states that the Mopan were said to have moved to Tisonte to escape from the Itzas.) Expressed in different words, then, if one were travelling from Martín Petz' *ranchería* to the place of the Ah Itza by way of the *ranchería* of the Ah Mopan, the latter *ranchería* would be at the halfway point of one's journey. The observations of J Eric Thompson which follow his translation of this portion of Father Delgado's account are, in my view, of overriding importance and bear the most careful reading:

> 'Sonte must have been north or northwest of Mopan [located, as noted in the immediately preceding paragraph of the instant judgment, in Guatemala], perhaps near (north of) Poctun [also located in Guatemala], since it was halfway between Martín Petz' house somewhere near

> Meditation Falls, and Lake Peten [also located in Guatemala]; it was also near the edge of the savanna stretching to Lake Peten. In that case the route was approximately northwest from the home of Martín Petz.'

Appreciation of the full import of these observations is enhanced upon consulting a map such as that (already referred to above) provided by Dr Jones as exhibit 'GJ 3' to his first affidavit at p 1045, Record (in which the location of Mopan (San Luis) well to the west of the Belize/Guatemala border, as well as of the Lago de Izabal (Golfo Dulce), is shown. (Since taking this trouble to explain why Tisonte should be regarded as having been located in Guatemala, I have come to realise that, as a matter of fact, Dr Jones does not suggest it was situated in the Toledo District: see the penultimate paragraph of the lengthy quote contained in para 75 of his first affidavit.) At a time when people travelled extraordinary distances on foot (witness the very journey of Father Delgado), it does not, to my mind, in the least strain credulity, as one looks at this map, that a young man whose base was in Golfo Dulce should have acquired familiarity with the surrounding forested areas as far to the northeast as Mopan (San Luis).

[80] That, however, leaves still to be considered the matter of the *ranchería* referred to by the name of Cantelac in the memoranda left by Father Delgado of his historic journey. In the translation provided by J Eric Thompson, at p 26 of his book now under consideration, this *rancheria* is included amongst those to be found along the route from Martín Petz' house to the *ranchería* of Ah Mopan at Tisonte (presumably, as already noted above, also known as Sonte). The good friar wrote that the Indians there were called Chicuy (not Mopan) and spoke another language (ie one other than Chol) called Omon (perhaps Oman, according to J Eric Thompson). In his commentary on this portion of the translation, however, J Eric Thompson merely suggestively remarks that 'one may suppose' [emphasis added] (p 26) Cantelac lay between San Antonio and San Antonio Viejo (which, if true, would put Cantelac in the Toledo District) and he goes on further to suggest that Omon or Oman 'must be' [emphasis added] (*ibid*) another term for Mopan. It therefore seems clear to me that J Eric Thompson himself was not exactly

sure (a) as to whether Cantelac was indeed located between San Antonio and San Antonio Viejo and (b) as to whether the language then spoken in Cantelac was in fact Mopan. He goes on (significantly in this regard) to leave this short point with the following comment, *ibid*:

> 'The Spaniards applied the term Mopan to the language, we have no information as to the term the Mopan themselves or their neighbours used; it may well have been Omon.'

What this, to employ a colloquialism, boils down to is that, first, Omon and Oman are not terms which were used by the Spaniards to refer to the language of the Mopan and, secondly, we are in no position to say that they were terms used by the Mopans themselves to refer to such language. In those circumstances, I find it impossible responsibly to conclude that, on a balance of probabilities, either term refers to the language of the Mopan.

[81] It is, in my view, hardly surprising that, in the face of this material, J Eric Thompson wrote, in the passage at p 4 of his book already referred to above, of the Manche Chol (but not the Mopan) having been in occupation of the Toledo District when the Spanish first arrived there. Not only is it the case that he makes no mention in the book under discussion of the Mopan as having inhabited the Toledo District at the time of first contact. Of equal importance, at p 34, some forty-two years after having famously described the Mopan, Kekchi-Chol and Kekchi in his *Ethnology of the Mayas of Southern and Central British Honduras* as immigrants and the descendants of immigrants, this 'doyen of Maya scholars' (as he was hailed by another great Maya scholar and fellow Cambridge alumnus, Professor Norman Hammond, on his sad passing in 1975) reaffirms that position, thus:

> 'As already noted, no Manche Chol survive anywhere in Belize or adjacent southeastern Peten; their place has been taken in the southwest of the

> Toledo District by immigrant Mopan Maya and Kekchi Maya. The latter have expanded enormously in the past three centuries, absorbing many former Manche Chol communities in the Alta Verapaz [in Guatemala], and then advancing to the Usumacinta, Cancuen and Sarstoon Rivers, and finally crossing into the Toledo District late in the nineteenth century.' [Emphasis added.]

It is necessary to keep in mind that (i) as regards the Usumacinta River, one part of it is entirely in Guatemala, another part entirely in Mexico and yet another part forms a portion of the Mexico/Guatemala border; (ii) the Cancuen is a river in Guatemala; and (iii) the Sarstoon River has its source in Guatemala, where it is known as the Río Sarstún, but goes on to form Belize's southern boundary with Guatemala. (These rivers are all shown on a map provided to this Court by Ms Young SC, for the appellants: see p 185, Record, where Ms Young refers to it as taken from p 21 of Robert J Sharer's, *The Ancient Maya,* 5th ed (Stanford, Stanford University Press, 1994).)

[82] In short, I find nothing, either in the pages of *The Maya of Belize: Historical Chapters Since Columbus* cited by Dr Jones, or elsewhere in the book, to support his thesis that Mopan Maya were present in the Toledo District at the time of the first arrival of the Europeans. I say little of the work of the German antiquarian and explorer Karl Sapper for the good reason that no excerpt from any work of his has been placed before this Court. But I think it needs to be said that I have no reason to believe that he was either an archaeologist or anthropologist. I acknowledge that, at para 32 of his first affidavit, Dr Jones refers to inhabitants of San Mateo Jocoloc, located in present-day Guatemala, who, according to the English translation of Sapper, *The Verapaz in the 16th and 17th Centuries: A Contribution to the Historical Geography and Ethnography of Northeastern Guatemala*, (Los Angeles, University of California, Institute of Archaeology, 1985), at p 25, were taken there by the Spanish from the Campin and Yahal rivers in Belize, the latter of which is in the Toledo District and is today known as the Moho River; but there is no suggestion by Dr Jones that Sapper believed these

people to be Mopanero Mayas. Indeed, quite to the contrary, Dr Jones himself goes on to remark, *ibid*: 'It is probable that these were speakers of Chol Maya.' This remark is decidedly on the guarded and conservative side as one would expect it to be, coming from Dr Jones, whose discomfort with the idea of Manche Chol predominance in the Toledo District at first contact is, if I may say so with respect, almost palpable. J Eric Thompson, on the other hand, discussing the same relocation of Indians from Campin and Yahal in San Mateo Xocoloc, forthrightly states that the Campin language was Manche Chol: see *The Maya of Belize: Historical Chapters Since Columbus*, pp 20 – 21. It is, I think, worth adding that, in a brief reference to a 1936 work of Sapper, J Eric Thompson describes it simply as a 'study on the Manche Chol' (without any mention of the Mopan): *The Maya of Belize: Historical Chapters Since Columbus*, p 31. J Eric Thompson also notes elsewhere that Sapper passed through San Antonio, Toledo District way ahead of him, specifically in 1891: *Ethnology of the Mayas of Southern and Central British Honduras*, p 36. I strongly believe the 1936 work in question to be the very publication deposed about by Dr Jones at para 32 of his first affidavit and fully identified in footnote 18 to that affidavit (where he speaks of a '1936 German edition').

(c) The alleged rounding up of Mopan Maya (*circa* 1706)

[83] Dr Jones, however, having invoked the authority of both J Eric Thompson and Karl Sapper purportedly in his own support, goes on, at para 40 of his first affidavit, to tell of a supposed rounding up, in or about 1706, of Mopan Maya who had been living in the Toledo and Cayo Districts. Whether or not the Mopan were present in the Cayo District (ie central Belize) at the time of first contact is not a question in the instant appeal and I do not, therefore, propose to enter into it. Suffice to say that I do not sense that there is any dispute on the matter amongst the experts. (As clear a statement as any on the position is that of Dr Wilk and Dr Chapin in their work *Ethnic Minorities* (abbreviating the title for convenience): see their opening sentence under the heading 'The Mopan Maya', at p 14.) But, as regards the supposed rounding up of Mopan Maya in the Toledo District in or about 1706, I regret to have to say that I am unable simply to

take Dr. Jones' word for it. He cites no authority at all in support of the claim, and, keeping in mind his earlier unfounded reliance on the work of J Eric Thompson in this same general context (just dealt with at paras [76] – [82], above), I feel constrained respectfully to decline to accept his word to the effect that Mopan Maya from the Toledo District were so rounded up at the time in question. Indeed, having rejected his assertion (which falls to be implied from para 36 of his affidavit) that the memoranda of Father Delgado, as explained by J Eric Thompson, provide good evidence of a Mopan presence in the Toledo District by 1677 (as noted earlier in this judgment, he erroneously speaks of 1687), I am left with no alternative but to assume the firm position that any further assertion to similar effect requires to be supported by clear authority.

(d) The eighteenth century materials uncovered by Dr Jones

– The legend to the map produced by Nicolás Lizarraga

[84] At para 47 of his first affidavit, Dr Jones turns to deal with another set of materials supposedly providing powerful support for his thesis that the Mopan Maya were in fact present in the Toledo District on the arrival of the first Europeans. He begins by adverting to a map of the 'forest of the Peten Itza' which he apparently has never seen for the reason that it was lost at some stage a long time ago. Therefore his reliance is placed not on this non-existent map itself but on what is said to be a mere legend to it. The drawing of this lost map (*circa* 1705 – 1710) is credited to a *don* Nicolás de Lizarraga, a settler in Petén, Guatemala, whose ambition evidently flowed freely from the field of cartography to that of biography. In this legend of sorts (which, without intending any disrespect, I shall, in the remainder of this judgment, for the most part call 'the de Lizarraga legend'), de Lizarraga goes off into what seems to be a biographical piece on a *don* Martín Chan, alias AjChan, said by the former to be a king who ruled over 'Mopan and Chols of the Gulf Coast'. Dr Jones takes the view (*ibid*) that de Lizarraga's description of a 'province' which he calls El Chan 'clearly identifies it as the Southern coastal plain of Belize'. [Emphasis added.] With the greatest respect, however, I am unable to find in Dr Jones' excerpts from these notes to the non-existent map of de Lizarraga anything in the nature of the clear identification of which the former

deposes. Nor do I find anything in Dr Jones' affidavit to satisfy me that de Lizarraga is writing on the basis of first-hand knowledge or is otherwise credible as a source. (I would refer here to the remarks I have already made at para [48], above, which apply *mutatis mutandis*.) There is, for example, with one exception to be considered below, no reference by Dr Jones in this affidavit to anything else this Spanish settler of Petén ever wrote. And it is further to be noted that, of all the place names provided in the de Lizarraga legend (as transcribed by Dr Jones, *ibid*), only one, viz IxTutz, appears in the list of *rancherias* left by Father Delgado in his first memorandum (p 26 of J Eric Thompson's *The Maya of Belize: Historical Chapters Since Columbus*). What is more, Dr Jones himself does not seem sure of the propriety of including this place name, ie IxTutz, in the list derived from the de Lizarraga legend. (He places the adverb 'possibly' before this name.) The question therefore arises: Were Father Delgado, probably on 6 June 1677, and Nicolás de Lizarraga, *circa* 1705 – 1710, both writing of the Toledo District? The largely (or, if IxTutz is wrongly included by Dr Jones, entirely) different sets of place names mentioned in their respective writings strongly suggest to me that they are not. And it is not easy to understand why Dr Jones singles out Paliak in the paragraph of his affidavit (para 48) immediately following, considering that, as he in fact acknowledges, that was a Chol-speaking town whilst the rather iconoclastic case he is endeavouring, and needs, to make out is that the Mopan were present in the Toledo District at the relevant time. Highlighting the fact that Paliak was Chol-speaking can hardly assist him in making out such a case.

[85] It would, I think, be remiss of me to leave the de Lizarraga legend without observing that, from all indications, this document, despite its antiquity, has only relatively recently been brought into any scholarly discussion of the Maya. Certainly, as far as the material to which this Court has been directed goes, it never came to the attention of J Eric Thompson. It is, however, extremely difficult to believe that Dr Wilk testified in ignorance of it; bearing in mind his astonishing claim to familiarity with relevant literature (para 3 of his first affidavit), to which I have previously adverted at para [43], above. And he must have had it very much in mind when, in the passage

quoted earlier in this judgment, he wrote in *Science and Engineering Ethics,* Vol 5, Issue 3, 1999, at p 372:

> '[Dr] Jones in particular has found much more material from the 18th century which suggests that some indigenous groups remained in the area long after the Spanish had supposedly depopulated the region.'

The de Lizarraga legend is certainly 18th century material. Therefore, Dr Wilk's next sentence, also quoted earlier in this judgment, bears repetition:

> 'But who were they, and what is their relationship to the modern inhabitants?'

As has been adumbrated above (at paras [58] – [60]), Dr Wilk clearly regards this as a lingering question.

- 'The five Spanish documents'

[86] Also forming what, for Dr Jones and the other two witnesses who sided (though not both to the same extent) with him, is clearly an important part of this set of other materials referred to at para [84] above, are the '[f]ive Spanish documents' introduced by him at para 49 of his first affidavit and said to be (with one exception) amongst the voluminous ancient records kept at the famous research library known as the *Archivo General de Indias* in Sevilla, Spain. Dr Jones expresses the view, at para 49 of his first affidavit, that these documents, consisting of letters and reports, confirm the evidence contained, as he suggests, in the de Lizarraga legend, to the effect that during the period 1705 – 1710 the Toledo District was occupied not only by Chols but also by the Itza and, critically for the purposes of the instant appeal, the Mopan. The first point that must, as I see it, be made about these documents relied upon by Dr. Jones as being confirmatory in the sense already described is that one name runs through all of them,

namely that of a Miguel Rodríguez Camilo. Thus, of this set of documents, which in fact number six rather than five (see footnote 27 to Dr Jones' affidavit), Rodríguez is either the sole author or a co-author of:

1. two reports to Gabriel Sánchez de Berrospe dated 18 June 1698 and 8 July 1698, respectively;

2. a report, to a person or persons unidentified in Dr Jones' first affidavit, dated 5 January 1699;

3. a report, to a person or persons similarly unidentified in the affidavit in question, dated 6 June 1699;

4. a report, to a person or persons also unidentified in the affidavit concerned, dated 17 September 1700 (this report being the exception referred to above in that it is said to be archived at the Archivo General de Centro América, Guatemala City)

and the addressee of a letter dated 8 December 1698 from a Francisco de Villela. Whilst Dr Jones deposes that these documents 'provide detailed eyewitness accounts that confirm Lizarraga's claim that during this period Mopans, Chols, and Itzas occupied the lands that today comprise the Toledo District of Belize', he does not, regrettably in my view, supply his reader with a single excerpt from any of them, limiting himself to a footnote reference to English translations of them said to be found in Lawrence H Feldman's, *Lost Shores, Forgotten Peoples: Spanish Explorations of the South East Maya Lowlands* (Durham and London, Duke University Press, 2000). What he does, however, point out is that the 'authors' of these documents (without referring to the dominant role of Rodríguez in their production) were military officers who followed certain orders from 'the Guatemalan President, Gabriel Sánchez de Berrospe'. These orders were, according to Dr Jones, 'to find, remove and resettle the independent native

populations occupying lands to the north and northeast of Golfo Dulce [(Lago de Izabal)]'. (I pause here clearly to state my own understanding that this reference to a Guatemalan President should not be taken to imply, contrary to historical fact, that Guatemala was already an independent Republic in the late seventeenth century. Berrospe was, to be precise, President of the *Real Audiencia* of Guatemala.)

[87] It is not without reason that I bemoan the absence in Dr Jones' first affidavit of an excerpt or two from the English translations said to be found in Dr Feldman's book. In my respectful view, the so-called 'five Spanish documents' ought in these circumstances properly to be ignored for purposes of this appeal. (I have already taken the strong position above that Dr Jones' thesis receives no real support, his own claims to the contrary notwithstanding, from J Eric Thompson's *The Maya of Belize: Historical Chapters Since Columbus.)* Alternatively, I would consider that there is justification, in the circumstances, for this court (and more so a court of final appeal) to have regard to any available material (even if not cited to the Court) touching upon the reliability and value, or otherwise, of the five Spanish documents. In the context of this alternative approach, I must now proceed to make the following observations. There is reason to believe that Rodríguez, a Spanish Sergeant Major, was not above embellishing his reports and disingenuously stating in them, that which, however plainly contrary to common sense it might be, was certain to resonate with official policy and doctrine: see Dr Francisco Luis Jiménez Abollado's article (not quoted below or in this Court), *Reducción de Indios Infieles en la Montaña del Chol: La Expedición del Sargento Mayor Miguel Rodríguez Camilo en 1699*, published in *Estudios de Cultura Maya*, Vol 35 (2010) (Mexico City, Center for Maya Studies of UNAM, 2010).

[88] Dr Jimenez' article concerns an abortive Spanish *entrada* (highly unusual in that it lacked a religious component) which was led by Sergeant Major Rodríguez and extended from 20 February to 10 March 1699. (*Entradas*, as Dr Jones points out at para 28 of his first affidavit, were exploratory-conquest forays.) I emphasise these dates given that they define a period which itself falls within the larger period defined,

for its part, by the respective dates of the earliest and latest of the items comprising the set of supposedly confirmatory letters and reports relied upon, as pointed out above, by Dr Jones. Those respective dates are, of course, 18 June 1698 and 17 September 1700. The expedition had as its object negotiation of the Montaña del Chol (Mountain of the Chol), said (whether rightly or wrongly) in the article to be located in El Petén, Guatemala, and the capture and removal to a *reducción* (ie town, see para [66], above) of all inhabitants, particularly the Mopan Maya. The expedition was, however, brought to a premature end, for reasons which need not be gone into for present purposes; and, whilst some Indians were captured and removed, they were all, as far as can be ascertained, Chol speakers who were found at different points along the route to the Montaña del Chol, which seems not to have been reached and, if reached, most assuredly not crossed. The expedition evidently proceeded by canoes and pirogues from Castillo de San Felipe on the Lago de Izabal (Lake Izabal) in what is, as already pointed out above, present-day Guatemala, to the mouth of the waterway now known as the Moho River (from which, as is well-known, there is a breathtaking view of the Maya Mountains as one looks inland and towards the Belize/Guatemala border). As previously noted, this river is mostly in the Toledo District; but at least one of its sources lies squarely in Guatemalan territory, a fact not without significance for purposes of properly understanding the article under reference. (It is a fact which is readily and fully appreciated on consulting a good map of Belize, such as the *Belize Travel Map* (Cubola Productions/Edigol Ediciones, SA 2008) produced before this Court by Ms Young, for the appellants, on 8 June 2011.) The expedition continued thence (ie from the mouth of the Moho) upriver to a point where there was an *embarcadero* (ie a wharf) at which the members landed with a view to pressing on with their journey on foot. Dr Jiménez, who, quite clearly, was able to peruse the relevant report of Sergeant Major Rodríguez, which, according to him, is archived at the *Biblioteca Nacional de México (Fondo Reservado)*, leaves it in no doubt whatever that the journey was supposed to have involved the crossing of mountains of the interior in order to arrive at the place believed to be inhabited by the Mopan people.

[89] This is, to me, a very strong indication that the expedition members had planned to cross what is today the Maya Mountains, which stretch across the Belize/Guatemala border, at some point after commencing the overland part of their journey on the banks of the Moho River. But, to my mind, such crossing of the Maya Mountains would have taken the expedition from the Toledo District into what is now eastern Guatemala. (The scale supplied on the *Belize Travel Map* already referred to above indicates that the breadth of the Toledo District from the mouth of the Moho River westwards to the Belize/Guatemala border is less than 25 miles.) In short, the Mopan Indians, if any, to be found on the other side of the mountains would have been in what is today eastern Guatemala, rather than in the Toledo District. To put the position in other language, whatever may be the content of the letters and reports cited, but, regrettably not quoted from, by Dr Jones in his first affidavit, the report of this largely unsuccessful *entrada* of 1699 lends no support to the view that the Mopan Maya were inhabitants of the Toledo District at the close of the seventeenth century or thereabouts. The expedition aborted, true enough, before the place supposedly inhabited by the Mopan could be reached; but since that place seems, from all indications, to have been located on the western side of the mountains, it is, in my view, the clear inference, anyway, that (if it at all existed) such place was situated in what is today Guatemala. It is of interest to note that, of the six documents relied upon by Dr Jones and enumerated at para [86], above, only two, viz those noted at 3 and 4, bear dates later than 10 March 1699, the date on which it was decided to abort the particular expedition upon which I have been focusing.

[90] In addition to all that I have said so far in regard to Dr Jones' contention that this set of six documents provides confirmation of the de Lizarraga legend, there is the fundamental point that, whereas, in the previously quoted words of Dr Jones at para 47 of his first affidavit:

> 'Lizarraga's description of "El Chan" clearly identifies it as the Southern coastal plain of Belize …',

the reader of such affidavit is presumably being asked unquestioningly to assume that those six documents also had to do with that coastal plain, when the selfsame Sergeant Major Rodríguez, the author or co-author of the most of those six documents, is speaking in another contemporaneous document (viz that discussed in the preceding paragraphs) of a search for Mopan Maya that was meant to be conducted not on the coastal plain of Toledo but in the mountainous hinterland on, and in the vicinity of, the present-day border between Belize and Guatemala.

- **The map (*circa* 1770) showing 'Tierras Yncvltas Havitadas de Yndios Gentiles Ytzaes'**

[91] A map made in or about 1770, according to Dr Jones' deposition at para 50 of his first affidavit, is the next document to which he turns for confirmation of the evidence which, as he claims, is provided by the de Lizarraga legend. To be effective, the analysis of this paragraph and those next following it in the affidavit requires, above all, that one keep focused on the facts and resist the danger of drifting off into a world of speculation in which fact and fiction become one. I suggest that the sole noteworthy fact revealed by this map is the existence of an area (located north of what is clearly Lago de Izabal) admittedly partly within present-day Belize which is marked 'Tierras Yncvltas Havitadas de Yndios Gentiles Ytzaes', which words Dr Jones translates into English as 'Uncivilized Lands Inhabited by Pagan Indian Itzas.' Self-evidently, there is no mention there of the Mopan Maya. Undeterred by this paucity of fact, however, Dr Jones, in typical style, I regret to say, actually states that these seven words on the map indicate that a number of Itzas had 'apparently' joined AjChan and Mopan and Chol speakers in the area. By the time one reaches the end of para 50, the discussion has turned to that which is somehow further 'apparent' to Dr Jones (viz that the three different Maya groups he is suddenly talking about – although only one is named in the map of *circa* 1770 – put aside any previous differences they might have had) and that which 'perhaps' may have happened earlier (viz that these groups were convinced by the previously-mentioned king, AjChan, that they could only retain their independence by joining forces against the Spanish). None of this, I am sorry to have to say,

ineluctably follows from what little this ancient map states about the supposed occupation of the Itza. (Exactly the same discomfiting form of argument manifests itself earlier on - at para 47 – where, introducing the topic of the de Lizarraga legend, Dr Jones tells of de Lizarraga describing the province where AjChan became King 'over Mopans and Chols' but then proceeds in the very next sentence inexplicably to throw the Itza, as well, into the mix, so to speak, with this assertion: 'He [AjChan] undoubtedly had Itzas among his followers as well.' [Emphasis added.])

- **The memorial from Nicolás de Lizarraga to the King of Spain**

[92] Paragraph 51 is, again, if I may respectfully say so, deposed to in characteristic Jones fashion. Dr Jones refers to a memorial said to have been written in 1708 by de Lizarraga to the King of Spain telling of two towns founded by five native youths from Petén '40 leagues from Los Dolores in Eastern Peten'. The reader is not informed as to whether de Lizarraga specified a particular direction from Los Dolores in his memorial. But the reader is nevertheless told, at para 52 that:

> 'If [de] Lizarraga correctly described the towns founded by these [five youths] as being 40 leagues from Los Dolores they were most certainly in the Toledo District …'

as if that were confirmation, by the de Lizarraga memorial itself, of the de Lizarraga legend. I would think, respectfully of course, that the reader must take the reference to de Lizarraga's memorial as he/she finds it and is neither required, nor entitled, to fill in any gaps to be found in it, by, for example, assuming that de Lizarraga meant to say 40 leagues west or southwest.

- **The statement of 'Sun-Kal'**

[93] I similarly find myself completely unconvinced by the efforts of Dr Jones in paras 53 – 54 of his first affidavit to demonstrate that there is additional confirmation of the de Lizarraga legend in a statement made by a Mopan-speaking man known as 'Sun-Kal' in 1757. The rather cryptic statement in question was to the effect that, some 10 years earlier, whilst hunting near his town, supposedly Los Remedios (present-day Flores, on Lago Petén Itza), he had seen 'signs of infidels'. Dr Jones correctly points out that 'infidels' merely refers to 'unconverted Mayas' but then launches off into a flight of speculation as to the state of mind which might have resulted in these 'signs' never having been followed by the previously-mentioned AjChan, by that time no longer a mighty King but only a cacique of San Luis, who for some unknown reason enters the picture, Los Remedios and San Luis not having been exactly twin-towns. It is noted in this regard that, at footnote 31 to his first affidavit, Dr Jones states that in 1695 Mopan (San Luis) was said to be about 45 leagues from Lago Petén Itza, although some years later this distance had been reduced to about 31 leagues. (J Eric Thompson writes at p 22 of *The Maya of Belize: Historical Chapters Since Columbus* that a league probably referred to an hour's walking.) Before you know it, the narrative is proceeding on the basis that these supposed infidels the subject of Sun-Kal's enigmatic utterance were in fact Mopan Maya. The reader is impliedly told to accept that as established fact. Why, otherwise, would the statement of Sun-Kal have any relevance to the discussion?

- **The '*Mapa del Pescador*'**

[94] At para 56 of his first affidavit, Dr Jones expresses the view that a map bearing the short title *Mapa del Pescador* ('The Fisherman's Map'), and produced in or about 1776, provides even further confirmation of the proposition 'that indigenous populations occupied southern Belize during the eighteenth century'. Of course, as should be clear by now, the critical issue in this appeal is not about indigenous populations, regardless of ethnic group, but about the Kekchi and Mopan groups in particular; and, at this stage

of the discussion, the focus is exclusively on the latter group. Moving of the goalposts, as it were, is simply impermissible once the game has started. My own short answer to Dr Jones' point, viz that there is text on this map extending northwards from the Sarstoon River to a point just north of what is today the town of Dangriga and reading '*Avitaciones de Yndios Caribes*' ('Habitations of Carib Indians'), is that such text makes not the slightest mention of the Mopan Maya. To agree with Dr Jones, as I do, when he says that:

> 'the term "Carib Indians" was a common colonial Spanish reference to indigenous populations who lived beyond Spanish control'

is not to accept what I can only regard as an implied suggestion that such Indians were in fact Mopan Maya. To my mind, the very high probability is that the Yndios Caribes' referred to in this map of *circa* 1776 are the same Itza Maya mentioned in the map of *circa* 1770 alluded to at para [91], above.

- **The Spanish document cited at para 58 of Dr Jones' first affidavit**

[95] The document cited by Dr Jones at para 58 of his first affidavit suffers from the same deficiency as the *Mapa del Pescador* and the above-mentioned map of *circa* 1770, viz that, from all indications, it contains no specific reference to the Mopan Maya. Dr Jones speaks of it as being the subject of his note (presumably footnote) 31, but such footnote does not seem to relate to it. The document in question appears, as I understand Dr Jones, to concern testimony of two Maya men who saw clear signs of 'Maya' habitation. The presentation of this piece of evidence by Dr Jones is otherwise unsatisfactory, to my mind, in that it is deposed in one and the same breath that (a) the signs were seen 'fifteen days <u>southeast</u> of the '*presidio*' [emphasis added] (no clear indication being given as to whether this was the *presidio* at Los Remedios or the one at Mopan) and (b) the populations in question lay to the <u>east</u> beyond a river called "Exulembaque". [Emphasis added.] The unanswered and, at this stage, unanswerable

question then is: Were these alleged signs spotted southeast or east of this unidentified *presidio*.

[96] It is useful at this juncture to pause to recall, for emphasis in particular, the skepticism first expressed in 1998 by no less a staunch ally of Dr Jones than Dr Wilk himself. A path, however short, to such recollection, may helpfully be paved. In a 1991 incarnation, as the author of *Household Ecology*, which I have cited above, Dr Wilk had, of course, seen the Mopan of southern Belize essentially in the same light as J Eric Thompson (that is to say as relatively modern immigrants to this country), writing, at p 57, that:

> 'The borders of British Honduras provided a haven for many different Maya groups during the nineteenth century … Toledo was peopled by both the Kekchi and the Mopan; the latter are a lowland Maya group … about whom little is known in colonial or precolonial times. Pacified and converted by the Spanish in the later 1600s, they were mostly left alone thereafter, living in widely scattered farming settlements and reducción towns such as San Luis in Guatemala. In 1886 Mopan from the town of San Luis undertook a planned and organized migration across the border into the Toledo District to escape taxation and forced labour [Thompson 1930 a: 41; Sapper 1897: 54; Clegern 1968: 93].'

There has been a considerable accumulation of water under the bridge since 1991. Dr Jones' curriculum vitae indicates that he carried out investigation concerning the central Petén area of Guatemala on two separate occasions later in the 1990s; and he, of course, published *The Conquest of the Last Maya Kingdom* in 1998. His first affidavit has been largely supported by that of Dr Wilk, sworn as already indicated above on 18 December 2008, in the 2008 Claim. Which brings me to the recollection foreshadowed at the beginning of this paragraph, viz that of the 1999 article of Dr Wilk, to which I have already adverted in the instant judgment. As I have noted at paras [58] – [60], above,

Dr Wilk, in that article published following the onset of the high-stakes litigation in Belize, acknowledged the newly found eighteenth century materials which have been brought into the debate by Dr Jones and Dr Leventhal and which have been under discussion in the immediately preceding paragraphs of the present judgment. But, importantly, Dr Wilk has realistically accepted that such materials are anything but conclusive support for the cause of the Kekchi and the Mopan. To highlight his commendable frankness (before the institution of the 2008 claim, at least) concerning the early inhabitants of southern Belize mentioned in Dr Jones' eighteenth century documents, I return to his incisive, two-fold rhetorical question (already set out at para [85], above) in *Science and Engineering Ethics* (1999), 5, at p 372:

> 'But who were they, and what is their relationship to the modern inhabitants?'

(e) Part VI (as it relates to the question of the presence of Mopan Maya in the Toledo District in the seventeenth and eighteenth centuries)

[97] In this part of his affidavit, headed 'Identifying the Historical Origins of Maya Groups', Dr Jones seeks to make the point that any effort today to attach a nationality to Maya surnames would be of dubious scholarly merit whilst serving to manipulate the history of peoples for modern political ends. In this regard, he reproduces several paragraphs of his own book, *The Conquest of the Last Maya Kingdom* (pp 19 – 22 and 433 – 434), in which he propounds the belief that the Mopans were 'a far larger and more widely spread ethnic group than has formerly been thought' (to which I have previously referred, underscoring the words 'than has formerly been thought', at para [42], above). In those paragraphs, Dr Jones argues, as I understand him, that the memoranda of Father Delgado which has been dealt with earlier in the present judgment provides evidence of the presence of the Mopan in what is now Belize at the time of the latter's famous journey. I have already set out above (at paras [76] - [82]) my own reasons for rejecting such a proposition and I see no point in repeating them. As should be clear at this stage, I have a clear preference for the entirely sober

conclusion of J Eric Thompson that Father Delgado's account demonstrates, pure and simple, the predominance of Chol-speaking Maya in the Toledo District as early as 1677. As Dr Jones rightly acknowledges in the lengthy excerpt from his book in question, "Delgado noted that most of this area was inhabited by Chol'. Dr Jones goes on, of course, immediately to, as it were, tack on to this his own conclusion that 'there were many Mopan as well'. What he does not, and cannot, do, however, is to say that Father Delgado himself actually noted that any part of the area was inhabited by Mopan. This, to me, is of much significance, for as Dr Jones himself is careful to note at para 49 of his affidavit:

> 'The Spanish were also well aware of ethnic differences among the population [ie native populations occupying lands to the north and northeast of Golfo Dulce], specifying, often by native toponyms or personal names, whether settlers were Chol, Mopan or Itza.'

Dr Jones nowhere in his affidavit suggests that there is any reason to believe that Father Delgado would have been unlike the generality of his countrymen in this regard. And I would note before leaving this part of Dr Jones' affidavit another example of his brand of reasoning with which I am unable to be at ease. Discussing D López de Cogolludo's interpretation of early seventeenth century travel accounts left behind by Fray Bartolomé de Fuensalida, he declares himself to be in agreement with the conclusion of J Eric Thompson that 'the fortified town of Tulumki' was in fact 'the principal town of the Chinamitas'. However, going where J Eric Thompson may have feared to tread, he expresses the belief that 'the Chinamitas were a branch of the Mopans living in eastern Petén and Belize'. As he puts it, two paragraphs later: '… I hypothesize that they [ie a number of 'nations' listed earlier] were all, including the Chimamitas … part of a larger ethnic population usually identified as Mopans'. Alas, hypothesis does not remain hypothesis for long. By the time one reaches the end of the next paragraph, Chinamitas are in fact Mopans as we are being told that a place called Santo Toribio was populated almost entirely by 'Mopans, some of whom were probably

Chinamitas …' And, nine paragraphs further down, Dr Jones is telling us of '[t]he Mopans who were known as Chinamitas …' Hypothesis has, with Kafkaesque suddenness, metamorphosed into fact.

VII - Conclusion

[98] On my own analysis of the evidence of Dr Grandia, Dr Wilk and Dr Jones, I am unable to accept it, as Conteh CJ did in the court below. It does not, to my mind, stand up to critical scrutiny and is not to be preferred to that of Dr Awe, which is supported by the conclusions of J Eric Thompson as well as others in Dr Awe's field to whom he referred in his affidavit. Because the evidence of Dr Grandia, Dr Wilk and Dr Jones does not so stand up to scrutiny, the third of the issues identified by Conteh CJ in the court below, set out at para [13], above, must, in my opinion, be resolved in the negative. Expressing this a little differently, the respondents have not shown, and cannot show, to the required standard, links to and with the original inhabitants of the lands presently occupied by them in the Toledo District for the purpose of establishing continuity to, in the words of Conteh CJ, 'ground their claim to customary rights and interests to these lands'. I am therefore unable to agree with Conteh CJ's finding that, on the evidence, there exist the essential historical and ancestral links between the original inhabitants of what is today the Toledo District and the respondents (para 99 of the 2010 judgment). (Conteh CJ spoke there also of social and cultural links but I utterly fail to see the significance of such links in circumstances where historical and ancestral ones are absent.) Unable to agree with Conteh CJ that the continuity which he properly saw as the necessary basis for the respondents' entitlement to customary rights and interests in land in the Toledo District in fact exists, I can myself see no basis for such an entitlement. It therefore remains only to say, for the avoidance of all doubt, that I consider the analytical exercise which I have carried out in the present judgment to be one perfectly within the powers of an appellate court in the light of the authorities. The evidence of Dr Awe, Dr Grandia and Dr Jones was given entirely in the form of affidavits and, hence, Conteh CJ was in no position of relative advantage over this

Court with respect to it. As regards the evidence of Dr Wilk, that was, of course, given both in the form of affidavits, a total of three in number, as already pointed out above, and in that of *viva voce* evidence. However, as has been amply demonstrated above, Conteh CJ refrained from subjecting the evidence of Dr Wilk (and, indeed, not only his) to anything resembling critical examination, thus negating all advantages naturally afforded to him as the trial judge. And, in my respectful view, such advantages would not, at any rate, have included any in the form of an enhanced opportunity to assess credibility since, as I have already noted above, credibility is a negligible factor in the assessment of evidence of an expert witness such as Dr Wilk. Certainly, the present judgment is not based on any conclusion of mine as to lack of credibility on the part of Dr Wilk. What I question is not the soundness of Conteh CJ's conclusion that Dr Wilk was credible as a witness but, rather, its very relevance. With that qualification clearly in mind, I am of the opinion that the instant case (in so far only as concerns Dr Wilk's *viva voce* testimony) falls under the third proposition articulated by Lord Thankerton in his speech in *Thomas v Thomas* [1947] AC 484, 487 – 488 and given acceptance by Lord Reid in his own speech in *Benmax v Austin Motor Co Ltd* [1955] AC 370, 376 (cited before the Court by Ms Young):

> 'The appellate court either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'

As already pointed out at para [26], above, Conteh CJ confusingly spoke, in the sole paragraph of the 2010 judgment devoted to the evidence of Dr Wilk, of the credibility of such evidence rather than, say, its cogency; and he thus put it beyond doubt, to my mind, that he failed to take full and proper advantage of his having seen and heard such witness. In so far as concerns the affidavit evidence of Dr Awe, Dr Wilk, Dr Grandia and

Dr Jones, as I have already observed, the trial judge was, *ab initio*, not in a position of advantage vis-à-vis this Court.

VIII - Disposition and Apology

[99] I would allow the appeal and set aside the orders of Conteh CJ. The cross-appeal cannot logically arise in circumstances where the claim ought properly to have been dismissed in the court below. I would, however, order that the parties bear their own respective costs, both here and in the court below; that such an order as to costs should stand and be final unless any party shall, within 10 days of the date of delivery of this judgment, apply (by letter to the Registrar) for a contrary order; and, further, that in such an event the matter of costs be decided by the Court on written submissions, to be filed and delivered by all parties in 14 days from the date of the making of such application. I acknowledge with deep regret the very long delay in the giving of judgment in the present appeal and I humbly apologise for so much of it as I am responsible for. The only explanation I can give is the enormous pressure of work under which this Court is called upon to function as the volume and complexity of appeals continues to increase.

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SOSA P

ANNEXE

Reliefs claimed by the claimants in the 2007 claims as reproduced by Conteh CJ at para 9 of his judgment dated 18 October 2007

9. The claimants now seek the following relief by these proceedings from this court:

a) A declaration that the claimants Villages of Santa Cruz and Conejo and their members hold, respectively, collective and individual rights in the lands and resources that they have used and occupied according to Maya customary practices and that these rights constitute "property" within the meaning of sections 3(d) and 17 of the Belize Constitution.

b) A declaration that the Maya Villages of Santa Cruz and Conejo hold collective title to the lands its members have traditionally used and occupied within the boundaries established through Maya customary practices; and that this collective title includes the derivative individual rights and interests of Village members which are in accordance with and subject to Santa Cruz and Conejo and Maya customary law.

c) An order that the government determine, demarcate and provide official documentation of Santa Cruz's and Conejo's title and rights in accordance with Maya customary law and practices, without prejudice to the rights of neighboring (*sic*) Villages.

d) An order that the defendants cease and abstain from any acts that might lead the agents of the government itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people of Santa Cruz and Conejo unless such acts are pursuant to their informed consent and in compliance with the safeguards

of the Belize Constitution. This order should include, but not be limited to, directing the government to abstain from:

i. issuing any lease or grants to lands or resources under the National Lands Act or any other Act;

ii. registering any interest in land;

iii. issuing any regulations concerning land or resources use; and

iv. issuing any concessions for resource exploitation and harvesting, including concessions, permits or contracts authorizing logging, prospecting or exploration, mining or similar activity under the Forest Act, the Mines and Minerals Act, the Petroleum Act, or any other Act.

MORRISON JA

Introduction

[100] This is an appeal from a judgment of Conteh CJ dated 28 June 2010, in which he granted declarations that (i) Maya customary land tenure exists in all the Maya villages in the Toledo District of southern Belize and, where it exists, "it gives rise to collective and individual property rights within the meaning of sections 3(d) and 17 of the Belize Constitution"; and (ii) that there is an obligation on the appellants ('GOB') "to adopt affirmative measures to identify and protect the rights of the [respondents] based on Maya customary tenure in conformity with the constitutional protection of property and non-discrimination pursuant to sections 3, 3(d), 16 and 17 of the Belize Constitution". The court also ordered that, in order to fulfil the obligation referred to at (ii) above, GOB should, in consultation with the Maya people or their representatives, "develop the legislative, administrative or other measures necessary to create an effective mechanism to identify and protect Maya customary property rights in land in accordance with Maya customary laws and land tenure practices".

[101] The court further ordered that –

> "...until such time [as an effective mechanism] is achieved, [GOB] shall cease and abstain from any acts that might lead the agents of the government itself, or third parties acting with its leave, acquiescence or tolerance, that might adversely affect the existence, value, use or enjoyment of the lands located in the Toledo District, occupied and used by Maya villagers in the said villages, unless such acts are with their informed consent and in conformity with the safeguards of the Belize Constitution. This order includes, but is not limited to, directing [GOB] to abstain from:
>
> (a) issuing any leases or grants to lands or resources under the National Lands Act or any other Act;
>
> (b) registering any interest in land;

(c) issuing any concessions for resource exploitation, including concessions, permits or contracts authorizing logging, prospecting or exploration, mining or similar activity under the Forests Act, the Mines and Minerals Act, the Petroleum Act, or any other Act."

[102] However, Conteh CJ declined to make any award in respect of the damages claimed by the respondents, considering, among other things, that the declarations made should suffice to vindicate their rights.

[103] In making this order, the learned Chief Justice expressly reaffirmed his earlier judgment given against GOB on 18 October 2007, in consolidated claims nos 171 and 172 of 2007, in which he had granted declarations in terms not entirely dissimilar to those set out at paragraph [1] above. In claim no 171, the claimants were Aurelio Cal, in his own behalf and on behalf of the Maya Village of Santa Cruz and others; and in claim no 172, the claimants were Manuel Coy, in his own behalf and on behalf of the Maya Village of Conejo, and others. There was no appeal from Conteh CJ's judgment in the consolidated claims, which I will refer to hereafter as the **'Maya land rights'** case (reported at (2007) 71 WIR 110).

[104] On this appeal, GOB challenges Conteh CJ's decision to grant the declarations referred to in paragraph [1] above and to grant consequential relief, including an order injunctive in effect, to the respondents. The respondents for their part contend that the decision of the learned Chief Justice should be varied, so as to include an award of damages for the violation by GOB of their constitutional rights.

The parties

[105] The first named appellant is a party to the appeal in his capacity as the legal representative of GOB, while the second named appellant is the minister of government with responsibility for natural resources and the environment. The respondents are, whether as individuals or, as in the case of the first and second named respondents, as collective bodies, representatives of, as the Chief Justice described it, "an ethnic or

cultural group, known and referred to as the **Maya**" (emphasis his). The group of persons represented by the respondents in these proceedings reside predominately in the Toledo District of southern Belize. They are either Kekchi Maya (approximately 10,600) or Mopan Maya (approximately 4,500).

[106] Two interested parties, who participated in the proceedings in the court below, are not parties to the appeal and did not appear, nor were they represented at the hearing of the appeal.

The shape of the case

[107] This is a case about history, tradition and a claim of a legal right to continuity. The respondents' claimed, by fixed date claim form filed on 30 June 2008, redress for alleged violations of sections 3, 3(a), 3(d), 4, 16 and 17 of the Constitution of Belize ('the Constitution'). These violations were said to arise "from [GOB's] failure to identify and protect" the respondents' customary land rights, "which are based on the traditional land use and occupation of the Maya people". Maya customary land rights, it was said, constitute property, "which like other property interests in Belize, are protected by the Constitution". These rights, which were "recognized and affirmed" in the **Maya Land Rights** case, impose an "affirmative duty" on GOB to protect them by way of "an appropriate statutory or administrative mechanism through which Maya land rights can be identified, demarcated and titled". GOB having failed or neglected to take effective steps to implement such a mechanism, the respondents accordingly sought declarations and orders for this purpose. The claim was supported by a large number of affidavits (by my count, 56 in all), the effect of many of which I will in due course attempt to summarise, while it will be necessary to refer to parts of others in greater detail.

[108] By their amended defence dated 14 January 2009, the appellants denied the respondents' claim to customary land rights. They stated that prior to the assertion of Spanish sovereignty and the subsequent British sovereignty over Belize, "the ancestors

of and the inhabitants of the villages the [respondents] purport to represent did not occupy lands in the Toledo District nor practice or enjoy customary land rights over those lands". Further, the appellants asserted, GOB had continually exercised and demonstrated its sovereignty over land in the Toledo District, thereby extinguishing any claimed customary rights. In answer to the respondents' reliance on the **Maya Land Rights** case, the appellants maintained that what that judgment had recognised was that the respondents had "property rights of a usufructuary nature", that is, a right of occupation and use of the land, as distinct from title to the land. The appellants also relied on a (considerably lesser) number of affidavits, to some of which it will also be necessary to refer in due course.

Terminology

[109] 'Mesoamerica', literally 'middle America', is the word used to denote Central America, between North Mexico and Panama[1].

[110] The names 'Mopan' and the 'Kekchi' are names derived from the distinctive languages spoken by each group. 'Kekchi' is variously spelled as 'Q'eqchi', 'Ketchi', 'Ke'kchi', among others, but for the purposes of this judgment I will adopt the spelling most commonly seen in the copious academic literature deployed on both sides of this case. This was also the spelling favoured by Conteh CJ in his judgment.

[111] 'Alcalde' is a word of Spanish origin, loosely meaning a magistrate or a mayor[2]. In contemporary Maya usage, it denotes the system of village leadership (or local government), whereby the person elected by the community to occupy the position assumes responsibility for the smooth governing of the community[3].

[1] Chambers Dictionary, 12th edn, page 958
[2] Chambers, op. cit., page 33
[3] See the 'Maya Atlas', a publication of the Toledo Maya Cultural Council and the Toledo Alcaldes Association, North Atlantic Books, Berkeley, California, 1997, page 6

The 'lay' evidence

[112] At the heart of the respondents' claim is the evidence of the members of the various Toledo Maya communities themselves. This evidence speaks to the personal backgrounds of the individual affiants, customary land tenure, the way of life in the communities and the current threats of harm to the communities by outside incursions. All of the affidavits filed on behalf of the respondents, despite individual differences, describe a similar history and circumstances and the affidavit of Domingo Chub, sworn to on 9 June 2008, which is set out in full below, is typical:

> "1, Domingo Chub, of Santa Ana, Toledo District, Belize MAKE OATH AND SAY as follows:
>
> **Personal Background**
>
> 1. My name is Domingo Chub. I was born in San Miguel, Toledo District on 4 September 1953. I have lived in Santa Ana for 30 years. My father was born in Aguacate, Toledo District. My mother is Belizean, but I do not know where she was born. I am married and have seven living children; three died. I speak Q'eqchi and English.
>
> 2. I was elected first Alcalde of Santa Ana in 2007. As alcalde, I am responsible for maintaining law and order in the village. I am like a magistrate judge. We have three village police officers, who the community selects. I have also been chairman of Santa Ana twice. As chairman, I did whatever the community needed, like getting streetlights replaced and organizing improvements to the school. I was also in charge of the fajina. The fajina is when all the men in the community cooperate to chop the bushes that grow around public buildings and areas. Attending the fajina is mandatory. People who miss it are charged a fee of $10. If somebody knows he will have to miss a scheduled fajina, he must inform the chairman in advance. The alcalde and chairman both watch over our community lands, and they work together to investigate and resolve land issues.
>
> **Immediate and irreparable harm to Santa Ana village lands**
>
> 3. Village outsiders have been doing illegal logging on our lands. These are private individuals, not companies. They do not ask the

permission of the village, yet they inflict serious damage to our lands. They sell the logs once they cut them. In the past, some Santa Ana villagers also did logging, including the last chairman and alcalde. As alcalde, I have tried my best to explain to the community that we have to think about the futures of our sons and daughters; we can't just think about our own profit. Since 2007, the village has agreed that we do not support logging and want it to stop.

4. Recently, the Lands Department and private surveyors have come to survey Santa Ana village land. We want to stop all outsiders from surveying our land, because our land is getting smaller and smaller and the community is getting bigger and bigger. If the government continues to sell our land, we will have no place for the younger people when it comes time for them to make their own farms. Last year, the community stopped somebody from surveying. Because the government would not help us protect our land, the whole village was forced to take action. We approached the man and told him to stop surveying the land we live and farm on. He listened to us and stopped. Nobody is presently surveying, but tomorrow, somebody could show up and begin; there is nothing stopping people from doing this and there need to be.

Maya customary land tenure in Santa Ana

5. If somebody from a different village wants to come live here, he has to put in a request with the chairman and alcalde. If the alcalde agree [sic], they call a meeting of the community to discuss the matter. If everybody agrees, we allow him to move in. He must pay an entrance fee. This money goes toward public services like maintaining the school. The new people must do the fajina, too. The chairman and alcalde are in charge of the fajina, which involves cleaning up community areas and buildings. When people from different countries want to move to the village, they never ask permission of the village first, they go to the government, which issues a lease without consulting with us. This is a problem, because it disrupts our whole land use system and usually deprives us of the land we use for farming, hunting and gathering.

6. Everybody in Santa Ana farms for a living. We plant corn, rice, beans, and other vegetables. We also raise pigs and chicken. We learn to farm from our parents. When we are young boys, we have to help with the work, so we learn how to do it. Nowadays, things are changing; some of the boys go away to high school and then go

and find jobs. They usually come back to visit their parents, who continue to live in the village. Sometimes they want to move back after working elsewhere for a while, and we allow them to, because this is their home.

7. The corn we grow is for home use and the rice is mostly for the market. Some people sell corn to the market in Punta Gorda. Santa Ana villagers farm on both sides of the Moho River. My family lives right by the river which is good farmland, so I plant my matahambre (dry season corn crop) near where we live. We plant out matahambre in October, November, or December and harvest it in May. Most villages do milpa (rotational farming) about two miles from the village, which is about a 30-minute walk. For milpa we chop the high bush in an area in March, let it dry through April, burn it, then plant in the end of May. We harvest the milpa corn in September. We do not make our milpa close to the village, because we raise pigs there and they will earn the corn.

8. I pray before I plant my crops, and sometimes when we harvest. I learned this from my father and mother. When I was a little boy, community member did lots of ceremonies, like the Cortez dance.

9. Each person in the village knows where every family in the village has their farm. If you want to farm in somebody else's area, you need his permission. If somebody goes and chops bush outside his area, it is a problem that we have to sit down and discuss.

10. Santa Ana is in a low area, and the challenge is always to find a high, dry place to build a house. There is a high area in the village, which we measure and divide between the villagers so that everybody has a dry place to live. People put in requests for different acreage depending on what they want to use the land for – some just want to put up a house while others want enough space to plant trees, like coconut, around their house.

11. Villagers usually harvest many kinds of plants, including cohune leaves, sticks, and poles for our houses. We have always harvested these plants in the forest across the Moho River. We have always hunted and farmed rice and our dry season corn there, too. 2-3 years ago, somebody with a lease told us to stop farming, hunting, and gathering in that area. It is especially difficult to harvest these plants now, because this entire area has been leased to outsiders in the past 10 years. Nobody in the village was aware that people were applying to lease this land until we saw surveyors out working. We wanted to do something to stop them, but we felt

helpless, because those people had papers from the government and we did not.

12. In addition to farming, I hunt and fish. I hunt for peccary, antelope, and gibnut in the 2-3 miles of forest surrounding the village. I use a 16 or 20-gauge gun, which I have a government license for. The villages are close together in our area, but we hunt in between the villages, nonetheless. Sometimes we meet people from other villages while we are out hunting, because there is such limited area to hunt in. I hunt on my farm and on other people's farms, too. You do not need permission to hunt in others' farm. When I go fishing, I usually go in the Moho River for machaka and tuba. I use a line and hook.

13. We understand that something needs to happen to protect our land or else we will continue to be thrown off of it. We have already agreed to a line and cut it with Boom Creek, San Felipe, and the other villages we share boundaries with, and are talking with Santa Teresa about doing the same thing. We will continue meeting with Santa Teresa so we can come to agreement and cut the line."

[113] In two important joint affidavits, Martin Ch'en and Cristina Coc, chairman of the Toledo Alcaldes Association and co-spokesperson of the Maya Leaders' Alliance ('MLA') respectively, provided a detailed account of the struggle of the Maya people of the Toledo District to gain official recognition of their rights in recent years, the effect of which is summarised in the following paragraphs..

[114] There are some 38 Maya communities currently occupying lands in Toledo District, part of the larger indigenous Maya people of Mesoamerica. Their land use patterns are governed by a system of mostly unwritten customary rules and values, whereby "Maya villages hold land collectively, while individuals and families enjoy derivative, subsidiary rights of use and occupancy". Within the villages, use of land by individuals and families is regulated by custom, under the authority of the elected alcalde, chairman and the villagers collectively.

[115] A number of logging concessions granted by GOB over the area occupied by Maya communities in the mid-1990s created much concern in the communities,

resulting in public protests and meetings with various public officials, including the then Prime Minister. Those efforts having failed, the Maya leadership first filed a claim against GOB in the Supreme Court in 1996, but, for reasons unknown, this matter did not progress to a resolution. As a result, in 1998, the Toledo Maya Cultural Council ('TMCC') submitted a petition to the Inter-American Commission on Human Rights ('IACHR') against GOB on behalf of the Maya communities of Toledo, alleging various violations of rights enshrined in the American Declaration of the Rights and Duties of Man and other instruments of international law, for failing to protect Maya rights. This petition initiated IACHR Case No. 12.053, **Maya Indigenous Communities of the Toledo District v Belize** ('**the Maya Indigenous Communities** case').

[116] The petition, which was dated 7 August 1998, identified "the victims" as the Mopan and Kekchi-speaking communities of the Toledo District and their members, "whose property, cultural life and physical well-being are being adversely affected by the acts and omissions complained of in this petition". The Maya people were described in this way (at para 12):

> "People who are identified as Maya have, for centuries, formed organized societies that have inhabited a vast territory – which includes the Toledo District of southern Belize – long before the arrival of Europeans and the colonial institutions that gave way to the modern State of Belize. Among the historical and contemporary Maya people of the Middle America region encompassing Belize, distinct subgroups and communities have existed and evolved within a system of interrelationships and cultural applications. The contemporary Mopan and Ke'kchi-speaking people of the Toledo District are the descendants or relatives of the Maya subgroups that inhabited the territory at least as far back as the time of Europeans exploration and incursions into Toledo in the seventeenth and eighteenth centuries."

[117] The petition went on to give details of the complaint as to the granting of logging concessions on Maya lands and the negative environmental impact of logging on those lands, as well as the granting of concessions for oil exploration in the Toledo District. The petition spoke further of the failure of previous attempts to attract the attention of

GOB officials and to invoke domestic judicial processes. Under the rubric, 'State Responsibility for the Violation of Maya Human Rights', it asserted the following (at paras 87 – 88):

> "By virtue of the facts described above, Belize is internationally responsible for violating rights that are affirmed in the American Declaration on the Rights and Duties of Man and in other provisions of international human rights law. As a member of the Organization of American States and a party to the OAS Charter, Belize is legally bound to promote the observance of human rights. The Inter-American Court on Human Rights has declared that the rights affirmed in the American Declaration are, at a minimum, the human rights that OAS member states are bound to uphold. Thus, Belize incurs international responsibility for any violation of rights articulated in the American Declaration, as well as for the violation of rights affirmed in any treaty to which Belize is a party.
>
> By permitting environmentally damaging logging, and potentially damaging logging, and potentially damaging oil development, on lands used and occupied by the Maya of the Toledo District, Belize is acting in violation of the right to property, the right to cultural integrity, the right to a safe and healthy environment (which is derivative of other rights), and the right to consultation. Belize has further incurred international responsibility because its competent officials have failed to recognize and guarantee, by appropriate legislation or otherwise, the customary land tenure of the Maya. Such international responsibility arises by virtue of the principle of equality under the law and the duty of states to adopt effective measures to secure indigenous property and other rights that are related to land and resource use. Finally, Belize is in violation of the right of judicial protection as a result of the failure of its judicial system to proceed expeditiously to provide redress for the violation of Maya land and resource rights."

[118] In a 'Preliminary Response' dated 8 May 2001, GOB responded to the petition and described the efforts which had been made to reach a friendly settlement of the matter[4]. Notably, reference was made to a 'Ten-Point Agreement' signed by the parties on 12 October 2000, under the terms of which GOB explicitly acknowledged the rights of the Maya of southern Belize, "based on their long-standing use and occupancy". This agreement was signed by the then Prime Minister of Belize, the Honourable Said Musa, and representatives of the Maya people of Toledo, while the IACHR proceedings were

[4] See the IACHR's report No 40/04 in the **Maya Indigenous Communities** case, dated 12 October 2004, paras 68-71

in progress, in an attempt to resolve the dispute. In order to achieve a resolution satisfactory to all concerned, clause three of the agreement contemplated a partnership between GOB and the Maya Leaders "for the involvement of the Maya Leaders in the design and implementation of development programmes and other matters affecting the Maya Leaders and their communities". The important features of the agreement (clauses six to ten) were as follows:

> "6. That the GOB recognizes that the Maya People have rights to lands and resources in southern Belize based on their long-standing use and occupancy.
>
> 7. That the first considerations of the partnership between the GOB and the Maya Leaders will be the establishment of a program to address the urgent land needs of the Maya communities of the south, including the surveying and distribution of lands or establishing and protecting communal lands, depending on the various needs of the Maya Communities. The GOB and the Maya Leaders shall develop, within four (4) months after the signing of this agreement, a framework and target dates, as well as administrative and other measurers for the implementation of the programme.
>
> 8. That the second consideration of the Partnership shall be to develop within four (4) months after the completion of the paragraph 7 objectives, a framework and target dates to resolve other measures of mutual concern, including:
>
> Sustainable management of natural resources within the 'Maya traditional land use areas' and equitable distribution of their benefits amongst the Maya communities;
>
> Protection of Maya cultural practices and management of Maya cultural heritage;
>
> Reform and status of community governance institutions; and
>
> Other issues as agreed upon by the GOB and the Maya Leaders.
>
> 9. That the Partnership shall, with mutually agreed upon technical assistance as appropriate, review and make recommendations about applications for licenses for logging or oil exploration or extraction, assess their social environmental and cultural impacts and make recommendations about their conditions and status.

> 10. That the GOB and the Maya Leaders will treat and use this Agreement as the new basis for the resolution of issues of concern to the Maya Leaders and will, by mutual agreement, expand, amend or develop more specific agreements within the framework of this general agreement."

[119] However, although expressing its hope that the issues could still be resolved through negotiations between the parties, GOB nevertheless provided a response to the merits of the petition. In particular, it questioned whether the petitioners had made out their claim to "aboriginal rights" on the basis of "the test required by law", which, it was submitted, postulated the following four criteria as "necessary for the establishment of aboriginal title"[5]:

> "1. That the applicants and their ancestors were members of an organized society; 2. that the organized society occupied the specific territory over which they assert aboriginal title; 3. That the occupation was to the exclusion of other organized societies; and 4. that the occupation was an established fact at the time sovereignty was asserted."[6]

[120] Referring to the Maya Atlas, GOB contended that "the dates of foundation of most of the Mayan Villages illustrates [sic] a significant breach in the continuity of occupation of the area over which title is asserted"[7]. GOB further observed that "the issue of possible extinguishment of any existing aboriginal rights by certain acts of the Sovereign over British Honduras is also unresolved"[8].

[121] In its report, the IACHR responded to GOB's contention of discontinuity in occupation of the Toledo area, with the observation that "[GOB] has not presented evidence contradicting or otherwise disputing the long-standing ancestral connections of members of the communities at issue to the Maya people in the southern area of

[5] Ibid, para 72
[6] Citing in support **Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development (1980) 107 DLR (3d) 513** and **Mabo v Queensland [1992] 5 CNLR 70**.
[7] Quoted at para 73 of the IACHR report
[8] Ibid

Belize"[9]. The report pointed out further that information published by GOB itself confirmed the allegations of the Maya, drawing attention to the following statement displayed on GOB's official website on 14 October 2002:

> "Numerous ruins indicate that for hundreds of years Belize was heavily populated by the Maya Indians, whose relatively advanced civilization reached its height between A.D. 250 and 900. Eventually the civilization declined leaving behind small groups whose offspring still exist in Belize contributing positively to the culturally diverse population."

[122] In the result, the IACHR report concluded as follows (at paras 192 – 197):

> "192. Based upon the foregoing analysis and in light of the absence of the State's response, the Commission hereby ratifies its conclusions that:
>
> 193. The State violated the right to property enshrined in Article XXIII of the American Declaration to the detriment of the Maya people, by failing to take effective measures to recognize their communal property right to the lands that they have traditionally occupied and used, without detriment to other indigenous communities, and to delimit, demarcate and title or otherwise established the legal mechanisms necessary to clarify and protect the territory on which their right exists.
>
> 194. The State further violated the right to property enshrined in Article XXIII of the American Declaration to the detriment of the Maya people, by granting logging and oil concessions to third parties to utilize the property and resources that could fall within the lands which must be delimited, demarcated and titled or otherwise clarified and protected, in the absence of effective consultations with and the informed consent of the Maya people.
>
> 195. The State violated the right to equality before the law, to equal protection of the law, and to non-discrimination enshrined in Article II of the American Declaration to the detriment of the Maya people, by failing to provide them with the protections necessary to exercise their property rights fully and equally with other members of the Belizean population.

[9] ibid, para 93

196. The State violated the right to judicial protection enshrined in Article XXIII of the American declaration to the detriment of the Maya people, by rendering domestic judicial proceedings brought by them ineffective through unreasonable delay and thereby failing to provide them with effective access to the courts for protection of their fundamental rights.

VI. RECOMMENDATIONS

197. In accordance with the analysis and conclusions in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES TO THE STATE OF BELIZE THAT IT:

1. Adopt in its domestic law, and through fully informed consultations with the Maya people, the legislative, administrative, and any other measures necessary to delimit, demarcate and title or otherwise clarify and protect the territory in which the Maya people have a communal property right, in accordance with their customary land use practices, and without detriment to other indigenous communities.

2. Carry out the measures to delimit, demarcate and title or otherwise clarify and protect the corresponding lands of the Maya people without detriment to other indigenous communities and, until those measures have been carried out, abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment located in the geographic area occupied and used by the Maya people.

3. Repair the environmental damage resulting from the logging concessions granted by the State in respect of the territory traditionally occupied and used by the Maya people."

[123] None of the IACHR's recommendations having been acted upon, on 3 April 2007 action was filed in the Supreme Court on behalf of the two Maya communities of Conejo and Santa Cruz, for constitutional redress in respect of the non-recognition of their customary land rights. This was the **Maya Land Rights** case, in which, as I have already indicated, Conteh CJ delivered judgment on 18 October 2007. In that judgment, the Chief Justice considered (at para 40) that, from the evidence that had been placed before him, he was "ineluctably bound to conclude that there does exist in the Toledo

District Mayan customary land tenure". He went on to hold (at para 99) that "the interests of the claimants in land based on Maya customary land tenure are clearly deserving of the protection accorded by the Belize Constitution to property…these rights and interests of the claimants according to Maya customary land tenure constitute under the Constitution 'property' and should be so readily cognizable". Accordingly, the court made orders that GOB "determine, demarcate and provide official documentation of Santa Cruz's and Conejo's title and rights in accordance with Maya customary law and practices, without prejudice to the rights of neighbouring Villages".

[124] In the aftermath of the Chief Justice's decision in the **Maya Land Rights** case, GOB took early steps to convene a meeting with representatives of the Maya leadership to discuss its implementation. Among the high level government officials in attendance at the meeting, which took place on 26 March 2008, were the Attorney-General and Minister of Foreign Affairs, and the Solicitor General.

[125] Following on from that meeting, the Solicitor General issued a memorandum dated 27 March 2008 to all Chief Executive Officers, the Commissioner of Lands and the Departments of Forestry, Fisheries, Environment and Protection and Geology, by which she advised that "on October 18, 2007, the Chief Justice issued the judgment of the Supreme Court with respect to the…Maya Land Case, in which it recognized the customary land rights of the Maya communities of Southern Belize, based on traditional use and occupation thereof". The Solicitor General further advised that GOB was in discussions with representatives of the Maya communities of southern Belize, with the aim of finding "the most appropriate manner of implementing the judgment of the Supreme Court". In order to facilitate this process, the Solicitor General directed the various heads of departments "to immediately cease all activities and/or operations on, or to otherwise deal with land in the Toledo District… until such time as further instructions of the mechanisms of implementation are issued".

[126] Despite this promising beginning, second thoughts on GOB's part quickly surfaced, first at a subsequent meeting on 9 April 2008, at which both the Attorney General and the Solicitor General were again present, and in a further memorandum from the Solicitor General to the heads of departments dated (obviously in error) 23 April 2007. In that memorandum, the Solicitor General was concerned to modify her earlier "cease and desist" instruction, by restricting it "to lands currently occupied and used by the villages of Santa Cruz and Conejo", the actual claimant communities in the **Maya Land Rights** case. The Solicitor General did acknowledge, however, that "other Maya communities in Southern Belize may consider that they have similar rights and may choose to have such rights recognized". Heads of departments were therefore encouraged "to give proper consideration henceforward to the above-mentioned possibilities when considering applications for licenses, permits, concessions, etc which would affect Land in the Toledo District".

[127] This revised position did not go down well with the Maya leadership and, in an immediate response dated 25 April 2008 and sent directly to the Prime Minister, Mrs Antoinette Moore SC on behalf of the Maya Leaders Alliance described it as "a mistake". Mrs Moore observed that while the orders made by the court in the **Maya Land Rights** case applied in their terms only to Conejo and Santa Cruz villages, "it is abundantly clear that Maya rights to land exist in other parts of the Toledo District". Mrs Moore urged the Prime Minister to reconsider the revised directive and advised that, if GOB's position was that each Maya village needed a court order to protect its property and other constitutional rights, "you should be aware that a number of Maya villages in Toledo District are prepared to take immediate legal action, if necessary, to halt unauthorized and unwanted activities in their lands".

[128] There was no response from GOB to this letter. A subsequent meeting between the parties, which had previously been scheduled for 14 May 2008, also proved unfruitful as, in place of the Attorney General and the Solicitor General, GOB was

represented by a single Crown counsel from the Solicitor General's office who had no authority to make any statements on behalf of GOB.

[129] However, the evidence given on behalf of the members of the Toledo communities was not all one way. In his affidavit sworn to on 17 February 2009 and filed on behalf of GOB, Mr Justino Peck of San Jose Village, chairman of the Toledo Cacao Growers Association ('the Cacao Growers'), described Cacao Growers as an association boasting a membership of 1,070 registered cacao farmers, drawn from all villages in the Toledo District. Although the market for cacao beans internationally was growing and had greater potential for further growth, cacao farmers were hesitant, in the context of commercial ownership. Cacao farmers needed to own their holdings of farming land, "in order to ensure good stewardship through self-motivation and risk-taking, especially dealing with permanent crops". Modern farming can only occur and advance in the context of individually owned land and progress "is hampered by communal ownership of land". Farmers need access to credit, which is only available against security "in the form of an unencumbered land title". The notion that the Maya people of Toledo "want to continue living a subsistence way of life does not reflect the majority sentiment of the Maya Indians in Toledo" and the Maya people want to own and develop their own land. Villagers in at least four communities visited by Mr Peck, it was said, were "not even aware that their Alcaldes have signed on their behalf".

[130] Mr Manuel Rodriguez, the Commissioner of Lands and Surveys, also swore an affidavit on behalf of GOB (on 2 June 2009). Mr Rodriguez spoke to the implementation of Indian Reservations in the Toledo District "as an attempt to control damage to the forests resulting from the slash and burn farming, otherwise known as milpa farming or swidden farming, practiced by the Kekchi and Mopan Indians in [Toledo]". Mr Rodriguez also spoke to the various leases, licenses and grants of land granted and made by GOB over the years under the Crown Lands Act 1872.

Finally, Mr Rodriguez produced to the court copies of two petitions, both dated 18 February 2009. The first was a petition presented to GOB, signed by over 100 residents of the village of San Pedro Columbia in the Toledo District, expressing a preference for individual land ownership, as opposed to communal land rights. The second was a petition also presented to GOB, signed by residents of San Jose Village and said to represent some 408 persons in support of individual land ownership through the current government system, as opposed to communal land rights.

[131] In a second affidavit sworn to on 9 June 2009, Mr Rodriguez averred that, since 1974, "the people of the Toledo District have always had a representative who is either a Kekchi or Mopan Indian to represent them in the House of Representatives or the Senate, or both". In support, Mr Rodriguez produced a list of 10 such representatives, two of them currently serving as at the date of the affidavit (one in the House of Representatives and the other in the Senate).

[132] Finally, Mr Marciano Cal, the chairperson of San Jose Village, in an affidavit sworn to on 9 June 2009, deposed that a "great many" of the villagers in San Jose village "do not want to have communal rights over land…[p]eople want to own land individually". Mr Cal produced petitions signed by 51 members of the Green Park Farmers' Cooperative and 27 villagers, saying respectively they were "strongly against the Maya Leaders Alliance action" and were "not in favour of communal land system [sic] in San Jose Village".

The expert evidence

[133] The respondents relied very heavily on expert evidence, most significantly on three affidavits sworn to by Professor Richard Wilk, Professor of Anthropology at Indiana University in Bloomington, Indiana, in the United States of America ('USA'). Professor Wilk also gave oral evidence at the trial. The respondents also relied on affidavits sworn to by Dr Liza Grandia, Assistant Professor of Anthropology in the Department of International Development, Community and Environment at Clark

University, Worcester, Massachusetts, USA (3 May 2009); Professor Grant Jones, retired professor of anthropology and sociology at Davidson College, Davidson, North Carolina, USA (5 May 2009); and Professor Kent McNeil, Professor of Law at Osgoode Hall Law School, York University, Toronto, Canada (6 May 2009). Each of these affidavits contains considerable detail and in the paragraphs which follow I will attempt to capture their essence, hopefully without doing any violence to them.

[134] Professor Wilk is a widely published author, whose work has focused particularly on land use and subsistence among the Kekchi Maya of southern Belize. He has conducted considerable archaeological and ethnographic field research in the Toledo District as well as historical archival research on land use and settlement in Toledo District at various periods between 1976 and 2002. In his first affidavit sworn to on 18 December 2008, Professor Wilk asserted (at para 3) his familiarity "with almost every published source on Toledo District's history".

[135] He observed at the outset (at para 4) that there are "many gaps in our knowledge and a good deal of history is based on very skimpy sources, especially for the time until the late 19th century". He nevertheless considered that there was sufficient evidence to demonstrate that Maya people have continuously occupied Toledo since sometime pre-dating the first contact with the Spanish in 1540. There is considerable archaeological evidence of the existence of "dense populations of people affiliated with the Classic Maya civilization" from about 450 AD through 1000 AD, and, to a lesser extent, during the post 1000 AD period through to the 16th century. At present, many Mopan and Kekchi people in Toledo continue to treat the ancient Maya sites dating back to the classic period of the ancient Maya civilisation as "sacred places built by their ancestors, and they still perform Mayan religious rituals in the ruins" (para 6).

[136] Because of the cataclysmic impact on the social, economic and political life of the region of the epidemic diseases that accompanied and even preceded European settlement (with archaeologists and historians now estimating that "90 to 95 percent of

native peoples in the Americas, including Mesoamerica, perished within a century of contact"), Professor Wilk considered (at para 7) that it was "impossible to draw any absolute conclusions about ethnic territorial divisions preceding contact". However, in his view, the evidence suggests that the principal inhabitants of the Toledo District during the 16th to the 18th centuries were Mayas, who spoke the Chol and Mopan languages, though they "may also have included Kekchi speakers" (para 8). When, in the 16th century, Spanish visitors first passed through southern Belize, parts of the area were independent of the Itza-Mayan state, which was centred on the Peten region of Guatemala. The inhabitants of the area were a group of people described by the Spanish as "Manche Chol", who spoke a Mayan language which was "not mutually intelligible with Kekchi".

[137] When the Spanish first encountered the Kekchi Maya in the early to mid-16th century, the Kekchi Maya lived in what would later become the department of Alta Verapaz, Guatemala, "mainly in the highland area around what is today the city of Coban and in the lowland areas of what are today known as the city of Cahabon and settlements along the Polochic Valley" (para 10). Among the other Maya groups neighbouring the Kekchi were the Mopan, the Manche Chol, the Pokomchi, the Itza and the Lacandon. According to Professor Wilk, the Kekchi have, for hundreds of years, "worked in trade and commerce between the Western highlands and the lowlands of Guatemala and Belize". Spanish efforts at resettling the various Maya groups met with much resistance, some of which Professor Wilk describes as follows (at paras 12–14):

> "12. Kekchi peoples, unhappy under Spanish rule, undoubtedly escaped into the forest frontier northwest of Cahabon, that is, into the area that would later become the modern state of Belize, which the Spanish repeatedly failed to conquer. In 1570 AD, during their raids into the forest frontier, Spanish troops found Kekchi runaways as far north as the countryside around the Maya city of Tipu in Belize. Although the Spanish ostensibly rounded up the Manche Chol and other unconquered lowland peoples in a series of campaigns culminating in the 1697 conquest of the Itza Maya in Peten, Guatemala, some of the Manche Chol survivors likely remained in the forests of the area that would become Belize (Jones 1998:40).

> 13. The Spanish first tried to resettle the Manche Chol into towns where they could be supervised by Spanish priests. They also hoped to protect the Manche from European and British pirates and buccaneers who roamed the coast at this time, sometimes taking Manche people as slaves to sell in Jamaica. An entry in the Archives of British Honduras in 1822 mentions that the Mosquito Indians, allies of the British, had taken slaves from southern Belize for more than a century (Burdon 1934:250).
>
> 14. In the 1690s, when the Spanish found the resettlement policy too costly and too difficult because the Indians kept escaping to the forest to hide, they attempted to round up the Manche and deport them to the Urran valley near Rabinal in the highlands of what is now Guatemala (Thompson 1938:593). At about the same time, Mopan people were gathered up and forcibly resettled in the area of San Luis in Guatemala where they largely remained until their self-organized return to Toledo, Belize in the 1880s. There is strong circumstantial evidence to conclude that the Kekchi deeply intermixed with the Mopan and Manche Chol peoples before and after the arrival of the Spanish and long before the demarcation of British Honduras."

[138] Professor Wilk next goes on to describe what he characterises as "Historical ethnic fluidity among Mopan, Kekchi, and Mache Chol groups". Among other factors, he posits (at para 15) the likelihood of "close relationships and indeed intermixing", between the Kekchi, the Mopan Maya and the extinct Manche Chol ethnic groups, stating his conclusion from contemporary and historical sources on the pre 18th century period as follows (at paras 18-19):

> "18. While the Spanish attempted for two centuries to conquer them, all the lowland Maya groups (e.g., Itza, Mopan Kekchi, Lacandon, Acala, Manche Chol) moved around to avoid the Spanish and band together with one another. The result of these movements over many years was a significant ethnic mixing, including intermarriage, and the sharing of cultural customs in both the Spanish reducciones [towns] as well as the frontier forest refuges. (Grandia, 2006)
>
> 19. Clear documentation of the Maya occupation in Toledo is not available until the 1880s when significant numbers of Mopan Maya re-occupied parts of Toledo from San Luis, and there was a surge of Kekchi migration from Guatemala. But there is circumstantial evidence that Manche Chol, Kekchi, and Mopan people continued to inhabit and use the forested interior of Toledo district during this period. There is much evidence that

> Kekchi people fled Spanish-controlled Guatemala in large numbers beginning in the 16th century, and many found refuge in adjacent lowland forests, including southern Belize, where they intermarried with existing groups. It is quite possible that Kekchi, mixed Kekchi-Chol, or mixed Kekchi-Mopan habitation of Toledo goes back to the 1500s."

[139] Among the circumstantial indicia adduced by Professor Wilk were the many contemporary 19th century references to 'Indians' living in the interior of British Honduras. There were also the findings of the renowned British anthropologist and Maya historian, Sir Eric Thompson, who studied the Kekchi and Mopan people in the Toledo District in the 1920s and 1930s[10]. Sir Eric found that the Kekchi spoken at that time incorporated many Manche Chol words and that the well-known Kekchi stories about the Manche Chol collected during the same period showed that the two groups knew each other well. Sir Eric also used linguistic evidence, "arguing that there were sufficient words of Chol origin in the Kekchi dialect spoken in southern Belize for him to conclude that the people in this region constituted a separate ethnic group he called 'Kekchi-Chol'". Sir Eric was in fact prepared to go even further, stating that, "at present the two races [the Kekchi and the Chol] have completely merged (1930:36)" (para 21).

[140] Other scholars found further evidence of resemblances in modes of dress and Kekchi folklore, which includes "abundant stories about Kekchi interactions with forest people called 'Chol wing', (Chol people)" (para 22), leading Professor Wilk to conclude that (para 23):

> "The consistency of these narratives indicates that the Kekchi sustained long-term interactions with the neighbouring Manche Chol peoples. The surveys done as part of the Maya Atlas project found that at least a third of Maya people interviewed in Toledo district asserted having contact with descendents [sic] of the Chol peoples. Grandia (2004) recently collected accounts from Kekchi elders describing encounters with Chol people in their youth. The depth and breadth of Kekchi people's specialized knowledge of hunting, fishing, agriculture, and botany (especially medicinal plants) in the Atlantic coastal region of Belize would indicate

[10] Thompson, J. Eric, 'Ethnology of the Mayas of Southern and Central British Honduras', Field Museum of Natural History, Anthropology Series 17, 1930.

> deep historical interactions with the ecosystem and the Chol, Kekchi, 'Kekchi-Chol' (to borrow Sir Eric Thompson's terminology) and Mopan peoples who lived and moved around there for generations."

[141] It is common ground between the parties in this case that, beginning in the mid to late 19th century, there was a Kekchi exodus from the highland region of Guatemala into the lowlands and into the Toledo District of Belize. Professor Wilk identifies (at paras 30-36) three peak periods of migration, the first of which took place in the late 19th century and led to the creation of the Toledo District in 1882, "for administrative purposes with its center at Punta Gorda" (para 32). The second and third were in the 1930s and the period 1960-1996 respectively, both in response to "unusually cruel...acts of genocide" by the Guatemalan authorities (paras 35-36). Professor Wilk makes the point (at para 37) that, when these waves of migration began in the late 19th century, "the border between Belize and Guatemala was still unclear and very much under dispute", with the result that when the Kekchi and Mopan peoples moved in a north or north east direction to escape Spanish oppression, "there was no border established between the two countries...[i]t was simply an unbroken forested region".

[142] The significance of this fact, in Professor Wilk's view (para 38), is that, while some may have been aware of the ill-defined border between Guatemala and Belize, most of the Kekchi people moving to Toledo "regarded their migration as a movement into a forested area without other owners, and regard their land in Belize as being part of a contiguous Maya territory". Still today –

> "...Kekchi elders believe that the sacred hills in Belize send messages back to the larger thirteen named sacred mountains around Coban. Elders from Maya villages in southern Toledo still participate in ritual and religious exchanges with communities in Guatemala. Traders, missionaries, elders, healers, and other Kekchi leaders visit back and forth between Guatemala and Belize. Kekchi residents of Toledo clearly assert their national allegiance as citizens of Belize, yet they maintain ties and affinities with an international Kekchi community, as well as a broader pan-Maya movement."

[143] For all these reasons. Professor Wilk concluded (at para 40) that "the Maya people are indigenous to Belize, having lived in this territory before the arrival of the Spanish conquerors and long before the arrival of the British settlers". In the period after contact with the Spanish, both the Mopan and the Manche Chol lived in Toledo before they were forcibly removed to Guatemala. During the Spanish colonial period, the Kekchi Maya intermixed with both these groups. They intermarried with the Mopan who had been moved to San Luis, Peten and "together these Mopan-Kekchi families organized a return to Belize in 1880". They are also intermixed with the Manche Chol, who are now extinct as a discernible ethnic group. The "political and demographic chaos caused by the Spanish conquest" resulted in widespread ethnic intermixing and cultural fluidity among all Maya groups, who, prior to the end of the 19th century, "did not recognize these 'tribal' or linguistic divisions".

[144] Professor Wilk also described the alcalde system (para 43):

> "The Alcalde system is found in various forms among all Mayan-speaking groups in Honduras, Guatemala, and Mexico as well as Belize. The social organization of the Kekchi has deep roots in pre-Hispanic practices, as well as in the early colonial era when Toledo district was a Spanish possession. The British administration adapted its laws to existing native practice (this was common to the system of indirect rule practiced throughout the British Empire). The Alcaldes apply customary law, which has been carefully described by Osborn (1982) and Howard (1974, 1977). In general practice the Alcaldes adjudicate land disputes within the community, deal with absences from the fagina work-groups, and adjudicate disputes over crop damage caused by domestic livestock and accusations of sorcery."

[145] Despite modifications and some lack of clarity brought about by the existence in some communities of formally elected village councils and the occasional resort by the Maya to the formal court system, the goal of the alcalde remains the use of "traditional consensus-based forms of mediation to reach settlements that are satisfactory to all parties, precluding the need to resort to the external judicial system" (para 44).

[146] The remainder of Professor Wilk's first affidavit is devoted to a detailed account of Maya customary land tenure in Toledo. He describes a "complex traditional set of land tenure regulations" (para 72), the basis of which is "the concept of usufruct rights, meaning the land is for those who use it" (para 53). Each village (some 37 in all) "has an elaborate set of rules and regulations, some written and some customary, for regulating land use rights and tenure within community territory". The Kekchi believe "that land belongs to their *Tzuultaq'a* gods and therefore cannot be owned by any one person" (para 71).

[147] As regards the actual patterns of land use in Toledo, Professor Wilk's final comment, having read a sampling of the affidavits filed on behalf of the respondents (including Domingo Chub's), was as follows (para 79):

> "The patterns of land use they describe in their villages are consistent with the traditional patterns of customary land tenure that I describe here. Any differences reflect the flexibility and adaptability of a system that has proven an effective guide to sustainable resource use in the subtropical rain forests of Mesoamerica for thousands of years."

[148] In his second affidavit (also sworn to on 18 December 2008), Professor Wilk was concerned to describe the legal relationship between the British colonial regime and the Maya.

[149] Spain claimed the area that now includes southern Mexico and Central America, including Belize, in 1540. Limited British rights within the territory were first acknowledged by Spain in 1763 (by the Treaty of Paris) and the late 18th and early 19th century brought increasing British influence in the area. But it was not until 1862 that Letters Patent were issued creating the Colony of British Honduras.

[150] At that time, there were clear indications of a Maya presence in southern Belize, with an American adventurer describing having encountered during an 1868 trip several small villages near the mouth of the Rio Grande, as well as cane cultivation (para 38). During the early years of the new colony, Professor Wilk stated (para 39), "British policy

was to accommodate Maya land use and encourage Maya settlement" and the earliest Crown Lands Ordinance passed in 1872 specifically provided the Lieutenant Governor with authority to reserve lands for the use of "such Indians and Charibs", wherever Maya villages existed. These reserves were to be created and surveyed at the Crown's expense and lands within them were to be allocated by the alcalde or headman (para 41).

[151] The Toledo District was created in 1882 and the principle of protecting Maya land use continued to enjoy official support after the 1872 Ordinance was passed, although no reserves were actually created until the 1890s. It was suggested by the authorities that a "well defined tract of Government land" be set aside for the undisturbed possession of Indians, in anticipation of a "probable influx of Indians" from the Guatemala side of the border. A new Crown Lands Ordinance, which was passed in 1886, also provided for the creation of reserves for the use and benefit of the Indian and Carib inhabitants. The first Indian reservation was established in 1893 on 1260 acres of land around the village of San Antonio, Toledo District (paras 44-46).

[152] Despite attempts at the local level to regulate land use by the grant of leases of defined parcels of land, the Maya continued, with official toleration, to use land in their customary fashion well into the 20th century. Professor Wilk describes the position in 1924 in this way (para 51):

> "Government officials on the ground generally saw Maya as squatters who could be moved or manipulated for their own objectives, be they preservation of mahogany, access to labour, or agricultural development. To this end, they often threatened, bullied, or persuaded the Maya to move. However, such attempts rarely if ever received the backing of the Colonial Secretary or Legislature. On the contrary, on at least one occasion when the bureaucrats attempted to move Maya farmers off their lands because they did not hold leases and were not located on a reserve, the response of the colonial authorities was to gainsay the officials and create a reserve protecting their use."

[153] The creation of reserves continued and, by 1962, it was estimated that about 77,727 acres of land had been formally reserved for Maya communities. Despite official

concerns about over-population on the reserves, the prevailing view remained that "the best feature of the Reservation Policy is that it does nothing to break up the traditional Maya habits of community effort" (quoting at para 54 from a report on a proposal for development of Crown lands in the Toledo District). Thus, Professor Wilk concluded of this period (at para 57):

> "From the late 1960s through to independence, the size of the Belizean Indian reserves remained relatively stable, while Maya population and villages expanded. Maya farmers did indeed re-settle in the south; Maya returned to many Maya villages in the Toledo Development Area during this period, and some new settlements were founded. The government's knowledge and acceptance of expanding land use outside reserved lands, however, was routine and widespread, and is demonstrated most visibly by the formal appointment of alcaldes elected to govern their respective Maya villages within and outside Indian reserves."

[154] Part 111 of Professor Wilk's second affidavit (paras 58–70) is devoted to a description of the progressive incorporation of the alcalde system of Maya village governance into the formal governance structure of the then British Honduras. Thus in 1858, the Legislative Assembly passed the first Alcalde Jurisdiction Act. The objective of the measure was "to provide for the more speedy and economical administration of justice in the rural districts of this settlement, and for that purpose to invest certain fit and proper persons resident therein with a limited criminal and civil jurisdiction" (para 59).

[155] Thus, Professor Wilk explained, "existing Maya village leadership structures and Maya customary law" were incorporated into the administration of the settlement. Further, by this means, the office of alcalde became, as historian O. Nigel Bolland characterised it, "the only non-Anglo-Saxon institution to have been incorporated into the administrative system of colonial Belize"[11]. Mr Bolland also quoted a late nineteenth century Colonial Secretary as having observed that "the best way to manage the natives

[11] See 'Alcaldes and Reservations: British Policy Towards the Maya in Late Nineteenth Century Belize' (1987) 67 *America Indigena* 33, 44

was through their own Chiefs and according to their own customs".[12] The Crown Lands Ordinance of 1872 also recognised the role of the alcaldes in Maya land tenure, "defining them as the authority to issue occupation permits within Indian reserves", while the restrictions "on alienation of occupancy permits in reserves mirrored Maya customary norms: occupancy rights could not be sold or leased, but could be inherited" (para 61). By 1877, the Secretary of State had approved the appointment of alcaldes throughout the colony.

[156] Mr Bolland's characterisation of the alcalde system finds a contemporary echo in an extract from the GOB website, quoted by Professor Wilk (at para 70):

> "The alcalde system is part of the local government structure of Belize ...The alcaldes are effectively local magistrates operating at the village and community level…They have the power to decide who can live in the village and can call for the communal clearing of a village. They are responsible for managing the communal land and act as school officers."

[157] Despite what he described as a general pattern of "historic tolerance of Maya land use" (para 71), Professor Wilk noted that there were from time to time examples of disruption of Maya land tenure arising from the lack of formal protection. Thus, GOB has on occasion granted leaseholds to individuals for properties located within the established boundaries of reservations, resulting in "the collective rights of the community… [being]…arbitrarily taken away and bestowed upon an individual" (para 75). These and other manifestations led Professor Wilk to conclude as follows (at para 78):

> "Government officials in this and the last administration often appear to be completely unaware of the most fundamental aspect of Maya customary rights – their communal aspect. In my experience, the Maya of Toledo do not want their lands broken up into individual parcels of private leasehold, the only option the government seems to be able to envision. Because of the particular geography of the Toledo district, breaking up the communal lands into private parcels makes no agricultural, ecological or cultural

[12] Ibid, page 59

> sense. The entire integrity of the Maya way of life depends on a complex system through which the community holds title to land, and apportions it among village members according to their needs."

[158] In a brief third affidavit (sworn to on 22 April 2009), Professor Wilk instanced a recent attempt (in 2009) by GOB to remove the elected alcalde and second alcalde of the village of Santa Elena, and to replace them with new appointees. Strenuous objections to this development by the villages of Santa Elena, other Maya and non-Maya Belizeans led to a retraction by GOB and a reversion to the status quo, resulting in persons chosen by the villagers subsequently being sworn in as first and second alcalde. The significance of this episode, Professor Wilk concluded (at para 8), was that it provided "an excellent example of the strength of the customary Maya roots of the alcalde position". Despite the absence of any constitutional or statutory provisions for alcalde elections, "[t]he legitimacy, authority, and many of the powers and responsibilities of the alcaldes are sourced in this customary mandate from the village".

[159] Dr Elizabeth Mara Grandia (known professionally as 'Liza Grandia'), an anthropologist, has published widely in the fields of cultural anthropology, gender and development studies and the indigenous people of Mesoamerica. Her anthropological fieldwork in the region since 1991 has been primarily in Guatemala and Belize. Her research in Belize occurred between October 2003 and April 2004 and comprised archival and interview research in Punta Gorda, Belmopan and Belize City, as well as fieldwork in the four Kekchi villages surrounding the Sarstoon-Temash National Park in Toledo. She is fluent in Spanish and "proficient" in Kekchi.

[160] Dr Grandia concurred with the view that, at the time of contact with the Spanish in the mid-16th century, both the Mopan and Manché Chol "indisputably" occupied the Toledo District and that the Kekchi intermixed with both groups, thus "blurring the lines between them". There was "widespread ethnic intermixing and cultural fluidity among all Maya groups", as a result of the "political and demographic chaos" brought about by

the Spanish conquest. This is how Dr Grandia characterised the relevance of ethnicity in this context (at paras 18 – 19):

> "18. Ethnicity is a fluid category, as many Maya groups share similar cultural traits and have all descended from a common lineage that connects them all to the ancient Maya peoples who inhabited Mesoamerica before the arrival of Europeans. The ancient Maya people shared a hieroglyphic writing system and maintained extensive political and economic ties among their city states. Yet, having settled in disparate geographic areas, over time the ancient Maya language diverged into different branches. Eventually, the linguistic differences between Maya groups became significant enough to classify them as separate languages. Outsiders have used these linguistic differences to classify different Maya speaking people as separate ethnic groups. Although their languages are mutually unintelligible and they are divided across five nation-states (Mexico, Guatemala, Belize, Honduras and El Salvador), Maya peoples nonetheless continue to share many cultural traits.
>
> 19. Externally imposed ethnic divisions such as those used by governments in census taking can be confusing to groups which have lived side by side for generations. Throughout my research, Q'eqchi people repeatedly asked me if "Maya" (referring to "Mopán" in Belize or sometimes simply "Maya") were the same as Q'eqchi. Although the Mopán and Q'eqchi languages are mutually unintelligible to native speakers, these groups nonetheless intermarry, share agronomic and forest knowledge, and have maintained remarkably similar village settlement patterns for generations."

[161] The larger part of Dr Grandia's affidavit was concerned to describe the customary Maya land management system, its advantages and the adverse effects of current threats to its existence. Her conclusion was that "the Maya villages in Toledo continue to use and occupy their land in accordance with long-standing customs, traditions and norms concerning land management".

[162] Professor Grant Jones, a veteran of Maya studies, first conducted preliminary ethnographic fieldwork in the Toledo District in 1965. His research on the Maya of Belize and adjacent areas, covering the period from the 16th to the 19th centuries, has spanned a period of over 40 years. His book, 'The Conquest of the Lost Maya

Kingdom', was published in 1998 (Stanford, Stanford University Press) and much of the contents of the affidavit was drawn from it.

[163] After detailed consideration of the history of the Maya in Mesoamerica from the mid-16th century through to the 19th century, Professor Jones concluded as follows:

> "86. The available historical evidence, then, indicates that the first Europeans to hear of and enter the Toledo District and its surrounding areas in 1568 and later, found already-longstanding Maya populations inhabiting the Toledo District of Belize. These populations were primarily Mopan speakers, who were politically and economically affiliated with the Itza, and Chol speakers. Like the rest of the native population of the Americas, this existing population was probably severely disrupted and reduced by illnesses introduced by the Europeans.
>
> 87. During the process of Spanish invasion and colonization, in the 17th century the Toledo area became a frontier zone of refuge, and prior political and cultural distinctions became blurred and intermixing took place, particularly between the Chol/Kekchi, and Kekchi/Mopan groups. Some Maya populations in the Toledo District and throughout Belize were again dislocated in the 17th and 18th century; and additional Maya populations migrated to Toledo in the 18th century due to the Spanish conquest of the Itza Mayas of Petén, Guatemala. Throughout these periods, Maya people from different linguistic groups intermarried and moved back and forth for centuries between territories that only later became distinct with the creation of national boundaries. Consequently, many people in the Toledo District who call themselves Kekchi are more accurately Kekchi-Chols or Kekchi-Mopan.
>
> 88. As much as can be discerned, all of the groups who lived in the area over these centuries of dislocation and relocation shared similar land tenure norms and patterns, practicing well-known forms of lowland tropical forest agriculture under a fundamentally communal land tenure system that allocated property in particular active cultivations or tended orchards in the forests to the cultivator, while locating control and ownership of these lands in the community as a whole.
>
> 89. In all, there is sufficient evidence to support my conclusion that the present Mopan and Kekchi-speaking inhabitants of the Maya communities of Toledo have a historical and cultural relationship with the lands on which they currently live and work, and with the populations that have

historically inhabited them. That relationship grounds their identity as an indigenous people of the region."

[164] Professor Kent McNeil is a professor of law at Osgoode Hall Law School, York University, Toronto, Canada. For close to 30 years his research and writing has focused on the rights of indigenous peoples in territories that were formerly British colonies, particularly Canada, Australia, New Zealand and the USA. Among his many publications are two books, 'Common Law Aboriginal Title' (1989) and 'Emerging Justice? Essays on Indigenous Rights in Canada and Australia' (2001). Professor McNeil's affidavit consisted of a detailed description and analysis of the law relating to the establishment and recognition of indigenous title to land in the common law jurisdictions of Canada, Australia, New Zealand and the USA. Despite contending for the existence of an identifiable body of law dealing with the issue, Professor McNeil was careful to observe (at para 9) that the former British colonies had different histories and different constitutional structures, with the result that each of them has over time developed "[its] own common law, based on English common law but with local differences".

[165] Referring firstly to the body of law developed by the common law courts of England to address the issue of the impact of British acquisition of sovereignty on the pre-existing rights of indigenous peoples, Professor McNeil identified (at para 11) "an important principle that is usually called the principle of continuity". This principle "provides that any rights the indigenous peoples had under the *lex loci* of the territory at the time of British acquisition of sovereignty continued thereafter and became enforceable in common law courts". This principle was however subject to certain limitations, the most important of which were that (i) "the Crown had the power to extinguish rights prior to or in the course of acquisition of sovereignty by, for example, seizing lands with the intention of extinguishing any pre-existing rights to them"; (ii) the continuation of existing rights could not be inconsistent with Crown sovereignty; and (iii) pre-existing rights cannot be "*malum in se*" (paras13-15).

[166] From his review of the case law of Canada and the USA, Professor McNeil concluded (at para 19) that it did not reveal "strict adherence to the doctrine of continuity whether indigenous land rights are concerned...physical occupation and use in accordance with the local peoples' way of life is sufficient to establish title, without proof of land rights under pre-existing indigenous law". However, in Australia and New Zealand, "the doctrine of continuity has been explicitly applied...[i]n those jurisdictions, indigenous title to land can be based directly on the rights that existed in indigenous systems of law at the time of Crown acquisition of sovereignty".

[167] As regards the time for establishing indigenous title to land, Professor McNeil noted (at paras 21-22) that in Australia and New Zealand, "the date of Crown acquisition of sovereignty has been used as the time when indigenous title to land becomes enforceable in common law courts", while in Canada "the Supreme Court has said that aboriginal title to land must be established by proof of exclusive occupation of land at the time of Crown 'assertion' of sovereignty"[13]. However, Professor McNeil observed (at para 23) that at least one member of the Canadian Supreme Court did suggest that "Crown sovereignty may not be the only time to consider where indigenous land rights are concerned"[14]. Further, in the USA, the case law indicated "an even more flexible approach", *viz*, "the occupation required for title must have been 'for a long time', but it need not have pre-dated European or even American assertion of sovereignty" (para 24).

The GOB response to the experts

[168] GOB relied on the affidavits of Mr Jose Cardona, an attorney-at-law and sometime employee of the Lands and Surveys Department, and Dr Jaime Awe, the Director of Archaeology in the National Institute of Culture and History.

[13] Citing in support **Delgamuukw v British Columbia** [1997] 3 S.C.R. 1010
[14] Ibid, per La Forest J, at para. 197

[169] Mr Cardona's evidence was based on "years of experience and research, acquired knowledge concerning Indian reserves and the Indian people living in Southern Belize" (para 3). At the outset, he declared his position as follows (at para 7):

> "I join issue on the proposition that the Mopan population of the Toledo District has ancestral roots in the area that long predate British Colonial claims over the area and Claimants' interpretation of the migrations into Toledo in the late nineteenth century as a return to their homeland."

[170] At the date of British settlement, Mr Cardona maintained, the southern portion of Belize was virtually uninhabited. The original inhabitants of the Toledo District were the Manche Chol, but towards the end of the 17th century these people were by and large rounded up by the Spanish and shipped to the highlands of Guatemala, and those who escaped were for the most part wiped out by disease. The result of this was, Mr Cardona stated (at para 11), "that by the eighteenth century, Toledo was essentially unpopulated". The Kekchi and Mopan Maya now found in southern Belize arrived from Guatemala in a series of migrations over the period 1860 to 1890, but "the real increase in the Ketchi population in southern Belize occurred in the 1970s" (para 13). This account of Ketchi migrations into Belize in the later 19th through to the 20th centuries was attributed by Mr Cardona to Professor Wilk's 1991 'Household Ecology' (page 63).

[171] Mr Cardona also spoke to official land policy in southern Belize in the post 1862 period, pointing out (at para 20) that, shortly after 1862, "the Crown had issued grants and leases of lands in the area referred to by the [respondents] as 'Maya traditional lands'". In 1872, the first Crown Lands Ordinance introduced a scheme, "which made it plain that lands in Indian and Carib reserves [were] to be occupied on permit and during pleasure" (para 24). Prior to the establishment of the reserves, most of southern Belize was privately owned lands but now, for various reasons, "most of the Toledo District is now National lands and so are the Indian reserves" (para 28). In Mr Cardona's view, the Crown has always regarded land in the reserves as its property and has continued to "issue leases, licences and grants in the areas as it deems fits" (para 31). There are no treaty or legal provisions obliging the Crown to consult with or seek the approval of

"any of the applicants in this case, or any Indian at all, before disposing or otherwise dealing with lands in the Indian reserves" (para 32).

[172] As for the alcalde system, Mr Cardona's only comment was that "[it] is a creature of legislation" (para 30).

[173] Dr Jaime Awe has worked in the field of archaeology since 1976 and has authored several publications on the ancient Maya of Belize. His particular area of specialisation is the archaeology of the Maya culture and civilisation and the prehistory of Mesoamerica. He too stated his thesis at the outset (at para 5):

> "With this witness statement I seek to provide evidence from scientific archaeological, linguistic, ethnohistoric and anthropological investigations, that demonstrates that the original inhabitants of the Toledo District were Manche-Chol (Chol for short), and that the Manche Chol people were forcibly removed and wiped out from southern Belize by Spanish colonizers. The data further shows that the modern Maya of southern Belize, consisting of the Mopan and Kekchi groups, are more recent immigrants to the Toledo District."

[174] Dr Awe sought to demonstrate from his published work that this was the position that he and other colleagues in the field of archaeology had held "for years" (para 6). Citing linguistic, cultural and physical evidence, as well as the views of other colleagues in Maya studies (including the seminal work of Sir Eric Thompson and Professor Wilk's 'Household Ecology'). Dr Awe concluded (at para 105) that the Mopan and Kekchi communities of the Toledo District, "are recent migrants to the area, and as such have no historical precedence predating the mid 19th century to claim the region as their original homeland". Dr Awe also made the point (at para 60) that the Maya of Central America "were never a unified nation". They never referred to themselves as 'Maya' and "the name 'the Maya' is a common parlance that has been applied in more recent times to the different tribes, or ethnic groups by European explorers, by anthropologists, and in popular writings".

[175] As regards the position of "colleagues in the study of 'the Maya'", which was in agreement with his, Dr Awe presented (at paras 89-112) excerpts from various published works, a sampling of which I set out below:

(i) "the Maya of Belize fell into three groups:

Yucatec Maya in the north with their important Capital of Chetumal; a loose group I call Chan Maya, with whom Yucatec Maya mingled in the centre, extending to the Sittee River and perhaps a little south of it, and the Manche Chol who occupied the Toledo District from the Monkey to the Sarstoon Rivers" (J Eric Thompson, 'The Maya of Belize: Historical Chapters since Columbus'. 1972, page 4).

(ii) "The Maya who lived in Belize at the time of the Spanish conquest of Yucatan and Guatemala were of at least two major language groups. In the north and west, Yucatec and Mopan Maya, closely related to each other, were spoken. In the south, the language was Manche Chol, about as distinct from Mopan/Yucatec as Italian from Portugese [sic]" (Professor Wilk and Mac Chapin, 'Ethnic minorities in Belize: Mopan Kekchi and Garifuna', 1990, page 10).

(iii) "The Spanish never made an effort to control or develop southern Belize, after they rounded up the indigenous Chol inhabitants and shipped them off to the highlands in the 1600s." (Professor Wilk, 'Household Ecology'. 1991, 54).

(iv) "At that time [1696 – 97] such of the Manche Chol as could be caught were shipped off to the highlands of Guatemala; those who escaped were for the most part wiped out by disease." (Thompson, op. cit., page 20.).

(v) "…no Manche Chol survives anywhere in Belize or adjacent southeastern Peten; their place has been taken in the south west of the Toledo District by immigrants, Mopan Maya and Kekchi Maya. The latter have expanded enormously in the past three centuries, absorbing many former Manche Chol communities in the Alta Verapaz, and then advancing to the Usumacinta, Cancun and Sarstoon Rivers, and finally crossing into the Toledo District late in the nineteenth century." (Thompson, op. cit., page 34.)

(vi) "The Kekchi language is quite distinctly related to Yucatec, Chol, and the other northern Maya languages. Kekchi and Mopan, for example, are not mutually intelligible, and have different words for

even such basic morphemes as 'sun' and 'tortilla'. For this reason many Indians in Toledo are trilingual in Kekchi, Mopan and English, and some of the older people know Spanish as well." (Professor Wilk and Mr Chapin, op. cit., page 16.)

(vii) "The borders of British Honduras provided a haven for many different groups during the nineteenth century. Toledo was peopled by both the Kekchi and the Mopan; the latter are a lowland Maya group…about whom little is known in colonial or precolonial times. Pacified and converted by the Spanish in the late 1600s, they were mostly left alone thereafter, living in widely scattered farming settlements and *reduccion* towns such as San Luis in Guatemala. In 1886 Mopan from the town of San Luis undertook a planned and organized migration across the border into the Toledo District, to escape taxation and forced labour…" (Household Ecology, pages 57 – 58.)

(viii) "Herman [Cramer] decided to begin a plantation on the Toledo lands and arranged with friends or relatives in the Verapaz to provide Kekchi workers. These Kekchi families were settled in San Pedro Sarstoon, a plantation established between 1881 and 1890 in the southwestern corner of the colony, close to the Guatemalan border." (ibid, page 60).

(ix) "Nobody, except the ghosts of the Manche Chol, has a better claim to the interior of Toledo District than the Mopan and Kekchi, and that claim should include the right to determine how that territory is to be divided and administered in future." (ibid, page 236.)

The oral evidence

[176] Professor Wilk's affidavit evidence was amplified at the trial by evidence that it is not necessary to rehearse in any detail for present purposes. However, it is probably worth noting that he did make the point that, historically, natives of Mesoamerica, including Belize, did not identify themselves according to ethnic groups in accordance with modern classifications:

"Instead, especially in this part of the Americas, people formed parts of kingdoms and nations, most of which included people who spoke more than one language. So for instance a large part of western Belize in the 1540s was called Tahitza. That means that there was an ethnic group

> called the Itza but this is incorrect. This was just a political organization, a State, if you will, a nation, and that was the name of the nation. Similarly, in 1538 when the Spanish came to Alta Vera Paz, the Highlands of Guatemala, they found a kingdom called Tezulutzan which means the land of war in the Aztec language. Now this kingdom covered a very large area. It extended at least partially into what we now know as Southern Belize. It encompassed people speaking many languages. The king spoke Kekchi but his subjects spoke languages including Chol and other languages. So the names that we use today or when we so easily call people Kekchi or Mopan are not the names that people used for themselves. They are names imposed by the conquerors and later by the colonial powers…The British and the Spanish wanted to divide people up into nice little groups with borders around them but that is not the situation that they found in this part of the world. Instead many people spoke two or three languages. And the borders of kingdoms were changing all the time. And they continued to change after the British and the Spanish entered the picture."

[177] Professor Wilk strongly maintained his stance that "there were indigenous people living in Toledo District throughout the 17th, 18th and 19th centuries" and attributed the view that the area had been virtually emptied of indigenous people to "an old mistaken history…[which]…still appears in some outdated history books".

[178] Cross-examined by Miss Lois Young SC for GOB, Professor Wilk accepted at the outset that "it would be fair to say" that he was "sympathetic" to the Kekchi and the Mopan peoples.

[179] Professor Wilk was also questioned in some detail on the views he had expressed in his 1991 publication, 'Household Ecology', which had been based, he told the court, "almost entirely" on the doctoral dissertation which he had completed in 1981. In particular, it was pointed out to him that in that publication he had expressed the view that the "exact geographic position of the Kekchi at the time of the [Spanish] conquest is not precisely known", but that they had "probably always moved between the highlands and the lowlands" of Guatemala, and had a homeland in the Alta Verapaz region. And further, that it was as a result of the erosion of Indian rights by private and government entities in Guatemala in the mid to late 19th century that there was a flight of the Kekchi

and the Mopan from the Alta Verapaz into southern Belize from the 1870s onwards, with perhaps the greatest increase in numbers occurring in the 1970s.

[180] Professor Wilk accepted that he had said all of this and more in the 1991 publication, but was careful to emphasise more than once that that was what he had written at that time. In re-examination, he amplified the caveat:

> "Briefly, the ethno-history, the section about the history of Mopan and Kekchi people and their migration to Belize that I wrote in 1981 and published in 1991 has been changed completely by new evidence. And that is the evidence that I lay out in my two affidavits and some of which I have learned from reading Grant Jones's recent work. There has also been a great deal of Anthropological research in the Toledo District. I think probably every village has an anthropologist at this point. And those younger scholars have added a tremendous amount to our knowledge of settlement, agriculture and the history of the district. I would say that the most important thing is that we now know that the Toledo District was occupied between the time of the Spanish conquest continuously to the 20th century as I testified earlier this week."

The Chief Justice's judgment

[181] Conteh CJ addressed the issues raised by the instant case against the backdrop of his earlier judgment in the **Mayan Land Rights** case and on the basis of the following questions:

(i) Does there exist in this action a Maya customary land tenure system and, if so, do members of these villages have rights and interests in land based on Maya customary land tenure?

(ii) Can the claimants show links to and with the original inhabitants of the lands occupied in Toledo District for the purposes of establishing continuity to ground their claim to customary rights and interests to these lands?

(iii) Has there been in fact and or in law extinguishment of any claim to rights or interests in the lands by the claimants by the assertion of Spanish sovereignty over the area in 1540 and in any event, upon later assertion of British sovereignty over the area?

[182] On the first issue, Conteh CJ found (para 76), reiterating his conclusion in the **Maya Land Rights** case, "that there does indeed exist in these villages Maya customary land tenure which inheres for the benefit of the inhabitants of these villages". The learned judge specifically rejected GOB's contention that, if anything, the respondents have only usufructuary rights in the lands and therefore no right to title.

[183] On the second issue, Conteh CJ considered (at para 92) that the expert evidence adduced on behalf of the respondents had proved "a satisfactory historical, ancestral and cultural continuity and links between [them and] the original inhabitants of what is now Toledo District …" The continuity between the respondents and the original inhabitants of the Toledo District, "entitles them to lay claims to customary rights and interests in land in the area" (para 101).

[184] On the third issue, Conteh CJ, having observed (at para. 103) that the court had already decided that issue against GOB in the **Maya Land Rights** case, nevertheless proceeded to examine it anew. Basing himself squarely on judicial authority from around the common law world, "that in order to extinguish indigenous or native title, there must be a plain, clear and express intention to do so" (para 109, emphases in the original), the Chief Justice concluded that the grant of leases over lands in the Toledo District had not operated to extinguish the indigenous rights and title of the respondents (para 110). The notion that there could be "an implied extinguishment of the common law title of indigenous title to land or rights and interest in it by the mere grant of a lease would be so antithetical as to offend any notion of decency and fair-play and at odds with the common law on the survival of indigenous title and interests in **land** on acquisition or change of sovereignty" (para 116).

The appeal

[185] In amended grounds of appeal, GOB challenged Conteh CJ's judgment on a number of grounds as follows:

> "Ground 1
>
> The learned Chief Justice erred in law in failing to identify the legal requirements for indigenous title and to direct his mind to whether the evidence of the claimants satisfied these legal requirements. As a consequence the learned trial judge fell into error when he found that the Respondents are entitled to indigenous title and to rights thereunder.
>
> Ground 2
>
> The decision is against the weight of the evidence that the learned trial judge failed to evaluate the facts as against the criteria for indigenouos [sic] title, and failed wholly to evaluate the evidence of the Appellants in relation to current land usage practices in Toledo.
>
> Ground 3
>
> The learned Chief Justice erred in law in finding that sections 3, 3(d), 16 and 17 of the Belize Constitution impose an obligation on the Defendants to adopt affirmative measures to identify and protect the rights of the Claimants based on Maya customary tenure.
>
> Ground 4
>
> The learned Chief Justice erred in law and misdirected himself in ordering that the Defendants, in order to comply with sections 3, 3(d), 16 and 17 of the Constitution, must develop the legislative, administrative or other means to identify Maya customary property rights in land and to protect them.
>
> Ground 5
>
> The learned Chief Justice erred in law in failing to take judicial notice of:
>
> (i) The Petroleum Act, Chapter 225 of the Laws of Belize (2000 Revision) and in particular of section 3 thereof which vests property in petroleum in the Crown and by section 31(4) which provides for a

5% royalty for the owner of any private land beneath which a petroleum reservoir is located; and

(ii) The Mines and Minerals Act, Chapter 226 of the Laws of Belize (2000 Revision) and in particular of section 2 thereof which deems the entire property in and control of all minerals to have been vested in Belize.

(iii) The Belize Constitution (Sixth Amendment) Act, (Act No. 13 of 2008) which came into force (with certain exceptions) on 12 April 2010, and which amended section 17 of the Constitution by providing that the entire property in and control over petroleum, minerals and accompanying substances, in whatever physical state, located on or under the territory of Belize (whether under public, private or community ownership), or the exclusive economic zone of Belize, 'are exclusively vested, and shall be deemed always to have been so vested, in the Government.'

(iv) As a result the learned Chief Justice fell into error in ordering the Defendants or third parties with it [sic] leave acquiescence or tolerance to abstain from issuing any leases or grants to lands or resources under the National Lands Act or any other Act; registering any interest in land; issuing any concessions for resource exploitation, including concessions, permits or contracts authorizing, logging, prospecting or exploration, mining or similar activity under the Forests Act, the Mines and Minerals Act, the Petroleum Act, or any other Act."

[186] By their respondents' notice filed on 16 August 2010, the respondents contended for a variation of Conteh CJ's judgment on the following ground:

> "The learned Chief Justice erred in failing to consider and award damages for the violation of the claimants' rights under sections 3, 3(a) and 16 of the Constitution (non-discrimination and protection of the law …)"

The argument

[187] This appeal was argued by Ms Lois Young SC for GOB and Mrs Antoinette Moore SC for the respondents with exceptional skill and thoroughness. It is impossible to do full justice to their extraordinarily thoughtful and careful submissions within the

confines of this judgment (Ms Young's original 'skeleton' arguments ran to 192 paragraphs, while Mrs Moore's covered 133 paragraphs, supplemented by two appendices of 39 and 31 paragraphs each and 10 volumes of a "Book of Authorities"). What follows is therefore a bare – but hopefully accurate – summary of the arguments, with apologies for any damage done to their high quality in the process.

[188] GOB's case on appeal may be summarised as follows:

(a) The respondents failed to prove that they are the indigenous people of the Toledo District.

(b) In accordance with established "Commonwealth common law principles" on the establishment of indigenous title, it was necessary for the respondents to establish that they were in exclusive occupation of the Toledo District at the time of the assertion of Spanish sovereignty over the area in 1540.

(c) The evidence showed that the exclusive occupiers of the Toledo District at the time of Spanish conquest were the Manche Chol Maya. The respondents, who are Kekchi Maya and Mopan Maya (which are separate and distinct groups from the Manche Chol, as well as from each other), were not in exclusive occupation of the Toledo District in 1540, neither were they in such occupation in 1763, when Spanish control passed to the British.

(d) The original home of the Kekchi Maya was Alta Verapaz in Guatemala, while the original home of the Mopan Maya was Yucatan in Mexico and then the Peten in Guatemala.

(e) The Kekchi and the Mopan Maya who occupy the villages that are the subject of the claim "in-migrated" to Belize from Guatemala in the late 19th century.

(f) The different groups of Maya to be found throughout Mesoamerica, although popularly referred to as 'the Mayas' were not historically one monolithic group, neither did they regard themselves as such.

(g) If, as GOB contends to be the case, the respondents were not in exclusive occupation of the Toledo District at the relevant time, then it would be necessary for them to prove that they are the descendants of the people who were, that is, the Manche Chol, either by way of biological descent or ancestral connection. This, the respondents have failed to do.

(h) Thus, the respondents failed to discharge the legal burden of proving to the requisite standard that, as the indigenous people of the Toledo District, they are entitled to indigenous title in respect of specific parcels land, as they were required to do.

(i) Conteh CJ failed to consider the evidence that a significant number of Kekchi and Mopan farmers in the Toledo District do not favour communal ownership and are in favour of individual titles to land in the area.

(j) Conteh CJ failed to appreciate that, under the provisions of the Petroleum Act and the Mines and Minerals Act, the rights to petroleum and minerals are vested in the Crown. The learned judge therefore erred in restraining GOB from dealing with the rights of property given to it by statute.

(k) This is therefore a case in which the Court of Appeal is empowered to disturb the trial judge's findings based on the evidence as a result of his

failure to make proper use of the advantage which he had as the trier of fact.

[189] In support of these submissions, Ms Young placed great reliance on the evidence, Dr Awe's in particular, as well as on several authorities, from Australia and Canada in particular, relating to the establishment of 'native title'.

[190] On behalf of the respondents, Mrs Moore SC advanced the following:

(a) The respondents did not seek from Conteh CJ, nor were they granted, a declaration of native title: what they sought was injunctive relief to protect their use and occupation of their lands, in accordance with their customary law, until such time as GOB rectified its discriminatory treatment of them and provided them with official documentation of their title.

(b) The Maya live and occupy lands in Toledo in accordance with their own customary land tenure system, and have done so with the full knowledge of national and colonial governments. This land tenure system has historical roots going back to pre-colonial times.

(c) The Constitution protects property of any description: therefore it must protect the property that arises out of the Maya customary land tenure system. GOB's failure to do so in practice is discriminatory and as such in breach of the constitutional guarantees of non-discrimination and the equal protection of the law.

(d) These issues were decided in favour of two typical Toledo Maya villages in the **Maya Land Rights** case, a judgment from which there was no appeal by GOB and which therefore will remain in effect in respect of those villages.

(e) The Chief Justice applied the correct analysis in determining that the respondents hold customary title to their village lands, amounting to property within the meaning of the Constitution.

(f) From the beginnings of British Honduras, the customary law of the inhabitants was recognised by the British as being part of the law of the land.

(g) Both the common law and international law support the existence of Maya land rights in Toledo based on current occupancy of lands with which the Maya have a historic relationship. Applying international norms, the IACHR has held that the ongoing patterns of land use by the Maya of Toledo give rise to interests in land and that the dates of establishment of particular Maya villages are not necessarily determinative of the existence of Maya communal property rights.

(h) A test for entitlement to customary title to property that focuses on the position at the moment of assertion of European sovereignty, rather than on the importance of the rights to the living people of today, "is a discriminatory remnant of colonialism". Similarly, a test which requires proof by present-day Maya of genealogical descent from the pre-1540 occupants of southern Belize is unreasonable and unrealistic.

(i) GOB, in the Ten-Point Agreement of 2000 formally acknowledged that the longstanding use and occupation of their villages by the Maya of southern Belize give rise to rights over lands and resources. GOB, by its affirmative support of the principle of the United Nations Declaration on the Rights of Indigenous Peoples in 2007, also recognised Maya customary land tenure.

(j) In order to remedy its violation of the respondents' constitutional rights and to guarantee their protection of their property, GOB has an affirmative duty to identify and protect Maya customary title where it exists, and specifically to develop the legislative, administrative or other means to do so.

(k) The Chief Justice was therefore correct to grant injunctive relief to respondents in the terms in which he did or, irrespective of the provisions of the Petroleum Act and the subsequent Belize Constitution (Sixth Amendment) Act (as to which, see para [98] below), the Maya villages are entitled to the surface rights to their lands.

(l) The Chief Justice's findings are supported by overwhelming evidence and ought therefore to be accorded a high level of deference by this Court.

(m) In the light of the uncontradicted evidence at the trial that the Maya of Golden Stream suffered immeasurable losses as a result of GOB's violations of their rights, Conteh CJ erred in not awarding damages, which would be the appropriate remedy, to the respondents.

[191] In reply, Ms Young submitted that, in the light of the respondents' position that they had not sought from Conteh CJ, nor were they granted, a declaration of indigenous title, the learned judge erred in according constitutional protection to their customary land practices in the absence of such a finding. As regards the respondents' complaint that damages ought to have been awarded for violation of section 3(a) (protection of the law) of the Constitution, GOB submitted that the learned trial judge made no finding that there had been a violation of section 3(a) and consequently no award of damages could be made. And, as regards the respondents' complaint of discrimination under section 16, GOB submitted that there was no evidence that it acted mala fides or targeted the respondents because of their Kekchi or Mopan ethnicity. The claim of discrimination had therefore not been made out.

The issues

[192] The issues that arise for determination on this appeal appear to me to be as follows:

(i) What is the appropriate test for the ascertainment of indigenous title in Belize?

(ii) Did the learned trial judge come to the correct conclusion on the evidence?

(iii) Was the learned trial judge correct to find that the Constitution imposes a positive obligation on GOB to adopt affirmative measures to protect the rights of the respondents?

(iv) Whether the learned trial judge acted correctly in granting an injunction to the respondents, in the light of the various constitutional and statutory provisions, of which he ought to have taken judicial notice, which vest the property in and control over minerals, petroleum and accompanying substances in GOB?

(v) Should the learned trial judge have awarded damages to the respondents?

The Constitution

[193] It may be helpful to frame the discussion with the Constitution, the Preamble to which (as amended in 2001[15]) proclaims the requirement of the people of Belize for –

[15] Act No. 2 of 2001

> "(e) …policies of state...which protect the identity, dignity and social and cultural values of Belizeans, including Belize's indigenous peoples…" (Emphasis mine)

[194] Section 3 affirms the entitlement of all persons in Belize to certain fundamental rights and freedoms, including "(a) life, liberty, security of the person, and the protection of the law;… [and]…(d) protection from arbitrary deprivation of property".

[195] Section 6(1) provides that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law".

[196] Section 16(1) provides that, subject to certain stated exceptions, none of which is relevant for present purposes, "no law shall make any provision that is discriminatory either of itself or in its effect". Section 16(2) provides, also subject to exceptions, that "no person shall be treated in a discriminatory manner by any person or authority". Section 16(3) defines the expression 'discriminatory' as –

> "…affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

[197] Section 17(1) provides protection from deprivation of property by proscribing compulsory acquisition of any property except under certain stated conditions. On 30 March 2010, the Governor-General assented to the Belize Constitution (Sixth Amendment) Act, 2008, ('the Sixth Amendment Act'), which amended section 17 of the Constitution by adding the following as subsections (3) and (4):

> "(3) Subsection (1) of this section does not apply to petroleum, minerals and accompanying substances, in whatever physical state, located on or under the territory of Belize (whether under public, private or community ownership) or the exclusive economic zone of Belize, the entire property in and control over

which are exclusively vested, and shall be deemed always to have been so vested, in the Government of Belize:

Provided that nothing in this subsection shall affect the right of the owner of any private land beneath which any petroleum deposits are located to receive royalty from the Government, as provided in the Petroleum Act and the regulations made thereunder, existing at the commencement of the Belize Constitution (Sixth Amendment) Act.

(4) For the purpose of subsection (3) above, the terms "petroleum" and "minerals" shall have the meanings as are or may be ascribed to them by any law."

Other legislation

[198] Section 2 of the Mines and Minerals Act, 1988 (which supersedes the Minerals Act 1929), provides that the "entire property in and control of all minerals… (a) in any land in Belize…shall be deemed to be and always to have been vested in Belize".

[199] Section 3(1) of the Petroleum Act, 1991 provides as follows:

> "The entire property in and control over all petroleum and accompanying substances, in whatever physical state located on or under the territory of Belize or in areas of the Continental Shelf in which rights of exploration and exploitation are exercisable by Belize are hereby vested exclusively in the Government of Belize."

[200] Section 69 of the Inferior Courts Act provides for the establishment in each district declared to be an "alcalde jurisdiction district", of an "Alcalde Jurisdiction Court", exercising both civil and criminal jurisdiction in minor matters.

The Maya Land Rights case

[201] The first order made by Conteh CJ in the instant case was to reaffirm his earlier judgment in the **Maya Land Rights** case. Before going to a consideration of some of

the authorities referred to by the parties, it may therefore also be helpful to consider briefly Conteh CJ's judgment in that case.

[202] The claimants in that case were, like the respondents in the instant case, members of Maya Communities of southern Belize, the proceedings having been brought on behalf of members of the villages of Santa Cruz and Conejo. This is how Conteh CJ summarised the nature of the proceedings in that case (at paras 2 and 3 of his judgment given on 18 October 2007):

> "2. The claimants have brought the present proceedings seeking redress for alleged violations of sections 3, 3(a); 3(d); 4; 16 and 17 of the Belize Constitution. These violations, they claim, arise from the failure of the Government of Belize to recognize, protect and respect their customary land rights, which they claim are based on the traditional land use and occupation of the May people, including the people of Santa Cruz and Conejo villages. Maya customary land rights, they claim, constitute property, which like other property interests in Belize, are or should be protected by the Constitution. They claim that the proprietary nature of these rights are [sic] affirmed by Maya customary law, international human rights law and the common law. In particular, they claim that the customary land rights of the Maya people of Belize, including the claimants, have been recognized and affirmed as property by the Inter-American Commission on Human Rights in the case of the **Maya Indigenous Communities of the Toledo District v Belize**. (More on this later).
>
> 3. The claimants allege as well that the Government of Belize has consistently failed to recognize and protect their property rights in the lands they and their ancestors have traditionally used and occupied; and that this failure to accord the same legal recognition and protection to Maya customary property rights unlike that extended to other forms of property is discriminatory and a violation of sections 3 and 16 of the Belize Constitution."

[203] Among other reliefs, the claimants sought a declaration that the members of Santa Cruz and Conejo villages held "collective and individual rights in the lands and resources that they have used and occupied according to Maya customary practices and that these rights constitute 'property' within the meaning of sections 3(e) and 17 of

[the Constitution]". The issues agreed between the parties were set out by Conteh CJ (at para 12) as follows:

> "1. Whether there exists, in Southern Belize, Maya customary land tenure.
>
> 2. Whether the members of the villages of Conejo and Santa Cruz have interests in land based on Maya customary land tenure and, if so, the nature of such interests.
>
> 3. If the members of the villages of Conejo and Santa Cruz have any interests in lands based on Maya customary land tenure:
>
> a) Whether such interests constitute "property" that is protected by sections 3(d) and 17 of the Constitution.
>
> b) Whether any government acts and omissions violate the claimants' right to property in sections 3(d) and 17 of the Constitution.
>
> c) Whether any government acts and omissions violate the claimants' right to equality guaranteed by sections 3 and 16 of the Constitution.
>
> d) Whether any government acts and omissions violate the claimants' rights to life, liberty, security of the person and the protection of the law guaranteed under sections 3(a) and 4 of the Constitution."

[204] Much of the evidence given in the instant case, Including that given by Professor Wilk, Dr Grandia and Professor Jones, was also heard and considered by Conteh CJ in the **Maya Land Rights**. On the basis of evidence, the Chief Justice stated his conclusion on the central issue of whether Maya customary land tenure was in existence in southern Belize as follows (at paras 40 – 41):

> "40. On the state of the evidence in this case, I am, therefore, ineluctably bound to conclude that there does exist in the Toledo District Maya customary land tenure. This conclusion, I must say, is supported by the overwhelming evidence of persons with relevant knowledge and expertise of the area and the regime of land tenure there. I have at some length tried to state this evidence in this judgment.
>
> 41. I am therefore satisfied that on the evidence, the claimants have established that there is in existence in Southern Belize in the Toledo District, particularly in the villages of Santa Cruz and Conejo, Maya customary land tenure."

[205] Conteh CJ observed (at para 42) that he was "fortified in this conclusion" by the finding in the IACHR report (which he considered to be persuasive) that "the Mopan and Ke'kchi Maya people have demonstrated a communal property right in the lands that they currently inhabit in the Toledo District". He also found (at para 45) that, by subscribing to the Ten-Point Agreement in 2000, GOB "had given its **imprimatur** and explicit recognition of the rights of the Maya people to lands and resources in southern Belize based on their long-standing use and occupancy" (emphasis in the original). Clause 6 of that agreement, was, Conteh CJ observed further (at para 48), "an important admission by the defendants sufficient to dispose of this aspect of the case in the claimants' favour".

[206] On the second issue, the Chief Justice found that the members of the villages of Santa Cruz and Conejo were entitled to individual and communal rights, usufructuary in nature, in the lands in their villages; that these rights were unaffected by subsequent changes in sovereignty; and that their interests were deserving of constitutional

protection. In coming to this conclusion, the learned judge found support in Belize's international law and treaty obligations and general principles of international law.

[207] On the third issue, basing himself on the preamble, section 3(d) and section 17 of the Constitution, and applying the definition of 'property' in the Law of Property Act (section 2), Conteh CJ found as follows (at para 99):

> "In the light of the conclusions I have reached in this case regarding the first and second issues agreed by the parties for the determination of this case, I am of the considered view that the interests of the claimants on land based on Maya customary land tenure are clearly deserving of the protection afforded by the Belize Constitution to property. That is to say, these rights and interest [sic] of the claimants according to Maya customary land tenure constitute under the Constitution 'property' and should be so readily cognizable.

[208] In arriving at this conclusion, the Chief Justice stated (at para 100), he was "fortified" by the finding of the report of the IACHR in the **Maya Indigenous Communities** case, in which the Commission had concluded (at para 127) that "the Mopan and Ke'kchi Maya people have demonstrated a communal property right to the lands that they currently inhabit in the Toledo District". Therefore, the learned judge concluded (at para 102) –

> "…adopting the guidelines of the Privy Council in **The Queen v Reyes (2002) A.C.** [sic] that a generous and purpose [sic] interpretation is to be given to constitutional provisions protecting humans and that a court is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a mature society, I have no doubt that the claimants' rights to and interests in their lands in accordance with Maya customary land tenure, form a species of property that is deserving of the protection the Belize Constitution accords to property in general. There is no doubt this form of property, from the evidence, nurtures and sustains the claimants and their very way of life and existence."

[209] Conteh CJ went on to indicate (at para 110) that, although the evidence disclosed "substantial impairment and infringement" of the claimants' rights to and interests in their lands, he was not satisfied that that impairment "reaches the level of arbitrary deprivation or compulsory acquisition of the kind contemplated and provided for by the Constitution". However, the Chief Justice did find that there had been violations of the claimants' rights to equality, the protection of the law and against discrimination.

[210] In the result, the declarations and orders sought by the claimants on behalf of the members of the villages of Santa Cruz and Conejo were granted by the court. Although confined in its specific effect to these two villages, I consider the Chief Justice's judgment in this case, from which there was no appeal by GOB, to be a valuable and persuasive part of the background to the fresh consideration of the issues which the appeal in the instant case invites.

The authorities

[211] It would be impossible in any judgment of reasonable length (which, already, this judgment is not) to refer in detail to all of the extraordinary number of cases, from all over the common law world, to which we were referred by the parties (in particular, by the respondents). What follows is therefore necessarily a highly selective survey, which may nevertheless suffice to provide a reliable basis for a decision in this case.

[212] **Attorney-General for British Honduras v Bristowe & Hunter (1880) 6 App Cas 143** is of value for, among other things, the very helpful account of the history of the colony of British Honduras provided by the judgment of Sir Montague E Smith (see especially pages 146-148). Despite the fact that it had been a Spanish possession since 1540, the English, principally from Jamaica, began to resort to the territory for the purpose of cutting logwood from some time in the 18th century and English settlers began to settle there in 1759. There followed a period of intermittent outbreaks of war between Spain and England, resulting in peace treaties of 1763, 1783 and 1786, which

increasingly enlarged the privileges of the English settlers. The important point established by Sir Montague Smith's judgment (at page 148) is that, despite the fact that British Honduras was not formally annexed as a British colony until 1862, the fact that grants of land in the colony were made by the British Crown from as early as 1817, "affords ample evidence that in that year at least the Crown had asserted territorial dominion in Honduras".

[213] **Amadu Tijani v The Secretary, Southern Nigeria [1921) 2 AC 399**, is an oft cited reminder (or "caution", as Conteh CJ described it in the **Maya Land Rights** case, at para 25) of the necessity to approach the question of the existence of indigenous title to land without any conceptual pre-determination of what the notion of 'title' to land entails. This how Viscount Haldane put it (at pages 403 – 4):

> "As a rule, in the various systems of native jurisprudence throughout the empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where it exists…The title, such as it is, may not be that of an individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession…[This] involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading."

[214] We were referred to a number Australia and Canadian cases. Prominent among the former is the well-known leading case of **Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23** (**'Mabo'**), a decision of the High Court of Australia. In that case,

the court was concerned with the entitlement to the use of their traditional lands by the Meriam people, the indigenous inhabitants of the Murray Islands. In 1879, the Murray Islands were annexed to the colony of Queensland by Letters Patent. The issue in the case was whether, by the common law of Australia, the rights and interests of the Meriam people fell to be determined on the footing that their ancestors lost their traditional rights and interests in the land of the Murray Islands upon its annexation by the Crown to the colony of Queensland in 1879. By a majority (six to one), the High Court held that the common law recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.

[215] In coming to this conclusion, the court departed from a long line of previous authority to the effect that, when the Crown assumed sovereignty over an Australian colony, it became the universal and absolute beneficial owner of all the land therein, thereby extinguishing the interests of the indigenous inhabitants in the land. The operation of this doctrine, Brennan J observed (at para 28), "made the indigenous inhabitants intruders in their own homes and mendicants for a place to live". Thus, the learned judge concluded (at para 42):

> "Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights…brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale

of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands."

[216] The learned judge then went on to make a number of important observations on the "nature and incidents of native title", upon some of which GOB placed particular emphasis. Thus –

> "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory." (para 64)
>
> "…the rights and interests which constitute a native title can be possessed only by the indigenous inhabitants and their descendants. Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law." (para 65)
>
> "Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional title of that clan or group can be said to remain in existence." (para 66)
>
> "The native title may be surrendered on purchase or surrendered voluntarily, whereupon the Crown's radical title is expanded to absolute ownership, a plenum dominium, for there is then no other owner." (para 67)
>
> "Sovereignty carries the power to create and extinguish private rights and interests in land within the Sovereign's territory." (para 73)
>
> "However, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or the Executive." (para 75)
>
> "A clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title…or which creates a regime or control that is consistent with the continued enjoyment of native title…A fortiori, a law which reserves or authorizes the reservation of land from sale for the purpose of permitting indigenous inhabitants and other descendants to enjoy their native title marks no extinguishment." (para 76)

> "A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title." (para 81)
>
> "Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land…Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people." (para 83.6)

[217] In **Rose & others v Fuller & another (**SAD 253 of 2002, judgment delivered 8 June 2005), the Federal Court of Australia held that the requirement in section 223(1)(a) of the Native Title Act 1993 that a claimant to native title must show that the title, rights and interest claimed are possessed under traditional laws acknowledged and customs observed by aboriginal peoples did not require a continuing physical connection to the land to be shown: "It is possible for Aboriginal peoples to acknowledge and observe traditional laws and customs through periods during which, for one reason or another, they have not maintained a physical connection with the claim area."

[218] And, again from Australia, in **Mason v Tritton (1994) 34 NSWLR 372, 588**, Kirby P said this:

> "In the nature of Aboriginal society, their many deprivations and disadvantages following European settlement of Australia and the limited record keeping of the earliest days, it is next to impossible to expect that Aboriginal Australians will ever be able to prove, by record details, their presence genealogy back to the time before 1788. In these circumstances, it would be unreasonable and unrealistic for the common law of Australia to demand such proof for the establishment of a claim to native title. The common law, being the creation of reason, typically rejects unrealistic and unreasonable principles."

[219] GOB placed greatest reliance on the decision of the Supreme Court of Canada in **Delgamuukw v British Columbia [1997] 3 S.C.R. 1010** (**'Delgamuukw'**). In that

case, the court was concerned with, among other things, the nature of the protection given to aboriginal title by section 35 of the Constitution Act 1982, which provides as follows:

> "(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada."

[220] As Lamer CJ observed (at para 133), "S. 35(1) did not create aboriginal rights; rather it accorded constitutional status to these rights which were 'existing' in 1982". The learned judge went on to state the test for the proof of aboriginal title as follows (at para 143):

> "In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive."

[221] As regards the first criterion, Lamer CJ considered that, since aboriginal title is a burden on the Crown's underlying title, it could only crystallise as at the date when sovereignty was asserted.

[222] As regards the second criterion, Lamer CJ acknowledged (at para 152) that conclusive evidence of pre-sovereignty occupation may be difficult to come by. So, instead, "an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title". But there must also be a continuity between present and pre-sovereignty occupation, since the relevant time for determination of aboriginal title is at the time before sovereignty.

[223] Importantly, Lamer CJ continued (at para 153):

> "Needless to say, there is no need to establish 'an unbroken chain of continuity'…between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal people at the hands of colonizers who failed to respect aboriginal rights to land…In **Mabo**, supra, the High Court of Australia set down the requirement that there must be 'substantial maintenance of the connection' between the people and the land. In my view, this test should be equally applicable to proof of title in Canada."

[224] And finally, as regards the third criterion, exclusivity of occupation is required. Such exclusivity will vest in the aboriginal community "which holds the ability to exclude others from the lands held pursuant to that title…[t]he proof of title must, in this respect, mirror the right" (para 155).

[225] However, in the concurring opinion delivered on behalf of himself and L'Heureux-Dubé J, La Forest J suggested that the moment of sovereignty may not be the only significant factor for consideration in determining indigenous land rights (paras 197 – 8):

> "197. Third, as indicated above, the aboriginal right of possession is based on the continued occupation and use of traditional tribal lands. The Chief Justice concludes that the relevant time period for the establishment of 'aboriginal title' is the time at which the Crown asserted sovereignty over the affected land. I agree that in the context of generalized land claims, it is more appropriate, from a practical and theoretical standpoint, to consider the time of sovereignty as opposed to the time of first contact between an aboriginal society and Europeans. However, I am also of the view that the date of sovereignty may not be the only relevant moment to consider. For instance, there may have been aboriginal settlements in one area of the province but, after the assertion of sovereignty, the aboriginal peoples may have all moved to another area where they remained from the date of sovereignty until the present. This relocation may have been due to natural causes, such as the flooding of villages, or to clashes with European settlers. In these circumstances, I would not deny the existence of 'aboriginal title' in that area merely because the relocation occurred post-sovereignty. In other words, continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area.

> 198. Also, on the view I take of continuity, I agree with the Chief Justice that it is not necessary for courts to have conclusive evidence of pre-sovereignty occupation. Rather, aboriginal peoples claiming a right of possession may provide evidence of present occupation as proof of prior occupation. Further, I agree that there is no need to establish an unbroken chain of continuity and that interruptions in occupancy or use do not necessarily preclude a finding of 'title'. I would go further, however, and suggest that the presence of two or more aboriginal groups in a territory may also have an impact on continuity of use. For instance, one aboriginal group may have ceded its possession to subsequent occupants or merged its territory with that of another aboriginal society. As well, the occupancy of one aboriginal society may be connected with the occupancy of another society by conquest or exchange. In these circumstances, continuity of use and occupation, extending back to the relevant time, may very well be established: see Brian Slattery, 'Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at p. 759.'"

[226] La Forest J also observed (at para 195) that, although "it is self-evident that an aboriginal society asserting the right to live on its ancestral land must specify the area which has been continuously used and confined…when dealing with vast tracts of territory it may be impossible to identify geographical limits with scientific precision".

[227] **Delgamuukw** was followed in **Tsilhoqot'in Nation v British Columbia [2007] B.C.S.C. 1700** ('**Tsilhqot'in'**), in which Vickers J at first instance applied it to a claim for declarations of aboriginal title. On the requirement of continuity, the learned judge said this (at paras [547] – [549]):

> "[547] Continuity is not a mandatory element for proof of Aboriginal title. It becomes an aspect of the test where an Aboriginal claimant relies on present occupation to raise an inference of pre-sovereignty occupation of the claimed territory. Establishing continuity may be difficult for some claimants where their occupation shifts due to colonial settlement, disease and other post-sovereignty conditions.
>
> [548] Where an Aboriginal group provides direct evidence of pre-sovereignty use and occupation of land to the exclusion of others, such evidence establishes Aboriginal title. There is no additional requirement that the claimant group show continuous occupation from sovereignty to the present-day. Upon the assertion of sovereignty, Aboriginal title

> crystallized into a right at common law, and it subsists until it is surrendered or extinguished.
>
> [549] Aboriginal claimants do not need to establish an unbroken chain of continuity between present and prior occupation: **Van der Peet**, para. 65. Aboriginal occupation may have been disrupted 'perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title': **Delgamuukw** (S.C.C.), para 153. Claimants must demonstrate that a substantial connection between the people and the land has been maintained: **Delgamuukw** (S.C.C.) 154."

[228] In **R v Van der Peet [1996] 2 S.C.R. 507**, the Supreme Court of Canada had held (by a majority) that the protection given by section 35(1) extended to the practices, customs and traditions of aboriginal peoples prior to the first European contact. However, the court expressly reserved its position with regard to claims to aboriginal rights brought on behalf of the Métis, that is, people of mixed Indian and European ancestry, who over time developed separate and distinct cultural identities. Métis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers became pre-eminent.

[229] The point subsequently came up for decision in **R v Powley [2003] 2 S.C.R. 207**, in which the respondents, who were Métis, claimed an aboriginal right to hunt for food. (As Lamer CJ explained in **Delgamuukw** (at para 138), aboriginal rights include rights in the nature of "practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right", on the one hand, and "aboriginal title itself", on the other.) While upholding the basic elements of the **Van der Peet** test, the court considered (at para [14]) that it was necessary to "modify certain elements of the pre-contact test to reflect the distinctive history and post-contact ethnogenesis of the Métis". The inclusion of the Métis in section 35 was not (and could not be) traceable to their pre-contact occupation of Canadian territory, but rather, "represents Canada's Commitment to recognize and value the distinctive Métis cultures" (para [17]). The court accordingly considered it necessary to modify the "pre-contact focus" of the **Van der Peet** test in the case of Métis claimants (para [18]):

> "Section 35 requires that we recognize and protect those customs and traditions that were historically important features of the Métis communities prior to the time of effective European control, and that persist to the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post contact foundation of their aboriginal rights."

[230] In the result, the respondents claim to an aboriginal right to hunt for food was upheld by the court (para [45]):

> "Although s. 35 protects 'existing' rights, it is more than a mere codification of the common law. Section 35 reflects a new premise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities. A certain margin of flexibility might be required to ensure that aboriginal practices can evolve and develop over time, but it is not necessary to deprive or to rely on that margin in this case. Hunting for food was an important feature of the Sault Ste. Marie Métis community, and the practice has been continuous to the present. [The Powleys] claim a Métis aboriginal right to hunt for food. The right claimed by the Powleys falls squarely within the bounds of the historical practice grounding the right."

[231] The respondents also drew our attention to a number of other Commonwealth authorities, to make the point that there is in fact no uniform approach to the problem of recognition of indigenous title.

[232] Thus, as regards proof of ancestry for the purpose of establishing indigenous title, in **Agi Anak Bunkong and others v Ladang Sawit Bintulu Sdn Bhd and others** (File No 22-93-2001-111(1), judgment delivered 21 January 2010), the High Court of Malaysia (Wong Dak Wah J) cited with approval (at page 11) the statement of Kirby P in **Mason v Tritton**, which I have already quoted para [116] above.

[233] Also in Malaysia, in **Nor Anak Nyawai & others v Barnes Pulp Plantation Sdn Bhd & others** [**2001] 6 MLJ 241**, the High Court had to deal with a claim to native customary rights over certain lands, although it was not disputed that the plaintiffs had only moved into the disputed area of their traditional territory in 1955, or 46 years

previously. After considering the evidence of the activities carried on by the plaintiffs in the disputed area, Ian Chin J concluded as follows (at page 258):

> "In my view, I am satisfied that the native customary rights which I have referred to earlier were exercised by the plaintiffs and their ancestors in the disputed area. Mr Tan had contended that the plaintiffs had not produced any direct evidence that their ancestors had exercised those rights. How is it possible to produce a witness who can testify to what he did or saw some 200 years ago, which is necessarily the case if Mr Tan's contention is to be upheld, was not gone into [sic]. If the present generation can prove that they are practising which historians described as having been practised 200 years ago, then that is sufficient proof that such native customary rights had been practised 200 years ago. The authority for this proposition can be found in *Halsbury's Laws* Vol 12 (4th Ed) para 422, which says:
>
> > '…as a general rule proof of the existence of the custom as far back as living witnesses can remember is treated, in the absence of any sufficient rebutting evidence, as proving the existence of the custom from time immemorial.'"

[234] And again in Malaysia, in **Kerejaan Negeri Selangor & Ors v Sagong Bin Tasi & Ors (2005) 6 MLJ 289**, the Court of Appeal (having accepted Viscount Haldane's statement in **Amodu Tijani** as "the definitive position at common law") said this (Gopal Sri Ram J.C.A., at page 312):

> "The precise nature of such a customary title depends on the practices and the usages of each individual community…What the individual practices and usages in regard to the acquisition of customary title is [sic] a matter of evidence as to the history of each particular community…It is a question of fact to be decided…by the primary trier of fact based on his or her belief of where on the totality of the evidence, the truth of the claim lies."

[235] In **United States v Santa Fe Pacific Railroad Company (314 U.S. 339, 1941)**, the Supreme Court of the United States determined (at page 345) that "[o]ccupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact". (See also **Cramer et al v United States, 261 U.S. 219, 232**

(1923), where the court referred to "the general doctrine …laid down by this court that the Indian tribes are wards of the nation", and as such entitled to the protection of the federal government.)

[236] And finally on the question of establishing indigenous title, I should mention **Alexkor Limited & The Government of Republic of South Africa v The Richtersveld Community and others 2003 (12) BCLR 1301 (CC) (S. Afr.)**, a decision of the Constitutional Court of South Africa. Although the test to be applied in establishing indigenous title did not arise in that case, the respondents nevertheless rely on some statements of a general nature made by the court. Thus, it was observed (at para [34]) that –

> "Courts in other jurisdictions have in recent times been faced with the complex and difficult problems of dealing, after the event, with the injustices caused by dispossessions of land, or rights in land, from indigenous inhabitants by later occupiers of the land in question…such dispossessions invariably took place in a racially discriminatory manner. They often occurred centuries ago, when the legal norms and principles of the later occupiers differed substantially from those of today."

[237] However, the court pointed out (at para [35]), the situation of South Africa "differs substantially from that of [other] jurisdictions…in that both our interim Constitution and the Constitution have dealt expressly with this problem". The court went on to comment on the relationship between indigenous law and the Constitution (at para [51]):

> "[51] While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bills of Rights.

Our Constitution

> "… does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights]."[16]

It is clear, therefore, that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law."

[238] Before leaving the authorities, I should also mention the additional authorities cited by the parties on the issues raised by the respondents under sections 3(a) and 16 of the Constitution.

[239] The first of GOB's cases is **Ong Ah Chuan v Public Prosecutor** [1981] AC 648, 670, an appeal from Singapore, in which the Privy Council considered that, in a constitution founded on the Westminster model, phrases such as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, "refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution…" In **Attorney General of Trinidad and Tobago v McLeod and another** [1984] 1 All ER 694, 701, Lord Diplock observed of a provision in similar terms to section 3(a) of the Constitution that, in respect of legislation which allegedly violated the constitution, access to justice for the purpose of challenging the validity of the law "is itself the 'protection of the law' to which all individuals are entitled under [the constitution]". And lastly, in **Nielsen v Barker** (1982) 32 WIR 254, 281, Massiah JA in the Court of Appeal of Guyana made the point that 'discrimination' under

[16] Section 39(3) of the Constitution of South Africa

the equivalent provision of section 16 of the Constitution "does not bear the wide meaning assigned to it in a dictionary". Rather, its meaning is confined to the "precise and limited connotation" of the word contained in the constitution.

[240] The respondents, for their part, referred us to number of cases. Firstly, a pair of Canadian cases, **Eldridge v. British Columbia [1997] 3 S.C.R. 624**, in which the Supreme Court of Canada held that the guarantee of equality under the law in section 15 of the Charter of Rights and Freedoms placed obligations on the state to allocate resources to ensure that disadvantaged groups, such as the deaf, have full advantage of public benefits; and **Dunmore v Ontario [2001] 3 S.C.R. 1016**, in which it was held that, although ordinarily the Charter did not oblige the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms, in order to make the right of freedom of association guaranteed by section 2(d) of the Charter meaningful, the law might impose such an obligation on the state to protect the rights of unprotected groups of workers in certain cases. We were also referred to cases from New Zealand and Malaysia, which imposed a duty on the state to provide active protection of the rights of indigenous peoples, as well as the jurisprudence of the Inter-American system, including the **Maya Indigenous Communities** case, in which the IACHR had held (at para 132) that GOB's obligation to recognise and guarantee the enjoyment by the Maya people of their communal right to property "necessarily requires the State to effectively delimit and demarcate the territory in which the Maya people's right extends and to take the appropriate measures to protect the right of the Maya people in their territory, including official recognition of that right".

The international dimension

[241] One of the explicit bases on which the respondents invite this court to affirm Conteh CJ's judgment is that the judgment, like his earlier judgment in the **Maya Land Rights** case, is consonant with contemporary international norms concerning the rights to land of indigenous peoples. To this end, Mrs Moore provided us with a very helpful summary (Appendix A to the respondents' Skeleton Arguments filed on 25 February

2011) of the relevant international instruments. The information contained in this section of the judgment is largely derived from that document.

[242] Belize is a member of the Organization of American States ('OAS') and, as such, a party to the OAS Charter. The IACHR is an organ of the OAS, and, according to article 1 of the Statute of the IACHR[17], was created "to promote the observance and defense of human rights and to serve as consultative organ of the [OAS]…" Article 2 provides that, for the purposes of the Statute, human rights are understood to be the rights set forth in the American Convention on Human Rights ('the American Convention') and the American Declaration of the Rights and Duties of Man ('the American Declaration').

[243] In **R v Reyes [2002] UKPC 11**, para 27, the Privy Council confirmed that, "[b]y becoming a member of the [OAS] Belize proclaimed its adherence to rights which, although not listed in the charter of the Organization, are expressed in the Declaration". The right to own private property is enshrined in article XXIII of the American Declaration[18].

[244] The United Nations Declaration on the Rights of Indigenous Peoples ('the UNDRIP') was adopted by the General Assembly on 13 September 2007. Article 2 states that "[i]ndigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity". Article 8(2) provides that states shall provide effective mechanisms for prevention of, and redress for, among other things, "(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources". Article 26(1) speaks to the right of indigenous peoples to "the lands, territories and resources which they have traditionally owned, occupied or otherwise, used or acquired", while article 26(3)

[17] G.A.Res. 447, Inter-Am C.H.R., 9th Sess. (1979), 22 May 2001, OAS, Ser. L/V/1.4 rev. 8
[18] 1948, OEA/Ser. L.V./11.82, doc. 6 rev. 1 (1992)

mandates States to "give legal recognition and protection to these lands, territories and resources…with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned".

[245] Belize acceded to the International Covenant on Civil and Political Rights ('the ICCPR') on 10 June 1996. Article 27 provides as follows:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

[246] In 'General Comment No. 23 (50): The Rights of Minorities' (Art. 27) (para 7)[19], the United Nations Human Rights Committee observed that:

> "Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law."

[247] Article 14 of the International Labour Organization ('the ILO') Convention (No 169) on the Rights of Indigenous Peoples states that:

> "1. The rights of ownership and possession of the peoples concerned over the land which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively used by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
>
> 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession."

[19] UN Doc. CCPR/C/21/Rev. 1/Add 5 (April 6, 1994)

[248] The 'Proposed American Declaration on the Rights of Indigenous Peoples'[20] was approved by the IACHR on 26 February 1997. Article XVIII provides as follows:

> "1) Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.
>
> 2) Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as the use of those to which they have historically had access for their traditional activities and livelihood.
>
> 3) Subject to 3.ii, where property and user rights of indigenous people arise from rights existing prior to the creation of those states, the states shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptive and indefeasible.
>
> 4) Such titles may only be changed by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature of attributes of such property."

[249] And, finally in this limited survey of the international instruments, I should mention the International Convention on the Elimination of All Forms of Racial Discrimination[21], which requires States to take measures to eradicate all manifestations of racial discrimination. In 1997, the United Nations Committee on the Elimination of All Forms of Racial Discrimination called upon States[22] -

> "to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories."

[20] 26 February 1997, OEA/Ser/L/V.11.95 Doc. 6
[21] 4 January 1969, UN Doc. A/6014 (1966) 660 U.N.T.S.
[22] U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation XXIII: Rights of Indigenous Peoples, para 5, U.N. doc. A/52/18 Annex V (Aug 18, 1997)

[250] In correspondence dated 9 March 2007, the Chairman of the Committee for the Elimination of Racial Discrimination wrote to the then Permanent Representative of Belize to the United Nations, to indicate that the Committee "is preoccupied by reports regarding privatization and leasing of land without the prior consultation or consent of the Maya people, as well as the granting of concessions for oil development, logging and the production of hydro-electricity".

[251] On 31 August 2001, the Inter American Court delivered its judgment in the case of **Mayagna (Sumo) Awas Tingni Community v Nicaragua** (79 Inter-Am C.H.R. SER. C (2001)) ('**Awas Tingni'**). The claim in that case was that the State of Nicaragua had violated the American Convention on Human Rights by its failure to demarcate the communal lands of the Awas Tingni Community and to adopt effective measures to ensure the property rights of the community to its ancestral and natural resources. Further, that the State had granted a concession on community lands without its assent and had failed to ensure an effective remedy in response to the community's protests regarding its property rights.

[252] The Inter American Court considered that Article 21 of the American Convention, which declares the right of everyone to the use and enjoyment of his property, fell to be interpreted "in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua" (para 148). Accordingly, the "communitarian tradition" of property ownership in indigenous communities requires the recognition of connection with the land as "the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival" (para 149).

[253] While Nicaragua had recognised communal property of indigenous peoples, it had not regulated "the specific procedure to materialize that recognition", despite not objecting to the claim of the Awas Tingni Community to be declared owner. Hence, the court concluded (at para 153):

> "153. It is the opinion of the Court that, pursuant to article 5 of the Constitution of Nicaragua, the members of the Awas Tingni Community gave a communal property right to the lands they currently inhabit, without detriment to the rights of other indigenous communities. Nevertheless, the Court notes that the limits of the territory on which that property right exists have not been effectively delimited and demarcated by the State. This situation has created a climate of constant uncertainty among the members of the Awas Tingni Community, insofar as they do not know for certain how far communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property. Based on this understanding, the Court considers that the members of the Awas Tingni Community have the right that the State
>
> a) Carry out the delimitation, demarcation, and titling of the territory belonging to the Community; and
>
> b) Abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities.
>
> Based on the above, and taking into account the criterion of the Court with respect to applying article 29(b) of the Convention (supra para 148), the Court believes that, in light of article 21 of the Convention, the State has violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property, and that it has granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled."

[254] Accordingly, the court went on to direct that Nicaragua "adopt the legislative, administrative and any other measures required to create an affective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores". This process was ordered to be completed within a maximum term of 15 months, with full participation by the Awas Tingni Community, "and taking into account its customary law, values, customs and mores" (para 164).

[255] The petitioners' claim in the **Maya Indigenous Communities** case, to which I have already made reference (paras [22] - [23] above), was in respect of alleged violations of their rights under the American Declaration, including the rights to life (Article I), equality before the law (Article II), religious freedom and worship (Article III), family and to protection thereof (Article VI), to a fair trial (Article XVII) and to property (Article XXIII). In particular, the petitioners claimed that the State had granted logging concessions and oil concessions on Maya lands without meaningful consultations with the Maya people and in a manner that caused substantial environmental harm and threatened long term and irreversible damage to the natural environment upon which the Maya depend. The petitioners also complained of a broader failure on the part of the State to (a) recognise and protect the rights of the Maya people to land in the Toledo District, based on their customary land use and occupancy; and (b) provide adequate judicial protection for the violations of their rights.

[256] In determining the case, the IACHR observed (at para 85) that "the American Declaration constitutes a source of international legal obligation for all member States of the [OAS], including Belize". The IACHR also considered (at para 88) that it should interpret and apply the relevant provisions of the American Declaration "in light of current developments in the field of international human rights law, as evidenced by treaties, custom and other relevant sources of international law".

[257] The IACHR noted (at para 93) that, while GOB had raised issues concerning "the dates of establishment of particular Maya villages within the Toledo District", it had not presented any evidence to contradict or otherwise dispute "the long-standing ancestral connections" of the petitioners to the Maya people of southern Belize. Indeed, the IACHR pointed out, information published by GOB on its official website appeared to support the petitioners' claim (a point to which I shall return in due course). On this basis, the IACHR found that the petition was in fact lodged "on behalf of the members of a people indigenous to the territory that presently comprises the Toledo district of Southern Belize". In this regard, the IACHR observed (at para 94, footnote 80) that,

"[w]ithout limiting the terms and characteristics by which indigenous peoples may be identified, the Commission notes that prevailing authorities include among such peoples those who are descendent from the populations that inhabited the territory prior to colonization and who retain some or all of their own traditional institutions". Specific reference was made to Article 1 of the ILO Convention (No 169), which states that the Convention applies to "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the region belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political status".

[258] It was also noted that, in the context of the Inter-American human rights system, the IACHR had "long recognized and promoted respect for the rights of indigenous peoples in this Hemisphere" (para 96). Accordingly, the IACHR considered it necessary, in deciding upon the petitioners' complaints, to "afford due consideration to the particulars norms and principles of international human rights law governing the individual and collective interests of indigenous people …" (para 98).

[259] It is against this background, therefore, that the IACHR concluded "that the members of the Mopan and Ke'kchi Maya Communities of the Toledo District of Southern Belize constitute an indigenous people whose ancestors inhabited the Toledo District prior to the arrival of the Europeans and the colonial institutions that gave way to the present State of Belize" (para 122).

[260] Notwithstanding GOB's submissions on the "significant break in continuity of occupation of the area", the IACHR was satisfied that the Mopan and Kekchi people had demonstrated a communal property right to lands that they currently inhabit in the Toledo District:

> "Those rights have arisen from the longstanding use and occupancy of the territory by the Maya people, which the parties have agreed pre-dated European colonization, and have extended to the use of the land and its resources for purposes relating to the physical and cultural survival of the Maya communities." (para 127)

[261] In reaching this conclusion, the IACHR made it clear that it had "taken into account the State's admission in the Ten-Point Agreement, which, together with the State's more general recognition of the long-standing presence of the Maya people in the Toledo District, constitutes formidable evidence of an enduring connection between the Maya people and lands in the Toledo District" (para 128). I have already set out (at para [23] above) the IACHR's recommendations and there is no need to repeat them here.

Some preliminary conclusions on the establishment of indigenous title

[262] It seems to be clear that the actual content of the common law rules governing the recognition of indigenous title in the former British colonies was considerably influenced by their differing histories and constitutional structures. If there came, over time, to be a unifying feature in the various approaches, it was provided by the seminal judgment of Viscount Haldane in **Amadu Tijani**, which established the necessity to view systems of indigenous title as *sui generis*. Thus, in determining whether indigenous title exists in a particular community or region, it is neither necessary nor helpful to import preconceived notions of rights to land from the legal system of the coloniser.

[263] Although proof of the existence of 'pre-sovereignty' occupation, which is continuous to the present day ('the doctrine of continuity') has been an essential feature of the process of determining indigenous rights in some jurisdictions, important qualifications are to be found in the cases from the various jurisdictions to which we were referred. The cases in fact seem to me to engage a more general principle of recognition of indigenous rights to land, based on the law, history and traditions of the

particular jurisdiction, informed by developed international standards of fairness, and not on any inflexible, *a priori* rules regarding the ascertainment of native title.

[264] Taking the case of Australia first, it will be recalled that Brennan J in **Mabo** had located the rights of the Meriam peoples to their traditional lands in the broad, general principle that it is "contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands" (para 42). There appears to be no controversy that, as Brennan J stated (at para 65), "the rights and interests which constitute a native title can be possessed only by the indigenous inhabitants and their descendants". But, as Toohey J observed in his concurring judgment (at para 39) –

> "It is the fact of the presence of indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection of rights. Presence would be insufficient to establish title if it was coincidental only or truly random, having no connection with or meaning in relation to a society's economic, cultural or religious life. It is presence amounting to occupancy which is the foundation of the title which attracts protection, and it is that which must be proved to establish title."

[265] **Rose & others v Fuller & another** (para [117] above) demonstrates that, even against the backdrop of a statutory requirement that a claimant to native title must show that the rights and interest claimed are possessed under traditional laws and customs observed by aboriginal peoples, the rights and interest claimed can be established, despite periods during which, for one reason or another, their physical occupation of the lands claimed has been discontinuous.

[266] And then, as regards proof of ancestry, there is Kirby P's robust reminder in **Mason v Tritton** (para [116] above) that indigenous peoples cannot be expected to prove, by detailed records, their precise genealogy "back to the time before 1788". The

Australian courts therefore appear to regard the ascertainment of the right to indigenous title as an exercise which, though subject to clearly stated principles, is a matter grounded in reason, hence Kirby P's further remark in **Mason v Tritton** that "t]he common law, being the creation of reason, typically rejects unrealistic and unreasonable principles".

[267] Turning to Canada, **Delgamuukw**, in which Lamer CJ writing for the majority concluded that the relevant time period for the establishment of indigenous title is the time at which the Crown asserted sovereignty over the affected land, is, of course, the high water mark of GOB's case. But the principle is not unqualified and Lamer CJ himself acknowledged that, in order to establish indigenous title, "there was no need to establish 'an unbroken chain of continuity'…between present and prior occupation". No doubt recognising the stark realities of the colonisation process, the Chief Justice went on to point out that the occupation and use of their lands by the indigenous people "may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title". Against this background, too strict an adherence to the requirement of continuity "would risk undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal people at the hands of colonizers who failed to respect aboriginal rights to land" (para 53 of the judgment, set out at para [121] above). (Lamer CJ had made the same point in almost identical terms in the earlier case of **R v Côté** [1996] 3 S. C. R. 139, para 53, observing that "…the respondent's proposed interpretation risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies" and quoting in support paragraph 42 of Brennan J's judgment in **Mabo**.)

[268] The concurring opinion of La Forest J and L'Heureux-Dubé J also suggested that the moment of sovereignty might not be "the only relevant moment to consider" in determining indigenous land rights, given the possibility of relocation indigenous

peoples, which "may have been due to natural causes, such as the flooding of villages, or to clashes with European settlers" (see para [123] above). Vickers J would subsequently make the same point in **Tsilohqot'in**, pointing out that there was no need for aboriginal claimants "to establish an unbroken chain of continuity between present and prior occupations" (para [125] above).

[269] Still in Canada, the decision in **Powley** is a notable example of the fact that the rules for the establishment of indigenous title will yield in a proper case to unique features in the history of the indigenous group in question, in that case the "post contact foundation" of the aboriginal rights of the Métis. That was a case in which the court considered it necessary to "modify certain elements of the pre-contact test to reflect the distinctive history and post-contact ethnogenesis of the Métis".

[270] It therefore seems to me that the Canadian jurisprudence on the establishment of indigenous title, even while laying down rules of general application, nevertheless imports and preserves a degree of flexibility, as a response in particular cases to the actual historical experience of various groups. That flexibility, it further seems to me, is born of the necessity to give effect to the letter and spirit of section 35(1) of the Constitution Act, the objective of which is, as it proclaims, to recognise and affirm the "existing aboriginal and treaty rights of the aboriginal peoples of Canada".

[271] Cases from other Commonwealth jurisdictions, Malaysia notable among them, also make it clear that the establishment of indigenous title demands a considerable degree of flexibility, bearing in mind the broad span of years and territory which is invariably involved in such an enquiry (La Forest J had made a similar point in his concurring judgment in **Delgamuukw**, observing - at para 195 - that, in seeking to establish indigenous title, "when dealing with vast tracts of territory it may be impossible to identify geographical limits with scientific precision"). Thus in **Nor Anak Nyawai**, for example, it was considered to be sufficient that the present generation of indigenous peoples, who had only come into the particular area in 1955, could prove that their

current practices were consonant with that which, according to the historians, was being practised 200 years previously.

[272] Outside the Commonwealth, Professor McNeil's unchallenged evidence was that in the USA, the case law indicated "an even more flexible approach" and that "the occupation required for title must have been 'for a long time', but it need not have pre-dated European or even American assertion of sovereignty" (para 24, of his affidavit, para [68] above).

[273] Notwithstanding all of the above, there is no dispute between the parties to this appeal, that, as Brennan J put it in **Mabo**, "Sovereignty carries the power to create and extinguish private rights and interests in land within the Sovereign's territory" (para 73). However, in order for the exercise of the sovereign power, whether by the executive or the legislature, to be effective, a "clear and plain intention to do so" must be demonstrated (see Brennan J, at para 75). A law which merely regulates the enjoyment of native title, or creates a regime that is consistent with the continued enjoyment of native title, as, for instance, "a law which reserves or authorizes the reservation of land from sale for the purpose of permitting indigenous inhabitants and other descendants to enjoy their native title" does not amount to an extinguishment of such title (para 76) (see also, for the identical Canadian position, **R v Sparrow [1990] 1 S.C.R. 1075**, especially per Dickson CJ and La Forest J at para 37). However, no question of extinguishment arises on this appeal, there having been no appeal from Conteh CJ's clear finding in the court below against GOB's contention that the indigenous rights claimed by the respondents had been extinguished (see para 120 of the judgment).

[274] And then there is the international dimension. It will be recalled that in **Mabo**, Brennan J had referred to what he described as "[t]he expectations of the international community" (para 42). The learned judge pointed out that Australia's accession to the ICCPR had brought to bear on the common law the powerful influence of the covenant and the international standards imported by it. In the case of Belize, explicit sanction for

a similar approach, albeit in respect of the interpretation of legislation, is to be found in section 65(b) of the Interpretation Act, which provides as follows:

> "The following shall be included among the principles to be applied in the interpretation of Acts where more than one construction of the provision is reasonably possible, namely…
>
> … (b) that a construction which is consistent with the international obligations of the Government of Belize is to be preferred to a construction which is not…"

[275] In **Reyes**, as is well known, the Privy Council was concerned with the constitutionality of the mandatory sentence of death provided for by section 102 of the Criminal Code of Belize. In coming to the conclusion that the mandatory sentence was in fact unconstitutional, Lord Bingham of Cornhill observed (at para 27) that "[i]n considering what norms have been accepted by Belize as consistent with the fundamental standards of humanity, it is relevant to take into account the international instruments incorporating such norms to which Belize has subscribed…" The instruments so considered included the United Nations Declaration on Human Rights, the ICCPR, the American Declaration and the American Convention. However, Lord Bingham continued (at para 28):

> "This does not mean that in interpreting the constitution of Belize effect need be given to treaties not incorporated into the domestic law of Belize or non-binding recommendations or opinions made or given by foreign courts or human rights bodies. It is open to the people of any country to lay down the rules by which they wish their state to be governed and they are not bound to give effect in their constitution to norms and standards accepted elsewhere, perhaps in very different societies. But the courts will not be astute to find that a constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the constitution, that it does."

[276] It therefore seems to me to be appropriate – indeed, required – that, in considering the proper approach to the establishment of indigenous title in Belize, the court should have regard to the ways in which the rights of indigenous peoples are

characterised and protected in the various international instruments to which I have already referred. I accordingly think that Conteh CJ was entirely correct, both in the **Maya Land Rights case** and in his judgment under appeal in the instant case, to take into account Belize's international law and treaty obligations, as well as general principles of international law.

[277] Hence, it is relevant to the issues raised by the instant case to have in mind, in my view, Article 26(1) of the UNDRIP, which speaks to the right of indigenous peoples to "the lands, territories and resources which they have traditionally owned, occupied or otherwise, used or acquired", and Article 26(3), which mandates States to "give legal recognition and protection to these lands, territories and resources…with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned". As Conteh CJ observed in the **Maya Land Rights case** (at para 132), Article 26 is "of especial resonance and relevance in the context of this case, reflecting, as I think it does, the growing consensus and the general principles of international law on indigenous peoples and their lands and resources".

[278] It is well to bear in mind, I think, that it has not always been so. The real significance of Brennan J's path-breaking judgment in **Mabo**, in my view, was that it helped to liberate the jurisprudence in this area of the law from the mindless paternalism that had characterised it in a previous age. As Brennan J reminded us that it was (at para 36) it was only 150 years ago, in **Advocate-General of Bengal v Ranee Surnomoye Dossee (1863) 2 Moo N S 22, 59**, that Lord Kingsdown had stated, no doubt without objection at the time, that "[w]here Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only laws, but the sovereignty of their own State; and those who live among them and become members of their community become also partakers of, and subject to the same laws". More than 50 years later, well into the 20th century, Lord Kingsdown's characterisation of indigenous societies found an echo in Lord Sumner's well-known justification of the denial of traditional rights to land of indigenous peoples in **In re Southern Rhodesia [1919] AC 211, 233 – 234**:

> "The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them."

[279] Brennan J's ringing renunciation in **Mabo** of the discriminatory and now discredited doctrines of that still not too long past age was explicitly premised in part on the evolution in the modern era of new international norms regarding respect for the rights of indigenous peoples. And now so must be, it seems to me, the explicit recognition of the rights of indigenous peoples in the constitutions of states as disparate in history, culture, tradition, resources, size and geographical location as, for example, Canada, South Africa and Belize[23].

[280] Which is the point that **Alexkor** makes in relation to South Africa, a country in which the old ways of seeing things have patently – and famously - given way to the new. The dispossessions of the past are now in the past and the recognition of the rights of indigenous peoples, once purely a matter for the common law, must now be regarded as "an integral part of our law", depending, like all other law, on the Constitution for its "ultimate force and validity" (see para [137] above).

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[23] In addition to Belize, States in the Latin American region which provide constitutional and/or other legal recognition of the rights of indigenous peoples include Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico and Nicaragua. Post **Mabo**, the federal government of Australia passed The Native Title Act 1993. Both Malaysia and the Philippines also provide constitutional protection to indigenous peoples - see S. James Arraya & Robert A. Williams Jr., 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System', 14 HARV. Hum. RTS.J. 33 (200).

Resolution of the case

Issue (i) – what is the appropriate test for ascertaining indigenous title?
Issue (ii) - did Conteh CJ come to the correct conclusion on the evidence?

[281] Because of the considerable overlap between these two issues, it may be convenient to take them together. GOB's primary contention on the first issue – and, indeed, on the entire appeal – is that the respondents have not satisfied the test for ascertainment of indigenous title, in particular as laid down in **Delgamuukw**, that is, they were in occupation of the lands in respect of which their claim has been brought "at the time at which the Crown asserted sovereignty over the land subject to the title" (**Delgamuukw**, per Lamer CJ at para 144). As Conteh CJ put it in his judgment in the court below (at para 24), the "nub" of GOB's case on this point was that "prior to and upon the assertion of Spanish sovereignty over the Settlement, now known as Belize in 1540 and in any event upon the assertion of British sovereignty…the ancestors of and the inhabitants of the villages the claimants purport to represent did not occupy lands in the Toledo District nor practice or enjoy customary land rights over those lands".

[282] There is, I think, some justice in GOB's complaint that Conteh CJ does not appear to have made any specific finding on the applicability of the **Delgamuukw** test for the ascertainment of indigenous title, but approached the matter instead solely by reference to the alternative question; that is, whether the respondents were able to "show links to and with the original inhabitants of the lands occupied in Toledo District for the purposes of establishing continuity to ground their claim to customary rights and interests in these lands".

[283] However, even in Canada, as I have attempted to demonstrate, the restrictive test of pre-sovereignty occupation is not invariably applicable. In any event, while it may be possible to justify that test by reference to historical and other factors in play in that jurisdiction, it seems to me to be wholly inappropriate to the situation of Belize, which has a different history in a number of significant respects. As Lamer CJ pointed out in **Delgamuukw** (at para. 11), there was little European influence in western

Canada until 1778 and the finding of the trial judge in that case was that the time of direct contact with the aboriginal peoples in the claimed territory was in fact as late as 1820. This is to be contrasted with Belize, where the original Spanish sovereignty dates back over 250 years before that, thus exponentially increasing the difficulty of satisfying the strict version of the **Delgamuukw** test in this jurisdiction. It would, in my view, be wholly "unrealistic and unreasonable", to borrow Kirby P's stirring language, for the common law of Belize, a member of the Inter-American system and an adherent to a number of international instruments designed to afford special protection to the rights of indigenous peoples, to adopt such a restrictive test.

[284] In seems to me further that, precisely because of the history of forced migrations among the Maya that the evidence on both sides of this case disclosed, the adoption of too strict a test for the ascertainment of indigenous title might risk undermining the very purpose of one of the stated aims of the Constitution, which is "[to] protect the identity, dignity and social and cultural values of Belizeans, including Belize's indigenous peoples". This would undoubtedly, in my view, have the tendency, as Lamer CJ put it in **Delgamuukw** (para 153), to perpetuate "the historical injustice suffered by [the indigenous] people at the hands of colonizers who failed to respect [indigenous] rights to land…"

[285] What the material that has been placed before the court by the parties demonstrates is that there has been no uniform solution to the problem of establishing indigenous title, whether at common law or in the international instruments. Although each jurisdiction has developed somewhat differently, there is nevertheless a discernible common feature, which is that indigenous peoples' rights have been held in a wide variety of circumstances to derive from their longstanding use and occupancy of traditional lands, in accordance with their traditional customary laws and practices. This is in fact the test which the IACHR applied in the case of **Maya Indigenous Communities** case (see para [158] above).

[286] But, the question remains, was it open to Conteh CJ to determine the matter in the respondents' favour on the basis which he did, that is, that they had proved "a satisfactory **historical, ancestral and cultural continuity and links** [with] the original inhabitants of what is now Toledo District…" (para 92, emphasis in the original)? It was held in **Mabo**, and GOB did not appear to dispute this, that one way of establishing a right to indigenous title is to show that the current claimants of the lands in question are descendants of the original indigenous inhabitants. Further, it was accepted in **Delgamuukw** that present occupation can be relied on as proof of occupation pre-sovereignty, provided that there is "a continuity between present and pre-sovereignty occupation" (per Lamer CJ, at para 143). It therefore seems to me that the correctness of Conteh CJ's conclusion on this question is entirely a matter of evidence.

[287] In this regard, Conteh CJ referred, firstly (at paras 93-94), to the evidence of Dr Grandia, who testified that, at the time of contact with the Spanish, "both the Mopan and the Manche Ch'ol indisputably lived in the Toledo District" and that, upon their forcible resettlement by the Spanish in Guatemala, "[t]he Q'eqchi intermixed with both these groups, blurring the distinction between them". Further, Dr Grandia stated, "the political and demographic chaos caused by the Spanish conquest resulted in widespread ethnic intermixing and cultural fluidity among all Maya groups" (see paras 16-18 of Dr Grandia's affidavit, para [61] above).

[288] Secondly, Conteh CJ referred (at paras 95-97) to the evidence of Professor Grant Jones, who considered that (a) "…Mayas in Toledo identified as Kekchis have strong ancestral roots among both Chol and Mopan Maya speakers who once inhabited Toledo and adjacent Peten, Guatemala"; (b) "…Chols were removed to various communities in Verapaz, Guatemala, where they gradually intermarried with Kekchis, resident Chols (especially in and around Cajabon), other Chols removed from the Manche Chol communities of Southern Peten, and probably other groups as well"; (c) "They disappeared as a language group, but their descendants survived as Kekchis or Kekchi Chols, some of whom retained their original Chol names"; (d) "…many people in Toledo who call themselves Kekchi are descended in part from people who once spoke

Chol…[and]…it is probably most accurate to speak of most Kekchi in Toledo as Kekchi Chols" (paras 65-68 of Professor Jones' affidavit, quoted by Conteh CJ at para 96, and see the summary of Professor Jones' conclusions at para [68] above).

[289] And lastly on this point, Conteh CJ referred (at para 98), without any direct quotation, to the evidence of Professor Wilk, who had spoken "of the historical ethnic fluidity among Mopan, Kekchi and Manche Chol groups in what is today the Toledo District". On this aspect of the matter, it will be recalled, Professor Wilk's evidence (see para [36] above) was that, although there are "many gaps in our knowledge and a good deal of history is based on very skimpy sources, especially for the time until the late 19th century", there was sufficient evidence to demonstrate that Maya people have continuously occupied Toledo since sometime pre-dating the first contact with the Spanish in 1540. Many Mopan and Kekchi people in Toledo continue to treat the ancient Maya sites dating back to the classic period of the ancient Maya civilisation as "sacred places built by their ancestors, and they still perform Mayan religious rituals in the ruins" (see paras [36]-[44] above for a summary of Professor Wilk's evidence on this point).

[290] Conteh CJ also commented on the fact that Professor Wilk had "creditably withstood what it is fair to say was blistering cross-examination by Ms Young SC", before concluding that he had no difficulty in "believing his testimony on the ancestral and cultural continuity between the claimants and the original inhabitants of what is today Toledo District". This is in my view an important conclusion, given the suggestion to Professor Wilk in cross-examination, which he accepted, that he was "sympathetic" to the Kekchi and the Mopan peoples (see para [79] above). Both the suggestion and the response invited consideration by the court, unusually in relation to an expert witness, of a credibility issue, which was especially significant in the light of Professor Wilk's evidence that, as a result of later research, he had changed his mind on a critical aspect of the case. But having seen and observed the witness as he gave evidence in court, the learned trial judge resolved this issue in the witness' favour. This finding plainly attracts, it seems to me, the well-known rule in **Benmax v Austin Motor Co. Ltd [1955]**

1 All ER 326, that an appellate court will not lightly differ from the finding of a trial judge on a question of fact, particularly where that finding turns solely on the credibility of a witness.

[291] In the result, the Chief Justice's conclusion on this evidence (at para 99) was that he was satisfied "beyond peradventure that…there are historical, ancestral, social and cultural links between the original inhabitants of what is today Toledo District and the claimants…[and that]…these links continue and endure to this day". These links therefore entitled the current inhabitants of the Toledo District "to lay claim to customary rights and interests in land in the area" (para 101). In coming to his conclusion, the Chief Justice might also have mentioned, but did not, the statement displayed on GOB's official website[24] indicating that, although the great Maya civilisation of the period between A.D. 250 and 900 had eventually declined, it had left behind "small groups whose offspring still exist in Belize contributing positively to the culturally diverse population". This was indeed one of the factors that led the IACHR to conclude on the evidence that the petition in the **Maya Indigenous Communities** case was "lodged on behalf of the members of a people indigenous to the territory that presently comprises the Toledo District of southern Belize" (para 94).

[292] The reality is that what may have appeared at first blush to be a stark contest between the evidence of the respondents' experts, on the one hand and Dr Awe's and Mr Cardona's, on the other, did not in the end really materialise. As it turned out, it was generally agreed on both sides that the original inhabitants of what is now the Toledo District were forcibly removed to what is now Guatemala sometime after the first contact with the Spanish in the 16th century and that the current inhabitants by and large only began to repopulate the Toledo District during the 19th century. There is, it is true, a difference between the respondents' experts, who say the original inhabitants of the Toledo District were the Mopan and the Manche Chol, and GOB's witnesses, who say that, in the south, there were Manche Chol only (a group that is now, as both sides

[24] When visited on 14 October 2002

agree, extinct). But there is no dispute that the current inhabitants, the respondents, are Mopan and Kekchi. The real issue between the parties was whether the current inhabitants are connected, through intermarriage over close on two centuries, by historical, ancestral and social links to the original inhabitants. This is the issue which Conteh CJ resolved on the strength of evidence which amply justified his conclusion and which he was entitled to accept and there is accordingly, in my view, no basis upon which to disturb his conclusion

[293] Conteh CJ next went on to find, as he had done in the **Maya Land Rights** case, that, "[f]rom the mound of evidence in this case, I am satisfied that there is in existence in the Maya Villages in the Toledo District, Maya customary land tenure system and land management" (para 80). In coming to this conclusion, the learned judge considered "the surfeit of evidence" of the alcaldes and individual villagers who testified to the existence of Maya customary land tenure (para 81), as well as the evidence of the experts, which he found to be "compelling and convincing on the existence of Maya customary land tenure and management in the Toledo District" (para 82). After referring to the evidence of Dr Grandia and Professor Grant Jones on the point, Conteh CJ turned to Professor Wilk's evidence, which he found to be "equally compelling, impressive, authoritative and convincing" (para 83).

[294] On this issue, Conteh CJ was moved to "confess an overwhelming sense of *déjà vu*", arising from "the simple and manifest fact that this issue formed a central plank in my judgment in the **Maya Land Rights case**" (para 71). He then proceeded to quote at length from his judgment in that case, in which he had referred to the finding of the IACHR in the **Maya Indigenous Communities** case, as well as to the Ten-Point Agreement, in clause 6 of which GOB had acknowledged "that the Maya People have rights to land and resources in Southern Belize based on their longstanding use and occupancy". In the **Maya Land Rights** case, Conteh CJ considered that acknowledgment to be "an important admission by [GOB] sufficient to dispose of the case in the claimants' favour" (para 48). Indeed, in that case, he had found "some

force" in the argument put forward on behalf of the claimants that GOB should be estopped from denying the claim to customary land tenure in southern Belize.

[295] In its skeleton argument and in Ms Young's submissions before us, GOB challenged the Chief Justice's findings on this issue in a number of ways: the affidavit evidence of cultivation patterns did not provide an ancestral connection between the Manche Chol and the respondents; reliance on the Ten-Point Agreement as an admission by GOB was "misconceived", it having been signed "in the midst of continuous proceedings before the [IACHR]"; any reliance on the alcalde system was also misconceived, as that was a system which could only have been introduced after first contact with the Spanish in 1525.

[296] There was indeed a considerable amount of evidence in the case in support of the respondents' contention that the Maya in southern Belize do practice a customary system of land tenure and management. The affidavit of Domingo Chub, for instance, which is set out in full at para [13] above, provides a detailed description of the system (at paras 5-12) and his account was replicated in the many other affidavits filed on behalf of the respondents. Dr Grandia's conclusion (at para [62] above), after a detailed account of land use customs and practices in the area, was that "the Maya villages in Toledo continue to use and occupy their land in accordance with long-standing customs, traditions and norms concerning land management". Professor Grant Jones considered (at para [64] above) that all of the Maya groups who lived in the area over "centuries of dislocation and relocation shared similar land tenure norms and patterns, practicing well-known forms of lowland tropical forest agriculture under a fundamentally communal land tenure system that allocated property in particular active cultivations or tended orchards in the forests to the cultivator, while locating control and ownership of these lands in the community as a whole". This led Professor Jones to the view that there was sufficient evidence to support the conclusion "that the present Mopan and Kekchi-speaking inhabitants of the Maya communities of Toledo have a historical and cultural relationship with the lands on which they currently live and work, and with the populations that have historically inhabited them". And, hardly least, given the strong

impression that his evidence made on Conteh CJ, Professor Wilk concluded (see para [48] above), after a review of some of the affidavits filed on behalf of the respondents (including Domingo Chub's), was that "the patterns of land use they describe in their villages are consistent with the traditional patterns of customary land tenure" which he had described in his affidavit, attributing any differences to "the flexibility and adaptability of a system that has proven an effective guide to sustainable resource use in the subtropical rain forests of Mesoamerica for thousands of years".

[297] This evidence was not, it seems to me, seriously challenged at the trial. Mr Cardona's efforts were largely directed to show that the presence of the current Maya population in the Toledo District was of relatively recent origin and to describe official land policy in southern Belize in the post 1862 period. The real burden of Dr Awe's evidence, as we have seen, was also to challenge the thesis that current Maya population of the Toledo District are in some way connected to the original inhabitants of the area. It is true that there was some evidence that not all members of the Maya community were supportive of the respondents' efforts to preserve the customary system of land tenure and that some persons were in favour of a system of individual land titles (see the affidavits of Justino Peck, Manuel Rodriguez and Marciano Cal, paras [30]-[33] above). However, far from controverting the assertion that there is a system of customary land tenure in existence in the region, this evidence tends in fact to support it, in that what it contends for is an abandonment of the system and its replacement by a system of individual land ownership. I make no comment on that contention, save to say that what is at issue in this case is what exists at the present time.

[298] Before turning to the Ten-Point Agreement, I can deal more shortly with the alcalde system. This is a system, GOB contends, which is derived from the Spanish and thus must have been introduced after first contact with the Spanish in 1525. It therefore cannot be prayed in aid in establishing indigenous rights. The point is based on Lamer CJ's statement in **Delgamuukw** (para 144) that "[p]ractices, customs or

traditions that arose solely as a response to European influences do not meet the standard for recognition as aboriginal rights".

[299] 'Alcalde', as I indicated close to the beginning of this judgment, "is a word of Spanish origin, loosely meaning a magistrate or a mayor" (para [12] above). Professor Wilk's evidence, it will be recalled, was that the goal of the alcalde system, found in various forms in several Maya populations in Mesoamerica, is to mediate community disputes in accordance with "traditional consensus-based forms of mediation" (para [46] above). Professor Wilk went on to conclude (at para [59] above) that "[t]he legitimacy, authority, and many of the powers and responsibilities of the alcaldes are sourced in [the] customary mandate from the village".

[300] What the evidence therefore suggests, it seems to me, is that the word alcalde is merely a descriptive term for a system of 'local government' leadership among the Maya that has its roots in pre-Hispanic times, which made it easily adaptable to Spanish and later British administration of the territory. It was an acknowledgment of the reality that, as one late nineteenth century Colonial Secretary is reported to have observed, "the best way to manage the natives was through their own Chiefs and according to their own customs" (see para [56] above). Looked at in this way, the alcalde system did not so much describe a practice or custom that arose solely as a response to European influences, as it did the harnessing of an existing tradition to the uses and convenience of the successive colonial administrations.

[301] In point of fact, the Ten-Point Agreement was arrived at, as GOB submitted, as part of what were then on-going efforts to settle the dispute while the parties were already before the IACHR (the petition having been filed on 7 August 1998). However, it is not without significance, in my view, that the agreement appears to have been struck at the local level before it was produced to the IACHR as evidence of the failed steps that had been taken at that level to resolve the matter. Indeed, the IACHR report represented GOB as having stated in its preliminary response, after the agreement was

signed, that "[it] became the new basis for the resolution of the claim of the Maya people of Toledo…[and]…the Petitioners acted prematurely in moving ahead with their litigation before the Commission while these negotiations were outstanding and while the terms of the Ten-Point Agreement had not yet been implemented".

[302] In addition to clause six, upon which the respondents naturally place great reliance, there is also clause three, which contemplated a partnership between GOB and the Maya Leaders "for the involvement of the Maya Leaders in the design and implementation of development programmes and other matters affecting the Maya Leaders and their communities". Further, there was clause seven, which foreshadowed the establishment of a program "to address the urgent land needs of the Maya communities of the south, including the surveying and distribution of lands or establishing and protecting communal lands"; and clause eight, which spoke to the development of a framework and target dates to resolve other measures of mutual concern, including sustainable management of natural resources, equitable distribution of their benefits amongst the Maya communities, protection of Maya cultural practices and management of Maya cultural heritage, reform and status of community governance institutions, and "[o]ther issues as agreed upon by the GOB and the Maya Leaders". Clauses nine provided for a review by the new partnership of matters relating to applications for licenses for logging or oil exploration or extraction, in the context of "their social environmental and cultural impacts", while clause ten appropriately rounded off the general spirit of recognition and accommodation by GOB of the rights of the Maya people of Toledo which the agreement betokened, in terms which bear repetition:

> "…GOB and the Maya Leaders will treat and use this Agreement as the new basis for the resolution of issues of concern to the Maya Leaders and will, by mutual agreement, expand, amend or develop more specific agreements within the framework of this general agreement."

[303] The Ten-Point Agreement was signed on behalf of GOB by the then Prime Minister of Belize on 12 October 2000. By that date, the Proposed American Declaration on the rights of Indigenous Peoples, to take but one example of several

other such international instruments, had already been approved by the IACHR some three years before, providing yet another clear statement of the right of indigenous peoples "to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied…" (Article XVIII (2). On 23 February 2001, within four months of the date of the Ten-Point Agreement, the Constitution of Belize would be amended by Act No. 2 of 2001, to include in paragraph (e) of the Preamble a requirement by the people of Belize of policies of state designed to "protect the identity, dignity and social and cultural values of Belizeans, including **Belize's indigenous people"** (emphasis supplied). As Conteh CJ pointed out, an express purpose of this constitutional amendment was stated to be "to increase the guiding principles enunciated in the Preamble…upon which the Nation of Belize is founded".

[304] In these circumstances, I find it impossible to accept GOB's submission that the Ten-Point Agreement now falls to be disregarded as having been no more than the expression of a negotiating position (perhaps 'posture' is a better word), in effect a without prejudice stance, adopted purely as part of the exploration of the possibility of a settlement. I therefore consider, in agreement with Conteh CJ in the **Maya Land Rights** case and in the court below that the Ten-Point Agreement, clause six in particular, represents a clear and important admission by GOB of the respondents' claim to "rights to land and resources in Southern Belize based on their longstanding use and occupancy".

Issue (iii) – was the learned trial judge correct to find that the Constitution imposes a positive obligation on GOB to adopt affirmative measures to protect the rights of the respondents?

[305] In their fixed date claim form, the respondents claimed (a) a declaration that GOB's failure to adopt affirmative measures to identify and protect rights based on Maya customary tenure violated their rights to property and non-discrimination under sections 3, 3(d), 16 and 17 of the Constitution and (b) an order that GOB develop the

legislative, administrative, or other measures necessary to create an effective mechanism, in consultation with the affected Maya people, to identify and protect Maya customary rights.

[306] The stated basis of this aspect of the claim was GOB's failure, despite its initial efforts in the right direction, to take any effective steps to comply with the judgment of the court in the **Maya Land Rights** case, from which there had been no appeal. In his judgment in the instant case, Conteh CJ rehearsed the facts relied upon by the respondents in this regard, the joint meeting on 26 March 2008 at which the Attorney-General and Minister of Foreign Affairs and the Solicitor General were present; the Solicitor General's memorandum dated 27 March 2008 to all Chief Executive Officers, the Commissioner of Lands and the Departments of Forestry, Fisheries, Environment and Protection and Geology, in which she advised the various heads of department of the judgment in the **Maya Land Rights** case and the steps being taken by GOB to find "the most appropriate manner of implementing the judgment of the Supreme Court"; the Solicitor General's direction the various heads of departments "to immediately cease all activities and/or operations on, or to otherwise deal with land in the Toledo District…until such time as further instructions of the mechanisms of implementation are issued"; and the subsequent change of position by GOB.

[307] Conteh CJ then stated his conclusion, without any further discussion, as follows (at para 125):

> "It is therefore the failure, or as the claimants would view it, the intransigence of the Government of Belize to move forward constructively in implementing that judgment, thereby offending the constitutional protection the court had adjudged their due, that has brought them back to this court."

[308] On this basis, the Chief Justice granted the declaration and made the order complained of. The respondents justify this result by reference to section 3(a) of the Constitution, which guarantees fundamental rights and freedoms to "every person in

Belize…whatever his race" and section 16, which provides that "no law shall make any provision that is discriminatory either of itself or in its effect" and "no person shall be treated in a discriminatory manner by any person or authority". While the laws of Belize provide administrative mechanisms (for example the General Registry Act and the Registered Land Act) for holders of property other than holders of Maya customary title, so the argument runs, they do not do the same for the latter category of persons, who have therefore been treated in a discriminatory manner. Where government omissions have discriminatory effects, the principle of equality imposes an affirmative duty on the part of the state to take action to eliminate the discrimination.

[309] GOB submitted that no arguments were developed at the trial before the Chief Justice on section 3 of the Constitution, neither was there any challenge to the constitutionality of either the General Registry Act or the Registered Land Act. In any event, it was submitted, what section 3(a) secures to every person is a right of access to a system of law which is fair. As regards section 16, GOB submitted that a claim of discrimination under section 16 can only be based on the specific grounds enumerated in section 16(1) and that there was no evidence that GOB acted mala fides or targeted the respondents on the basis of their Kekchi or Mopan ethnicity.

[310] As regards section 3 of the Constitution, it may be helpful to set out the relevant parts of the text of the section in their context:

> **"3.** Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
>
> (a) life, liberty, security of the person, and the protection of the law;
>
> (b) …
>
> (c) …
>
> (d) protection from arbitrary deprivation of property,

> the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

[311] The respondents rely entirely on "the protection of the law" and the "protection from arbitrary deprivation of property". No question arises as to the latter, as the Chief Justice found expressly, as he had done in the **Maya Land Rights** case, that the evidence "did not rise up to the level of deprivation of property within the meaning of the Constitution or can be visited on [GOB]" (para 128). In relation to the former, the question that naturally arises is what meaning should be attributed to the phrase 'the protection of the law'.

[312] In **Ong Ah Chuan v Public Prosecutor**, to which reference has already been made, the Board was concerned with articles 9 (1) and 12 (1) of the Constitution of the Republic of Singapore, which provided as follows:

> Article 9 (1) - "No person shall be deprived of his life or personal liberty save in accordance with law."
>
> Article 12 (1) - "All persons are equal before the law and entitled to the equal protection of the law."

[313] Lord Diplock said this (at pages 670-671):

> "In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a

> system of law that did not flout those fundamental rules. If it were otherwise it would be a misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by article 5) of articles 9 (1) and 12 (1) would be little better than a mockery."

[314] In **Attorney General of Trinidad and Tobago and another v McLeod**, to which reference has also already been made, the Board was concerned with an Act of Parliament which purported to amend the Constitution of Trinidad and Tobago. The Act was passed otherwise than in accordance with the entrenched constitutional amendment procedure and a member of the House of Representatives, who was affected by it, brought proceedings for a declaration that the amendment Act was null and void and an injunction to restrain the Speaker of the House from taking any action against him pursuant the Act. The application, which was dismissed at first instance, succeeded in the Court of Appeal of Trinidad and Tobago, the court considering that, among other things, the passing of a law which was contrary to the entrenched provisions was an infringement of the member's right to "the protection of the law" under section 4*(b)* of the constitution. So far as is material, section 4 provided that –

> "It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist…the following fundamental rights and freedoms, namely…(*b*) the right of the individual to equality before the law and the protection of the law…"

[315] In allowing the Attorney General and the Speaker's further appeal, the Board said this (per Lord Diplock, at page 701):

> "In his originating motion however the only infringement of his fundamental rights that Mr McLeod alleged was his right to 'the protection of the law' under s 4(*b*) of the Constitution. The 'law' of which he claimed to have been deprived of the protection was s 54(3) of the Constitution, which he contended (successfully in the Court of Appeal) prohibited parliament from passing the amendment Act, except by the majorities specified in that subsection. This argument, although it was accepted by Hyatali CJ and Kelsick JA in the Court of Appeal, is in their Lordships' view fallacious. For parliament to purport to make a law that is void under s 2 of the Constitution, because of its inconsistency with the Constitution, deprives no one of the 'protection of the law', so long as the judicial system of

> Trinidad and Tobago affords a procedure by which any person interested in establishing the invalidity of that purported law can obtain from the courts of justice, in which the plenitude of the judicial power of the state is vested, a declaration of its invalidity that will be binding on the parliament itself and on all persons attempting to act under or enforce the purported law. Access to a court of justice for that purpose is itself 'the protection of the law' to which all individuals are entitled under s 4(*b*)."

[316] However, the Board declined the appellants' invitation to supply a comprehensive definition of what is meant by the expression 'the protection of law', partially because the respondent was not represented on the hearing before it, but also because it considered that "[t]he problem of defining what is included in each of the fundamental human rights and freedoms referred to in the lettered paragraphs of ss 4 and 5(1) is best dealt with on a case-to-case basis". But notwithstanding this caution, these authorities appear to me to suggest that the notion of the protection of law speaks to the availability of processes for the vindication of rights rather than to the substantive rights themselves. Appearing as it does in what is in fact the preamble to Part II of the Belize Constitution and the detailed elaboration of the fundamental rights and freedoms which it contains, the phrase 'the protection of law' in section 3(a) is in my view an assurance to persons in Belize of a continued ("every person in Belize **is** entitled…" – my emphasis) right of access to the courts of Belize, under a system of law that is fair for declarations of the invalidity of executive or legislative action.

[317] Turning to section 16 of the Constitution, it will be recalled that section 16(3) defines 'discriminatory treatment' as -

> "…affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

[318] This is, in my view, even giving the subsection the most generous and purposive construction possible, plainly a precise and exhaustive definition of the phrase 'discriminatory treatment' for the purposes of section 16 of the Constitution (see **Nielsen v Barker** (1982) 32 WIR 254, 281, per Massiah JA, referred to at para [140] above). In place of a finding that the respondents, or any of the persons represented by them, were subjected to discriminatory treatment within the meaning of section 16(3), Conteh CJ appears to have approached the matter on the basis that, by its failure to comply with his earlier judgment in the **Maya Land Rights** case, GOB had breached the constitutional proscription against discrimination. With the greatest of respect to the learned trial judge, I cannot regard this undoubtedly well-meaning attempt to, in effect, enforce the previous judgment of the court as a satisfactory substitute for carrying out an assessment of the evidence to determine whether this was a case in which GOB had violated the constitutional rights of the respondents by affording them different treatment, attributable wholly or mainly to their sex, race, place of origin, political opinions, colour or creed. For this reason, I cannot regard section 16 and the claim of discrimination as a secure basis for the relief sought by the respondents under this head.

[319] In respect of sections 3(d) and 17 of the Constitution, despite reaffirming his conclusion in the **Maya Land Rights** case that Maya customary land tenure in the Toledo District gave rise to "collective and individual property rights" within the meaning of these sections, the Chief Justice declined, as I have pointed out, to find that there had in fact been any deprivation of property. I consider that he was plainly right to do so, as there was absolutely no evidence to this effect and that, beyond the classification of the rights claimed by the respondents as property, nothing further turns on either of these sections.

[320] The upshot of the foregoing discussion on sections 3, 16 and 17 is that, in my view, none of them provides a basis for the declaration and order made by the Chief Justice. The remedies must flow from a right. The question of whether the court has

the power to order the state to take affirmative action in the protection or furtherance of constitutional rights in a proper case does not therefore, in my view, arise in this case.

Issue (iv) – the grant of the injunction

[321] On this issue, GOB referred to the provisions of (a) the Sixth Amendment Act, which came into force on 12 April 2010, and which amended section 17 of the Constitution by providing that the entire property in and control over petroleum, minerals and accompanying substances are exclusively vested, and shall be deemed always to have been so vested, in GOB; (b) the Mines and Minerals Act, section 2 of which deems the entire property in and control of all minerals in any land in Belize to be vested in GOB; and (c) the Petroleum Act, section 3 of which vests the entire property in and control over all petroleum and accompanying substances in GOB, subject to section 34(4), which provides for payment of a 5% royalty to the owner of any private land beneath which a petroleum reservoir is located.

[322] As a result of these provisions, it was submitted, Conteh CJ erred in granting an injunction restraining GOB from issuing leases, licences, grants to land or resources, concessions for resource exploitation, and the like, under the Forest Act, the Mines and Minerals Act, the Petroleum Act, "or any other Act". By doing so, GOB submitted, the Chief Justice by his order effectively restrained it from "the lawful exercise of rights over petroleum and or minerals, the ownership to and proprietary rights in which are, by the ordinary law and by the Constitution, vested in [GOB]".

[323] The respondents sought to meet these submissions by pointing out that the Sixth Amendment Act makes no reference to resources on the surface of the land and therefore, even if this issue had been raised at the trial, it would have had no relevance to the injunction against permits or concessions under any legislation concerning surface natural resources. Further, both the Mining and Minerals Act and the Petroleum Act recognise and accord certain rights to the owners and lawful occupiers of lands within a concession area. Until Maya villages are able to obtain official demarcation and

documentation of their customary title, it was submitted, it is eminently appropriate to enjoin GOB, regardless of the applicability of the recent constitutional amendments.

[324] It is an unfortunate feature of the Chief Justice's judgment, in my view, that it contains absolutely no discussion of the question whether the grant of an injunction in the terms in which it was sought and granted was an appropriate remedy for the wrongs complained of by the respondents. Indeed, the question of remedies was not among the issues identified by the learned judge as having arisen for decision in the case. I therefore find myself in the unhappy position of being quite unable to say what considerations the judge took into account in determining whether to grant the injunction. While it could well be that Conteh CJ was influenced by the fact that there was already an injunction in place by virtue of his judgment in the **Maya Land Rights** case, it would still have been helpful to know why he considered it necessary to grant a fresh injunction in the instant case.

[325] Notwithstanding the constitutional amendments and the legislation already referred to – and assuming for the moment that they have the effect contended for by GOB - it appears to me that it is arguable that this might well have been appropriate case for an injunction on the basis advanced by the respondents; that is, that those measures deal with the property in substances lying under the surface only. However, given the actual terms of the order made by Conteh CJ, which is explicitly tied to the declaration and order that I have already concluded to be not justified by the Constitution (para [220] above), I have come to the conclusion that the order for an injunction cannot in these circumstances be supported. It seems to me, in other words, that all the pieces of the grant of (i) a declaration that there is an obligation on GOB to adopt affirmative measures to identify and protect the respondents' rights; (ii) an order that, with a view to achieving this objective, GOB must develop legislative and administrative measures, etc; and (iii) the further order that, "until such time" as (ii) is achieved, GOB is restrained in the manner stated, must stand or fall together. If (i) and (ii) cannot be justified by reference to the constitutional provisions relied upon in their

support, then (iii), which is clearly intended to operate in aid of (i) and (ii) cannot, in my view, stand alone, in the absence of any indication in the learned judge's judgment that he took into account other, more general considerations in granting injunctive relief.

Issue (v) - should the learned trial judge have awarded damages to the respondents?

[326] Conteh CJ declined to make an award of damages to the respondents for the violations of their constitutional rights which he found to have taken place. However, he considered (at para 127) that "[t]he declarations and orders I have made in this judgment should, in my view, pursuant to section 20 of the Belize Constitution be appropriate, in the circumstances, for the purpose of enforcing or securing the enforcement of the provisions of the Constitution the claimants seek in these proceedings".

[327] In their respondents' notice, the respondents complained that the Chief Justice erred in failing to consider an award of damages for the violation of the their rights, basing themselves squarely on sections 3, 3(a) and 16 of the Constitution. It seems to me that, in the light of my conclusions on the applicability and scope of those sections in respect of the third issue (para [220] above), the respondents' contention that an award of damages is justified in this case cannot succeed. I do not therefore find it necessary to consider the very interesting submissions made by Mrs Moore in support of the claim for damages.

Disposal of the appeal

[328] On the basis of all of the foregoing, I would therefore conclude as follows:

(a) Grounds one and two of GOB's appeal should be dismissed and Conteh CJ's declaration, reaffirming his judgment given on 18 October 2007, "that Maya customary land tenure exist [sic] in all the Maya villages in the Toledo Districts

[sic] and where it exists, gives rise to collective and individual property rights within the meaning of sections 3(d) and 17 of the Belize Constitution", should be affirmed.

(b) Grounds three, four and five of GOB's appeal should succeed, and the orders numbered ii, iii, and iv should be set aside.

(c) The respondents' cross appeal should be dismissed.

[329] On the question of costs, the parties having each enjoyed a measure of success, I would order that written submissions as to the appropriate order as to the costs of the appeal and the trial in the court below be submitted by both parties within 21 days of the date of the order disposing of the appeal. Thereafter, I would propose that the court should make a determination as to costs within six weeks.

Conclusion

[330] In concluding his judgment in the court below, Conteh CJ observed as follows (at paras 129-30):

> "In nearly every country with an indigenous, native or aboriginal inhabitants before contact with essentially European presence…which later resulted in permanent settlement of what was again essentially European stock in the countries concerned, history has shown that, over the years, a *modus vivendi*, has been forged between the original native or indigenous inhabitants and the later settlers or arrivals.
>
> This arrangement was intermediated through legal process and sometimes through conscious political accommodation on both sides."

[331] The unchallenged evidence in this case has shown that, from the earliest years of the colony of British Honduras, British policy was to accommodate Maya land use and to encourage Maya settlement (see paras [51-2] above). The earliest Crown Lands

Ordinance, which was passed in 1872, specifically provided for the creation and survey of reserves at the Crown's expense wherever Maya villages existed. The general pattern of accommodation of Maya land use continued well into the 20th century, with the result that, as Conteh CJ put it (at para 133), "successive governments have recognized the entitlement of the Maya to lands in Southern Belize". The Ten-Point Agreement, as well as Act 2 of 2001, which closely followed it, are both of a piece, in my view, with what has in fact been a historic tendency towards recognition of the rights of the Maya. It is to be hoped that this tendency will continue beyond this litigation.

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MORRISON JA

ALLEYNE JA

[332] I join the Hon Mr Justice Sosa P and the Hon Mr Justice Morrison JA, in commending counsel for the appellants and for the respondents on their extensive and very helpful preparation and presentations on the appeal. The scope of their respective research and the clarity of their arguments have assisted the court in coming to grips with the many complex issues arising in this important appeal.

[333] I have had the opportunity of reading the judgments of Sosa P and Morrison JA both of whom have undertaken comprehensive analysis of the issues arising in this appeal. I will refrain from going over the issues addressed so fully by my learned brethren.

[334] The factual basis of the case, the evidence relating thereto, the technical issues addressed by the expert evidence relied on by the respective parties, and the legal arguments propounded on behalf of the parties have been fully explored and analysed by the learned President and by Morrison JA, and I will not indulge in further discussion.

[335] I agree with and adopt the arguments and conclusions of Morrison JA, and would consequently dismiss the appeal and affirm the order of Conteh CJ. In particular I note the learned trial judge's finding that the Maya people have rights to land and resources in Southern Belize based on their long-standing use and occupancy, and that the respondents have succeeded in establishing their claim to customary land tenure in Belize. The learned trial judge held, in my view correctly based on the evidence which he found to be credible, that the Maya communities of the Toledo district of Belize have a historical and cultural relationship with the lands on which they currently live and work, and with the populations which have historically inhabited them, and that the patterns they describe in their villages are consistent with the traditional patterns of customary land tenure.

[336] I also agree that the learned Chief Justice's finding that the institution of Alcalde in Southern Belize is a system of local government leadership among the Maya that has its roots in pre-Hispanic times. The learned Chief Justice also found that the Ten Point agreement, clause 6 in particular, represents a clear and important admission by the Government of Belize of the respondents' claim to rights to land and resources in Southern Belize based on their long-standing use and occupancy. The learned Chief Justice was plainly right in declining to find that there had in fact been any deprivation of traditional property rights of the respondents and their ancestors.

[337] I also agree that the order for an injunction cannot be supported in this case, and that in that regard the appeal should be allowed. I further agree that the learned Chief Justice was justified in declining to award damages to the respondents.

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ALLEYNE JA