

**IN THE SUPREME COURT OF BELIZE, A.D. 2010**

**CLAIM NO. 366 OF 2008**

**BETWEEN:**

**THE MAYA LEADERS ALLIANCE and THE TOLEDO ALCALDES ASSOCIATION on behalf of the Maya villages of Toledo District and  
JUAN POP on behalf of the Maya village of Golden Stream and  
DOMINGO CAL on his own behalf and on behalf of the Maya village of Aguacate, and  
LUCIANO CAL on his own behalf and on behalf of the Maya village of Bladen, and  
ALBERTO HUN on his own behalf and on behalf of the Maya village of Blue Creek, and  
CANDIDO CHO on his own behalf and on behalf of the Maya village of Crique Jute, and  
LUIS CHO on his own behalf and on behalf of the Maya village of Crique Sarco, and  
PEDRO CUCUL on his own behalf and on behalf of the Maya village of Dolores, and  
MANUEL CHOC on his own behalf and on behalf of the Maya village of Indian Creek, and  
ALFONSO OH on his own behalf and on behalf of the Maya village of Jalacte, and  
MARIANO CHOC on his own behalf and on behalf of the Maya village of Jordan, and  
EDUARDO COY on his own behalf and on behalf of the Maya village of Laguna, and  
PABLO SALAM on his own behalf and on behalf of the Maya village of Medina Bank, and  
ROLANDO AUGUSTINE PAU on his own behalf and on behalf of the Maya village of Midway, and  
LORENZO COC on his own behalf and on behalf of the Maya village of Otoxha, and  
SANTIAGO COC on his own behalf and on behalf of the Maya village of Pueblo Viejo, and  
SILVINO SHO on his own behalf and on behalf of the Maya village of San Antonio, and  
IGNACIO TEC on his own behalf and on behalf of the Maya village of San Benito Poite, and  
GALO MENJANGRE on his own behalf and on behalf of the Maya village of San Felipe, and  
FRANCISCO CUS on his own behalf and on behalf of the Maya village of San Marcos, and  
MARCOS ACK on his own behalf and on behalf of the Maya village of San Miguel, and  
JUAN QUIB on his own behalf and on behalf of the Maya village of San Vicente, and  
LIGORIO COY on his own behalf and on behalf of the Maya village of Santa Anna, and  
ELIGORIO CUS on his own behalf and on behalf of the Maya village of Santa Theresa**  
**Claimants**

**AND**

**THE ATTORNEY GENERAL OF BELIZE  
and  
THE MINISTER OF NATURAL RESOURCES AND ENVIRONMENT**  
**Defendants**

**AND**

**FRANCIS JOHNSTON  
and  
SALVADOR BOCHUB**  
**Interested Parties**

—

**BEFORE** the Honourable Abdulai Conteh, Chief Justice.

Ms. Antoinette Moore SC for the claimants.

Ms. Lois Young SC for the defendants.

Mr. Rodwell Williams SC for the first Interested Party.

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## **JUDGMENT**

### *Introduction*

In a material sense the instant claim which is the subject of this judgment is a direct sequel of the judgment of this court in Claims Nos. 171 and 172 of 2007 delivered on 18<sup>th</sup> October 2007. Those actions which were consolidated and heard together related to claims by members of the Maya Communities in Southern Belize, in particular, in respect of the Maya Villages of Santa Cruz and Conejo regarding their customary land tenure. There were as well, individual claimants in these two actions, namely **Aurelio Cal** who claimed in his own behalf and on behalf of the Maya Village of Santa Cruz of which he was the elected Alcalde. There were other individual co-claimants also who were all members of the said village. So it was in respect of Claim No. 172 in which **Manuel Coy** sued on his own account and on behalf of the Maya Village of Conejo of which he was the elected Alcalde. The other co-claimants in that action were as well members of Conejo Village.

2. I shall for convenience refer hereafter to the judgment in these consolidated cases as the “judgment in the Maya Land case” or simply “the Maya Land Rights case.”

3. The evident and undeniable link between the **Maya Land Rights case** and the instant case is that they both relate to the existence or otherwise of Maya customary land tenure in Southern Belize and the constitutional implications that arise for such tenure by members of the Maya Communities flowing from alleged conduct of the defendants.

#### The Parties

4. In relation to the *dramatis personae*, there are however more additional claimants in the instant case than those in the **Maya Land Rights case**: By an order of the court following an application by Ms. Antoinette Moore, as she then was (she has since been elevated to the rank of Senior Counsel) on behalf of several individual claimants on their own behalf and on behalf of the several Maya villages whom they represent as Alcaldes. There were joined by twenty-two other individual claimants in their own behalf and those of the Maya villages they claim to represent. The basis of the application was that these individuals hold office as Alcaldes which is the customary symbol of their villages' collective customary title and jurisdiction over their land and that they therefore had a direct interest in the property rights sought to be vindicated in this claim.
5. I granted the application on 19<sup>th</sup> February 2009; it was however filed on 10<sup>th</sup> June 2009. Juan Pop was an original co-claimant on behalf of the Maya Village of Golden Stream in addition to the other two original claimants, namely, the **Maya Leaders Alliance** and **The Toledo Alcaldes Association**. It is, I think, fair to describe these organizations as the umbrella organizations for the promotion and protection of the interests of the Maya Communities in Belize. They have advanced the present claim on behalf of the Maya villages of **Toledo District** in Southern Belize.

It is helpful, I think, to give a brief description of the parties in this case.

6. **First**, the claimants:

The Maya Leaders Alliance (MLA), was constituted in 1999 to defend Maya land rights and promote development of the Maya people. Its constituency includes the Mopan and Q'eqchi' people of the Toledo District. The MLA is composed of the Toledo Alcaldes Association; Tumulkin Center of Learning; Toledo Maya Cultural Council; Toledo Maya Women's Council; Ke'kchi Council of Belize; and the Juan Cho Society.

The claimant Toledo Alcaldes Association (TLA), is the organization of all the Alcaldes of the Toledo District, that is, of the customary elected leaders of the Maya villages of Toledo, including Aguacate, Big Falls, Blue Creek, Boom Creek, **Conejo Creek**, Corazon, Crique Jute, Crique Sarco, Dolores, Golden Stream, Graham Creek, Indian Creek, Jalacte, Jordan, Laguna, Mabil Ha, Machakil Ha, Medina Bank, Midway, Na Luum Caj, Otoxha, Pueblo Viejo, San Antonio, San Benito Poite, San Felipe, San Jose, San Lucas, San Marcos, San Miguel, San Pablo, San Pedro Columbia, San Vicente, Santa Anna, **Santa Cruz**, Santa Elena, Santa Teresa, Silver Creek, and Sunday Wood. (Thirty eight villages in all and of these **Conejo** and **Santa Cruz** featured specifically in the **Maya Land Rights case**).

**Juan Pop**, the alcalde of Golden Stream, participates in this claim as an Alcalde and as a member of the Toledo Alcaldes Association; and by an order of the court dated 19<sup>th</sup> February 2009, **twenty two other Alcaldes** representing villages in the Toledo District were joined as claimants in their own

behalf and on behalf of the several villages stated in the order.

7. It is clear therefore, that all the claimants, 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**. This group resides predominantly in the Toledo District in Southern Belize. It is undoubted that, as a group, the Maya form the bulk, perhaps, exclusively, of the **indigenous** peoples of Belize. This group, by a constitutional amendment in 2001 (Act No. 2 of 2001) gained, as it were, constitutional affirmation and recognition when the Preamble of the Belize Constitution was amended to state among other things, that “... *the people of Belize ... require policies of State ... which protect the identity, dignity, and social and cultural values of Belizeans, including **Belize’s indigenous people**; ...*” (emphasis added). An express purpose of the constitutional amendment was stated to be “*to increase the guiding principles enunciated in the Preamble ... upon which the Nation of Belize is founded.*”
8. It is therefore today the position that it is a constitutional precept that the policies of the State, in effect, the Government of Belize, should protect the identity, dignity and social and cultural values of the Maya as they should of all other Belizeans.
9. The individual claimants are self-explanatory: they claim on their own behalf as well as the several villages of which they say they are the Alcaldes. In the case of the first two claimants (MLA and TAA), they were in fact authorized by written resolutions of their membership to bring the present claim (see second joint affidavit of Martin Chen and Christina Coc at para. 3 et seq).

10. It was this consideration, when conjoined with the provisions of Rule 21.1(1) and Rule 56.2 of the Supreme Court Rules (2005) that inclined me not to find favour with the strenuous objections that the claimants lacked standing to pursue the present claim. Mr. Rodwell Williams SC for the first interested party adroitly advanced the objections which Ms. Lois Young SC for the defendants adopted.
11. I am satisfied however that the claimants, given their interests in the subject-matter of the claim, have adequate and proper standing to ventilate their claim in this court. Although this is not a judicial review proceedings, it cannot be doubted or denied that the claimants enjoy and possess sufficient standing for the purposes of this case. I accordingly ruled on 1<sup>st</sup> December 2008 dismissing the objections: see ruling dated 1<sup>st</sup> December 2008.
12. I am mindful as well that this is a constitutional claim for alleged violation of sections of the Constitution which can lie at the suit of “any person” who alleges a violation of sections 3 to 19 thereof. But the Constitution does not for this purpose define who or what a “person” is. But guided by the almost unlimited scope of the definition of a “**person**” in section 3(1) of the Interpretation Act – Cap. 1 of the Laws of Belize, Revised Edition 2000 to mean “**a natural person or a legal person and includes any body of persons corporate or incorporate, and this definition shall apply notwithstanding that the word ‘person’ occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation,**” I am satisfied that “person” in section 20 of the Constitution would comprehend the present claimants who cannot, by any stretch of the imagination, be regarded as meddlesome busy-bodies and therefore lack standing as has been implausibly urged for the defendants and the interested party.

13. I am fortified in this conclusion also by the consideration that, given the collective nature of indigenous customary title to or interests in land, representative actions, such as the instant claim, whether by MLA or TAA or the individual Alcalde claimants, are an appropriate vehicle through which to advance those rights or interests. For example, in **Mabo v Queensland (No. 2) HCA 23** at para. 69; (1993) 1 LRC, 194 at p. 245, paras f to l, Brennan J stated, in discussing the nature and incidents of native title, regarding the representation of indigenous people in a claim regarding the establishment of native title thus:

*“(W)here an indigenous people (including a clan or group) as a community, are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected **or their entitlement to possession may be enforced by a representative action brought on behalf of the people, or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title. A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect the communal title** (see *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 530-531, 537-539, 547-548; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35-36, 41-42, 46, 51, 62, 74-75). **A communal native title enures for the benefit of the community as a whole and for the sub-groups and individuals within it who have particular rights and interests in the community’s lands.**” (Emphasis added)*

I respectfully adopted this reasoning. (See as well, the judgment of this court in the **Maya Land Rights case**, on representation for collective interests in or rights to customary land). I accordingly, find and hold that the claimants can pursue the present claim.

14. **Secondly**, the defendants are the Attorney General of Belize who is the legal representative of the Government of Belize and is the proper party pursuant to section 42(5) of the Belize Constitution in civil proceedings against the State; and the Minister of Natural Resources and the Environment, who is responsible for land matters in Belize, in the Government of Belize.
15. The defendants, it may be noted, are the same as in the **Maya Land Rights case**.
16. **Thirdly**, the Interested Parties: first, Mr. Francis Johnston was a resident of Big Falls Village in the Toledo District. I say was, because soon after the conclusion of the hearing of this case, Mr. Johnston was the victim of a dastardly criminal attack at his home in which he lost his life. I record the condolences of the court to his family and friends. However, Mr. Johnston claimed to have obtained a lease through a Mr. Salvador Bochub, the second interested party, over an area of land used and occupied in the Golden Stream Village. As a result of activities by Mr. Johnston in clearing land in Golden Stream in the face of objections from some residents who claimed they were threatened with loss of their crop and resources, an urgent application was made for an injunction restraining Mr. Johnston. However, in the light of an undertaking by the then Attorney General who personally appeared, no order was made. It is of course, the case that that undertaking is in place until the conclusion of this case or an order made from the court discharging it.



17. Mr. Salvador Bochub however, took no part in the proceedings and was not represented.
18. It is however pertinent to observe that it was developments in Golden Stream Village between Mr. Johnston and the Maya residents, in particular, Mr. Alfonso Cal, one of the claimants in this case, that provided the spark that has ignited the instant claim. But this comes against the backdrop of the judgment of this court in the **Maya Land Rights case** in 2007. (More on this later).

*The nature and substance of the claimants' case*

19. It is I think helpful to state the nature of the claimants' case as stated in their Fixed Date Claim Form:

*(i) The claimants 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 claimants' customary land rights, which are based on the traditional land use and occupation of the Maya people.*

*(ii) 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 recognized and affirmed by the October 18, 2007 judgment of the Supreme Court in the Maya Land Rights case.*

*(iii) 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.*

*(iv) In particular, the constitutional rights 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 claimants use and occupy until such a mechanism exists.*

*(v) 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.*

*(vi) In response to the Maya Land Rights 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 licenses, permits and concessions ... shall be permitted to resume.”*

*(vii) 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 claimants justifiably fear that without affirmative recognition and protection of their lands, their property, livelihoods, cultural integrity, health, and lives are at risk.*

*(viii) In light of this refusal of government officials to respect or often even acknowledge the existence of the claimants' customary property rights, the guarantee 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.*

*(ix) Thus, the government's failure to provide the claimants with the mechanism or protection 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 section 3(a) and 4 of the Belize Constitution.*

### **Relief Sought**

20. Accordingly, the claimants seek the following relief against the defendants:

*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 defendants' failure to adopt affirmative measures to identify and protect rights based on Maya customary tenure violates the claimants' rights to property and non-discrimination under sections 3, 3(d), 16 and 17 of the Belize Constitution;*

*c) An order that the defendants 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 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 effect 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 lands 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 use;*
  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 claimants' constitutional rights.*
  - f) *Costs; and*
  - g) *Such further and other remedy as this Honourable Court deems just.*

### The Defence

21. The general thrust of the defence is that the claimants are not entitled to any of the relief sought. In the classic pleader's style the Defence sets out in several paragraphs to itemize and elaborate upon its averments of why the claimants are not entitled to any of the relief.
22. In the first place, the defendants aver that the first two claimants (MLA) and the Toledo Alcaldes Association (TAA) are not entitled to bring this representative claim for alleged breaches of fundamental rights and freedoms provisions of the Constitution in respect of alleged customary land rights for the villages named in the Claim Form. The substance of

this averment which is really about the standing of the claimants was also advanced in argument for the first interested party by Mr. Williams SC.

23. This point need not detain me any further in the light of my conclusions at paras. 6, 7, 8 and 9 of this judgment. I am satisfied that the first two claimants, given their representative character of the Maya as a group, and of course, the individual claimants have sufficient interest in the subject-matter of this claim namely the existence of Maya customary land rights in the Toledo District and the alleged violations by the defendants of those rights.
24. The nub of the Defence however really, is that the defendants deny that the claimants have customary land rights which they (the defendants) have failed to identify and protect; and 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 over the said Settlement, 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. A closely allied ground advanced for the defendants is that from as early as 1839 the defendants exercised and demonstrated their sovereignty over land in Toledo District thereby clearly evincing rights of ownership over the land to the extinction of any customary rights claimed.

I understand this to mean that any customary rights in land in the Toledo District had been extinguished.

25. An important chink, however, in the defendants' armour in this case is their admission, as they were bound to admit that customary land rights have been held by this court in the **Maya Land Rights case** to constitute property. The defendants contend, however, that that judgment should not be given general application, presumably to include the claimants in

the instant case as it only related to the two villages of **Conejo** and **Santa Cruz** that were claimants in that case.

26. Somewhat paradoxically however, the defendants aver that in so far as customary land rights exist for the claimants, which they deny, the first defendant has always recognized and protected these rights, subject however, to the rights of other inhabitants of Belize.
27. Quite how the defendants have recognized and protected the customary land rights of the claimants is nowhere stated nor was this advanced in evidence at trial on behalf of the defendants.
28. In sum, the defendants deny that they have violated any of the constitutional rights as averred by the claimants.
29. Mr. Francis Johnston the first interested party for his part filed an affidavit to refute the claimants' claim. Although he lived in Big Falls Village, he claimed he owned a 50 acre plot of land in Golden Stream (one of the Maya villages as claimant in this case) where he farmed mainly rice. Mr. Johnston claimed that the land was leased to his brother-in-law, Mr. Salvador Bochub, the second interested party in this case, from whom he acquired it.

However, there was no lease put in evidence and no evidence given of the terms and conditions of the said lease. This point was highlighted by Ms. Young SC for the defendants in urging this court not to award any damages against the defendants to Alfonso Cal because of the damages to his crops by bulldozing on behalf of the Mr. Johnston. This, she submitted, was because Mr. Johnston had not produced any lease from the defendants.

30. I am inclined to agree as I have no evidence of how Mr. Johnson came to possess land in Golden Stream which he could press against the claimants. (More on this later at paras. 114, 115 and 116 below).

*The issues agitated by this case*

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 **Maya Land Rights case** fought over. The difference here is with the number of claimants – twenty-five in all including the two umbrella Maya organizations on behalf of the Maya villages in the Toledo District, (the MLA and TAA) and twenty-three Alcaldes on behalf of the respective Maya villages named in the Claim Form.
32. The third claimant, **Juan Pop**, is the Alcalde of **Golden Stream Village** and he lives in the said village and has joined in this action in his own behalf and on behalf of the said village. In his first affidavit filed on 5<sup>th</sup> June 2008, Mr. Pop deposed of incidents in **Golden Stream Village** involving the destruction of the farms of two villagers, Messers. Alfonso Cal and Mr. Salvador Cal by bulldozing on the orders of Mr. Johnson. (See in particular, paras. 3, 4, 5 to 11).
33. These incidents in **Golden Stream Village** and the lack of satisfactory response by the defendants to their pleas for help prompted the present claim.
34. It is, in my considered view, that it is against the backdrop of the judgment of this court in the **Maya Land Rights case** and the incidents in Golden Stream Village that this case falls for determination.



35. It must be said right away that the first declaration sought by the claimants in the present action was a part of the subject of the judgment in the **Maya Land Right case**. However, the claimants now seek a declaration **re-affirming** that part of that judgment that Maya customary land tenure rights exist in the Toledo District, and that where they exist they constitute “property” within the meaning of sections 3(d) and 17 of the Belize Constitution.
36. However, the declaration in that case was village-specific, viz, the villages of **Conejo** and **Santa Cruz** in respect of which that claim was brought.
37. The first issue that inevitable therefore arises for determination is: **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?**
38. The second issue is: **What, if any, are the constitutional implications or purport of these rights and interests?**
39. The third issue is: **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?**
40. A fourth issue is: **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?**

Preliminary skirmishes between the parties

41. I must, before I turn to an examination of the issues which in my view arise for determination, state that, from the parties' statements of case, there arose some spirited preliminary skirmishes between them before the hearing proper. These concerned an application by the claimants to strike out portions of the Defence as they relate to matters already decided by this court in the **Maya Land Rights case**; and that the claimants' case was, in the light of that judgment, already *res judicata* and therefore their present claim should be dismissed as the defendants and interested party urged.
42. The claimants for their part applied to have certain parts of the Amended Defence struck out as being already decided by the Court. I decided however, *de bene esse* to let the challenged portions of the Amended Defence stand and to hear the whole case in the light of the evidence, arguments and submissions advanced for the parties.

The Evidence

43. I must admit that the evidence and documentation submitted by the parties are enormous: For the claimants, there were fifty-one affidavits with copious exhibits. Among these are affidavits by individuals describing land tenure system in Golden Stream Village and detailing events that occurred in that village in May 2008, involving the interested party (see affidavits of Alfonso Cal, Bartolo Cal). Some of the individual claimants filed affidavits as well, describing customary land tenure system in respect of the villages named in the Claim Form.
44. There was filed for the claimants as well, affidavit evidence by experts describing the history of the Maya presence in Toledo District as well as

the connection between present day Maya and historical Maya and Maya customary land tenure and system (see in particular affidavits of Prof. Liza Grandia and Prof. Grant Jones).

45. One of the expert witnesses for the claimants, Prof. Richard Wilks, is a professor of Anthropology and Gender Studies at Indiana University, U.S.A. He was initially trained as an archeologist and later in cultural anthropology in which he obtained his Doctoral Degree. He made the cultural and historical study of the Maya one of his specialties. He, in addition to his affidavit evidence in this case, also gave oral testimony. He was cross-examined at some length by Ms. Young SC for the defendants. I found Prof. Wilks a competent, reliable and helpful witness, particularly on the historical continuity of Maya presence in what is today Toledo District before **first contact** and **post contact**. That is, before and after the advent of Spanish presence and later British colonial administration in the area and continuing presence even before independence in 1981. He also testified in his expert statement about the Alcalde system and Maya customary land tenure and management: see paras. 81 and 83 below.
46. Seven affidavits, again some with copious exhibits and documents, were filed on behalf of the defendants.

The substance of the affidavits for the defendants, in effect, is first, there is no Maya customary land tenure or system in Toledo District; secondly, all lands in Toledo District other than Crown grants and leases, are Crown land; thirdly the claimants are not indigenous to Toledo District, they having recently migrated from Guatemala. (See in particular, paras. 6, 7, 8, 9, 10, 11, 12, 13 of Jose Cardona's affidavit and paras. 5, 6, 21, 23, 24, 28, 47, 48, 49, 77, 79, 80, 81, 94, 95 of Dr. Jaime Awe's first affidavit).

47. Dr. Awe is employed by the Government of Belize as the Director of Archaeology in the National Institute of Culture and History. He holds a Masters Degree in Anthropology with a Doctorate in Archaeology. He describes his particular specialization as the archaeology of Maya culture and Civilization and the pre-history of Meso-America.
48. Mr. Jose Cardona is an attorney at law now in private practice. Before that, he worked in the Lands and Surveys Department in various capacities, including Land Inspector, Assistant Lands Officer, Legal Officer, Acting Registrar of Lands and Commissioner of Lands and Legal Counsel.
49. Mr. Cardona states in his affidavit at para. 3 that *“through years of experience and research, (he) acquired knowledge concerning Indian reserves and Indian people living in Southern Belize.”* Presumably, he meant the Maya people. But a weakness I find, with respect, with Mr. Cardona’s affidavit is when he states at paras. 6 and 7 that he “joins issue” with the claimants’ claim and the proposition that the “Mopan” population of the Toledo District has ancestral roots in the area.
50. In my view, a witness or an affiant, does not join issue with parties on either side to a case: his testimony is to help the court decide the issue joined between them.
51. Dr. Awe’s manifest expertise in archaeology is undoubted, but I am not sure his affidavit testimony was put forward as an expert’s. He admitted that he is employed by the Government of Belize (the defendants). Rule 32 of the Supreme Court Rules 2005 provides for expert evidence. There is of course, no claim made in respect of Mr. Cardona as an expert witness. I find the exhibits to his affidavit helpful however.

52. I however, had to consider **all** the testimony in this case, including affidavit evidence by individuals, experts' evidence and oral testimony at the trial, in the round.

*The basis of the present claim*

53. It is, I think, fair before I go on to examine the issues that have arisen in this case, to state if only briefly, what has prompted the instant action by the claimants.
54. I have at para. 3 of this judgment alluded to the manifest link between this present case and the judgment of this court in the **Maya Land Rights case**. Indeed, the claimants state as much in their Fixed Date Claim Form in describing the nature of their claim.
55. However, the link is made more evident by the evidence tendered in this case, including the narration (by affidavit) of the incidents in May 2008, in Golden Stream Village involving some residents of that village and the first interested party concerning the clearing of some 50 acres of land in the said village. These incidents, as I have observed at para. 14 above, provided the spark for the instant claim. These developments, however, came almost hard on the heels of the judgment in the **Maya Land Rights case** delivered on 18<sup>th</sup> October 2007.
56. Following that decision, steps were taken by the defendants (the Government of Belize) to implement it in concert with representatives of the claimants by first having a joint meeting on 26<sup>th</sup> March 2008 (See **Exhibit MC et al 3** to the joint affidavit of Martin Chen and Cristina Coc, for Minutes of this meeting). This was followed by a Memorandum, dated March 27, 2008 from the Solicitor General to all Chief Executive Officers, Commissioner of Lands and Departments of Forestry, Fisheries,

Environment and petroleum and Geology on the subject of the judgment of the Court in the Maya Land Rights case in Claims Nos. 171 and 172 of 2007.

57. It is helpful, I think, to reproduce this Memorandum in its entirety:

***MEMORANDUM***

*My Ref:*            *SGF/40/01/08 (3)*

*From;*            *Solicitor General, Attorney General's Ministry*

*To:*                *All Chief Executive Officers, Commissioner of Lands, and Departments of Forestry, Fisheries, Environment and Petroleum and Geology*

*Date:*             *March 27, 2008*

*Subject:*         *Judgment of the Supreme Court of Belize in Claim Nos. 171 and 172 of 2007, Aurelio Cal and Manuel Coy et al v the Attorney General and the Minister of Natural Resources and the Environment*

*Please be informed that on October 18, 2007, the Chief Justice issued the judgment of the Supreme Court of Belize with respect to the above-mentioned consolidated claims, termed 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.*

*Presently, the Government of Belize is involved in discussions with the attorney-at-law and representatives of the Maya communities of Southern Belize. The aim of these discussions is to find the most appropriate manner of implementing the judgment of the Supreme Court, which contained, inter alia:*

- “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 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 include, but not be limited to, directing the government from:*
- i. issuing any lease or grants to lands or resources under the National Lands Act or any other Acts;*
  - ii. registering any such 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, the Petroleum Act, or any other Act.”*

*In order to facilitate the implementation of the judgment, you are hereby directed to immediately cease all activities and/or operations on, or to otherwise deal with land in the Toledo District, in particular but not limited to the ways set out above by the Order of the Court, until such time as further instructions of the mechanisms of implementation are issued.*

*Please note that Departments with direct interest in the judgment and its implementation will be contacted separately for their input and/or participation.*

*You are so advised.*

*Sincerely yours,*

*Sgd: T Herwanger*

*TANYA HERWANGER (Mrs.)*

*cc: Hon. Prime Minister  
Hon. Attorney General*

58. After this memorandum, there was yet another meeting on 9<sup>th</sup> April 2008, to explore further ways of implementing the 2007 decision of the court. (See paras. 20, 21, 22, 23 of Ch'en and Coc's affidavit and **Exhibit MC et al 5**, a copy of the minutes of this meeting).
59. There was evidently an impasse between representatives of the claimants and those of the Government of Belize (the defendants) as to the extent and reach of the judgment in the **Maya Land Rights case**: the former stating that it affected all Maya villages in the Toledo District and the latter insisting that it only related to the villages of Santa Cruz and Conejo.
60. The upshot of all this was the issuance on 23<sup>rd</sup> April 2008 of a further Memorandum from the Solicitor General to government officials regarding the implementation of the judgment in the **Maya Land Rights case**. Again, it is helpful to reproduce this Memorandum:



MEMORANDUM

*My Ref:* SGF/40/01/08 (23)

*From:* Solicitor General, Attorney General's Ministry

*To:* All Chief Executive Officers, Commissioner of Lands, and Departments of Forestry, Fisheries, Environment and Petroleum and Geology

*cc:* Hon. Attorney General  
Cabinet Secretary

*Date:* April 23, 2007 (sic)

*Subject:* Further Instructions re implementation of the Judgment of the Supreme Court of Belize in the case of Aurelio Cal et al v the Attorney General et al (Claim Nos. 171 and 172 of 2007)

*Further to our SGF/10/01/08 (3) of March with, instant, with the subject of "Judgment of the Supreme Court of Belize in Claim Nos. 171 and 172 of 2007, Aurelio Cal and Manuel Coy et al v the Attorney General and the Minister of Natural Resources and the environment".*

*Kindly consider this second memorandum as further instructions on the matter of implementation of the judgment of the Supreme Court in the above-mentioned case, which shall apply until further notice.*

*The instructions contained in our March 27<sup>th</sup> Memorandum to "cease and desist" on all activities and/or operations, are hereby modified as follows, with immediate effect:*

- 1. the "cease and desist" instruction continues to apply fully, but only with respect to lands currently occupied and used by the villages of Santa Cruz and Conejo, the Claimant communities; and*

2. *the existing licenses, permits and concessions which affect land elsewhere in the Toledo District shall be permitted to resume.*

*We take the opportunity to remind you that although our current obligations arising from the judgment are with respect to the two Claimant villages, Santa Cruz and Conejo, other Maya communities in Southern Belize **may** consider that they have similar rights and may choose to have such rights recognized. In this regard, we encourage you 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.*

*You are so advised.*

*Sincerely yours,*

*TANYA HERWANGER (Mrs.)  
Solicitor General*

61. The claimants not unexpectedly, did not view this reversal of position by the Government of Belize kindly: see paras. 24, 25, 26, 27, 28, 29 to 33 of the joint affidavit of Chen and Coc. The claimants accordingly regard the situation as one in which, as deposed in paras, 33 of Ch'en and Coc's affidavit:

*"... the government seems to be taking the position that in order to have customary rights respected, every community must bring a case before the courts. We believe that forcing thirty eight Maya villages into the adversarial process of litigation is inappropriate and divisive, and only exacerbates the effects of the government's long-standing failure to protect our rights."*

62. The claimants therefore regarded the subsequent memorandum of 23<sup>rd</sup> April 2008 (which inaccurately is dated 23<sup>rd</sup> April 2007) as a volte-face by the Government from the initial attempts to implement the judgment in the **Maya Land Rights case** of 2007. They regarded this change as a revocation of protection of Maya lands by the government.
63. The claimants therefore assert that this change violates their constitutional rights. They claim as well that the revocation of protection for their lands has prompted an increase in non-Maya third party activities on Maya village lands throughout the Toledo District.
64. Martin Ch'en and Cristina Coc deposed in this respect in their joint affidavit as follows:

***Continuing Compulsory Acquisition and Infringements of Maya Property Rights in Toledo***

34. *As soon as the government revoked the March 27 directive, and before Maya villages were advised and the April 23 directive was issued, third party activities resumed on Maya village lands throughout Toledo. Indeed, it is our impression that third party activities have accelerated, as if the initial directive put outsiders on notice that our lands would not be freely available to exploit indefinitely, thereby creating something of a land-grab.*
35. *For example, the alcalde of San Pedro Columbia informed us that Minister Coy, a member of the government itself, announced that an area of that village is to be promptly surveyed and leased to some 20 families. There are more than 20 families currently farming that area in the customary fashion, some of whom have already been forced off their groves and fields elsewhere in the community as a result of leasing, and have an action in process before this court in that regard.*

36. *In other communities, logging re-commenced without any consultation with the villages nor concern for the use the community makes of the land.*
37. *Similarly, Mr. Johnson in Golden Stream not only proceeded with his surveying, but also brought in bulldozers to destroy cacao groves, milpa fields, and forest of the community.*
38. *In practice, despite its verbal commitment to creating a framework though (sic) which Maya villages can establish and title the area over which they have customary rights, the government of Belize in all of its instances continues to behave as though Maya customary property rights do not exist and as though Maya people are squatters on the land that the communities traditionally use and occupy. Despite the decision in the Maya Land Rights case, the government continues to disregard the rights of Maya communities and individuals over the land, and treats Maya land as unburdened land for the purposes of issuing leases, grants, and concessions.*
39. *This inaction confirms the need for preventative protection of all Maya village lands where customary rights may exist, during the period in which the government is developing a framework for protecting them. Our decades-long struggle to have our land rights recognized would be of little benefit to our people if third parties are permitted to come into our communities and remove our forests, bulldoze our crops, and lease our lands while we wait patiently for the government to design a method to by which we can eventually register our title. The longer this takes, the more likely it will be that all we are left with is a residual patchwork of land that is inadequate to sustain the forests and wildlife necessary for our physical and cultural survival.*

65. Several affidavits for the claimants depict this state of affairs: for example, the affidavits of Pedro Ishim; Liberato Choc; and the witness statement of Froylan Tzalam,

66. It is therefore reasonable in the circumstances, to find that that it is the perceived threats to lands in the Maya villages, whether through increased activities by others by logging, land clearing etc., and the inability to elicit a prompt and meaningful response from the defendants by way of addressing these concerns that have compelled the claimants to launch the instant claim seeking the several relief they now want.
67. The activities of Mr. Francis Johnston, the first interested party in May 2008 in Golden Stream Village was perhaps the last straw on the camel's back. These activities are described in the first affidavit of Juan Pop who at the material time was the Alcalde of that village: see particularly paras. 4 to 14.
68. Juan Pop's first affidavit was in support of an application for an interim order restraining the defendants from doing the several things stated in the application. On the Attorney General's undertaking not to do any of the said things, no formal order was therefore issued. But it was manifest that it was the activities involving bulldozing and clearing a large part of the village lands that prompted the application.

*Consideration and Determination of the issues*

69. It is against this backdrop and in the light of the parties' respective statements of case that I now turn to a consideration of the issues which in my view arise for determination in this case.

70. **A. Is there in existence in the Maya villages in the Toledo District represented in this action Maya customary land tenure system and if so, do members of these villages have rights and interests in the village lands based on Maya customary land tenure?**

71. I must confess to an overwhelming sense of *déjà vu*. This stems from the simple and manifest fact that this issue formed a central plank in my judgment in the **Maya Land Rights case**. At the risk of repeating myself, I stated in that judgment at paras. 40 – 48 as follows:

*“40. On the state of the evidence ..., 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.*

*42. I am fortified in this conclusion by the finding of the Inter-American Commission on Human*

***Rights in the Maya Indigenous Communities case supra when it stated at paragraph 127 of its Report:***

*“127. Based upon the arguments and evidence before it, the Commission is satisfied 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. These 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.”*

***43. Like the Commission in that case, I am satisfied that the defendants in the present proceedings, have not presented any credible argument or evidence to refute the claimants’ argument and evidence concerning the land use patterns practiced by the Maya People in the Toledo District or the customary land tenure system that seems to have been developed by them – see para. 128 of the Commission’s Report *ibid*.***

44. *Accordingly, I find and hold that there is in existence, in Southern Belize, in particular, in the Toledo District, Maya customary land tenure.*
45. *Importantly also, I find from the evidence in this case, that the Government of Belize, 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. This significant development was arrived at on 12<sup>th</sup> October, 2000 in an Agreement between the Government of Belize and the Toledo Maya Cultural Council, the Toledo Alcaldes' Association, the Kekchi Council of Belize, the Toledo Maya Women's Council and the Association of Village Council Chairpersons. All the latter organizations are collectively described in the Agreement as the Maya Leaders representing the Maya peoples of southern Belize. The Agreement was signed by Prime Minister for and on behalf of the Government of Belize.*
46. *Clause 6 of this Ten-Point Agreement, I find, is a clear and unequivocal governmental endorsement of the existence of the Maya*



*people's rights to land and resources in southern Belize based on their long-standing use and occupancy. This, I find is a clear affirmation of the existence of Maya customary land tenure in southern Belize.*

47. *A copy of the Ten-Point Agreement is annexed as Exhibit GC 5 to the joint affidavit of Gregorio Choc, Cristina Coc and Martin Chen. Clause 6 of this Ten-Point Agreement expressly states:*

*“That the GOB (Government of Belize) recognises that the Maya People have rights to land and resources in Southern Belize based on their longstanding use and occupancy.”*

48. *This point is, in my view, an important admission by the defendants sufficient to dispose of this aspect of the case in the claimants' favour. However, it is manifest that notwithstanding the recognition of the property rights of the Maya people in their traditional lands based on their longstanding use and occupancy, the defendants as representing the Government of Belize, have not delimited, demarcated or titled or otherwise established any clear or legal mechanisms that may be*

*necessary to clarify and protect the claimants' rights so recognized. Hence this litigation. But it is important to state that this Ten-Point Agreement, and in particular its paragraph 6, has never been questioned, disputed or refuted by the defendants in these proceedings. Indeed, Ms. Antoinette Moore the learned attorney for the claimants urged on their behalf, with I dare say some cogency, that in the light of the admission contained in para. 6 of the Ten-Point Agreement, the defendants should be estopped from denying the claimants' customary land tenure in Southern Belize. I must say there is some force in this line of argument."*

72. Therefore, in the circumstances, I find the arguments and submissions, advanced by both Ms. Young SC for the defendants and Mr. Williams SC for the first interested party, to the effect that the claim of the claimants in the instant case is *res judicata* in the light of the decision in the **Maya Land Rights case** are not without some attraction.
73. Yes, the defendants before me now were the same as in the **Maya Land Rights case**. There is, however, the fact that the individual claimants in that case and the villages of Santa Cruz and Conejo involved, were Maya, as the claimants in the instant case though larger in number. But on the issue of the existence or otherwise of Maya customary land tenure in Toledo District, there could be said to be some privity, if only of interest between the claimants in the **Maya Land Rights case** on the one hand and the present defendants on the other. But that issue was decided in

favour of the former: **Midland Bank Trust Co Ltd v Green (1980) Ch 590** at p. 607; **(1978) 3 All ER 555** and Spencer Bower, Turner and Handley, generally **The Doctrine of Res Judicata** 3<sup>rd</sup> Ed. (1996). Therefore, assuming without deciding that *res judicata* operates in the instant case, it should in my considered view, operate to disentitle the defendants who were the same in the **Maya Land Rights case**, to re-open or re-litigate the same issue all over.

74. However, the present claim seeks different relief from those sought in the **Maya Land Rights case**. The instant claim is about the defendants' obligation to protect the constitutional rights of the claimants, particularly their right to Maya customary land rights and interests in the Maya villages in the Toledo District. These are rights and interests which were the subject of determination in the **Maya Land Rights case**. The claimants in the instant case are seeking to prove that there is an obligation on the defendants to protect these rights and interests, and they claim that the failure to so provide the necessary protection for those rights and interests is a disregard or violation of that obligation amounting to a breach of the several sections of the Belize Constitution.
75. It is for all these reasons that I decided, even in the face of the preliminary skirmishes between the parties I have briefly recounted at paras. 41 to 42, to let the case go to a full trial and be determined on the evidence.
76. However, on the issue of the existence or non-existence in the Maya Villages in the Toledo District of Maya customary land tenure and whether the members of these villages have rights and interest in land based on Maya customary land tenure, I am satisfied by the surfeit of evidence in this case that there does indeed exist in these villages Maya customary land tenure which inheres for the benefit of the inhabitants of these villages.

77. I am constrained to observe that from the evidence, there was even an admission, albeit grudgingly, by the defendants of this fact when they sought to corral the existence of Maya customary land tenure with rights and interests for the Maya Villages only to the villages of Conejo and Santa Cruz: see in particular, Memorandum dated 23<sup>rd</sup> April 2008, reproduced at para. 60 above. These two villages were, of course, claimants in the **Maya Land Rights case**. But more importantly, a part of the *ratio* of the judgment in that case was that “... *there is in existence in Southern Belize, in particular, in the Toledo District, Maya customary land tenure.*” (See paras. 44 to 49 of the judgment in that case).
78. In the instant case, the claimants include the two umbrella Maya organizations (MLA and TLA) and twenty-two individual Alcaldes with named Maya villages in the Toledo District; but there can be no doubt about the representational character of the claim to embrace **all** the Maya villages in the Toledo District.
79. There are in all, **thirty-three** Maya villages in the Toledo District (inclusive of Conejo and Santa Cruz which featured in the **Maya Land Rights case**). Both sides put in evidence **The Maya Atlas** (1997) which contains maps of the Maya villages in Southern Belize with detailed description of the villages. *The Atlas* contains in Regions 1 to 4, a village by village description of the Maya villages in the Toledo District. It is, I think, clear and reasonable to find that it is in respect of these that the present claim is being prosecuted given the standing of the claimants as I have determined at paras. 4 to 14 of this judgment. There are additionally **five** Maya villages in the Stann Creek District and these are described in Region 5 of the Maya Atlas. Stann Creek District is in Southern Belize, it is therefore reasonable to extend the existence of Maya customary land tenure to the five Maya villages there as well. But I make no finding on this as no claim

was pressed on behalf of these Maya villages in the Stann creek District in these proceedings.

80. From 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; nearly all the individual affiants for the claimants deposed to this and the expert testimonies bear this out as well: see for example, affidavits of Pedro Ishim, para. 10 et seq; Liberato Choc, paras. 12 et seq; first affidavit of Alfonso Cal, paras. 18 to 24, the affidavit of Candida Cho, paras. 3 to 12; Domingo Cal, paras. 3 to 12.
81. The claimants put in evidence testimonies from Alcaldes and individual villagers testifying to the existence of Maya customary land tenure system and management. It is impossible to ignore this surfeit of evidence on this issue.
82. I also find the evidence of the experts on behalf of the claimants compelling and convincing on the existence of Maya customary land tenure and management in the Toledo District. The evidence of Elizabeth Grandia known professionally as Lisa Grandia on the customary Maya land management at paras. 23 and following of her expert statement, is impressive and helpful. See also expert statement of Grant D Jones, in particular, "*Part 1: Maya Land Occupancy and Use in the Toledo District.*"
83. I find equally compelling, impressive, authoritative and convincing, the testimony of Prof. Richard Wilks, one of the claimants' experts. I have already referred to him at para. 45 above. His testimony on the accommodation of Maya land use, from the inception of the country as the colony of British Honduras in 1862; the adaptation of the Alcalde system which is a central institution of Maya customary law especially in the area of land management, is credible and authoritative. See also his first

affidavit dated 18 March 2008 at para. 41 and following on Maya customary land tenure in Toledo District.

84. I therefore find and hold that from the evidence, there 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.
85. For the avoidance of doubt, this conclusion is not limited to only Conejo and Santa Cruz Villages, already the subject of the judgment in the **Maya Land Rights case**, but includes, as it, perforce, must, given the representative nature of the instant claim, the other Maya villages in the Toledo District.
86. Finally, in answer to the contention advanced by Ms. Young SC for the defendants that in any event, the claimants have only usufructuary rights in the lands and therefore do not have right to title, I am unable to share or agree with this. As Brennan J stated in **Mabo (No. 2)** supra at p. 237 paras. (g) to (i):

*The fact that individual members of the community ...enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title. Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title. There may be difficulties of proof of boundaries or membership of the community or of representative of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law.*

87. **B. Are there any links between the claimants and the original inhabitants of the lands now in the Toledo District so as to establish continuity to ground the claimants' claim to customary rights and interests in lands in the area?**

This is one of the planks in the defendants' platform in this case: they deny that the claimants are the original inhabitants of what is today Toledo District and therefore could not have practiced or enjoyed customary land rights or interests in lands in the area.

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 defendants' 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.*" (See para. 5 of Awe's statement).

89. Much the same thesis, if only less scientific in terms of expertise, is advanced in the affidavit of Mr. Cardona. He states at paras. 10, 11 and 12 as follows:

10. *My research has revealed that the original inhabitants of the Toledo District were a group of people now called the Manche Chol. In a successful drive in 1796-97, with one Spanish army moving southward from Campeche in Mexico and the other moving northward from Cajabon in Guatemala, Indian Itza rule' was crushed and Spanish rule established throughout Peten. At the time, such of the Manche Chol as could be caught were shipped to the highlands of Guatemala; those who escaped were for the most part wiped out by diseases.*
  11. *The result was that by the eighteenth century, Toledo was essentially unpopulated. This is supported by Eric Thompson in "The Maya of Belize", a copy of which is now shown to me and marked "J.C. 2".*
  12. *The Maya Indians in southern Belize are from Ketchi and Mopan stock. The former are part of a much larger population whose homeland is the Department of Verapaz of Guatemala. During the 1860's and 1870's, as a result of factors such as loss of traditional lands, the Madamiento laws, and the extension of the forced-labour period, the Ketchis began their migration to southern Belize.*
90. The brunt of the defendants' case on this score is that the claimants have no ancestral roots or links to the Toledo District and that they or their own ancestors are in fact recent immigrants from Guatemala. To this end Mr. Cardona deposes in para. 8 of his affidavit that in 1997 he submitted to the Director of Immigration and Nationality a list of surnames and that he



requested a search of their records to indicate the nationality of the surnames. He states that he was provided with a list showing the nationalities of the surnames. He then deposes that: *“Most of the surnames are indicated to be Guatemalan. The list of names is shown to me and marked “J.C. 1” (exhibiting the list of names).*

91. I can only wonder how in the world a surname is indicative or conclusive of nationality; but importantly, it is not averred or claimed that the surnames are those of any of the claimants!
92. The claimants have on the other hand, put in compelling expert evidence to disprove the defendants’ thesis on the historical and ancestral links of the claimants proving, in my view, a satisfactory **historical, ancestral and cultural continuity and links** between the original inhabitants of what is now Toledo District and the present claimants.
93. The first is Lisa Grandia, an assistant Professor in Anthropology at Clarke University in Worcester in Massachusetts, USA. She holds a Ph.D. Degree in Anthropology from the University of California at Berkeley on the Dissertation *“Unsettling: Land Dispossession and Ending Inequality for the Q’eqchi Maya in Guatemala and Belizean Frontier Colonization process.”* She did extensive field work in both Guatemala and Belize. She claims proficiency in Q’eqchi, both spoken and written.
94. In her statement she states at paras, 15, 16, 17 and 19 as follows:

***Historical Context – the Maya People in Toledo***

*15. In this section, I review the relationship of the two Maya groups involved involved as Claimants in this case, the Mopan and*

*the Q'eqchi, as well as a third extinct Maya group described by historians as the Manche Ch'ol. At the time of contact with the Spanish, both the Mopan and the Manche 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. As I will describe, the Q'eqchi intermixed with both these groups, blurring the lines between them.*

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 writing 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 Mopan and the Manche 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.*

17. *In the period after contact with the Spanish, the Mopan Maya lived in Toledo until the Spanish removed them against their will to Peten, Guatemala. The Manche 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 Mopan who had been relocated to San Luis, Peten and together these Mopan-Q'eqchi families organized a return to Belize in the 1880s. the Q'eqchi Maya also intermixed with the Manche' Ch'ol people in two regions; (1) in highland Verapaz where the Spanish relocated some of the Manche Ch'ol and (2) with remnant populations in the region north and northwest of Cahabon, 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 Guatemala. I would reiterate here that the political and demographic chaos cause by the Spanish conquest resulted in widespread ethnic intermixing and cultural fluidity among all Maya groups.*

19. *Externally imposed ethnic divisions such as those used by government 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 Mopan peoples, known as "Maya Mopan" in Belize or sometimes simply "Maya") were the same as Q'eqchi. Although the Mopan 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.*

95. The second is Professor Emeritus Grant D. Jones, former Charles A. Dana Professor of Anthropology at Davidson College in Davidson, North Carolina, USA and former chair of the Department of Anthropology and Sociology at that College. She has conducted ethnographic and ethno-historical research on the Maya in Belize and adjacent area for over forty years. She is the author of *The Conquest of the Last Maya Kingdom* (Stanford University Press 1998).
96. Professor Jones gives a summary of her statement at para. 10 which is divided into Seven Parts. In part V she states that there is sufficient evidence to conclude that many people in the Toledo District who call themselves Kekchi are more accurately Kekchi-Chols or Kekchi-Mopan; and states at part V of her statement as follows:

**Part V: Historical Basis for Kekchi and Mopan Claims to Heritage in the Toledo District**

65. ... various speakers of Mayan languages have inhabited the Toledo District since the time prior to the first European contact in the 16<sup>th</sup> century. In this section, I will explain that 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.

**Kekchi Ancestral Relationship to Chol Maya Speakers**

66. It is incorrect to oversimplify the native population of this region by characterizing it as a former Chol-speaking area whose original inhabitants became extinct following their removal to Guatemala. To the contrary, 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. They disappeared as a language group, but their descendants survived as Kekchis or Kekchi-Chols, some of whom retained their original Chol names.

67. In his 1928-1929 ethnographic study of the people of San Antonio, Toledo, Sir Eric Thompson characterized the Maya-speaking population of the district as follows:

*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 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 number, They hail for the most part from San Pedro Charcha, a small town lying a little to the east of Coban, and there are a few Kekchis scattered throughout the villages of the Toledo District from Coban itself.*

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. Because we know that Chol names appear in varying frequencies throughout the Kekchi communities of Guatemala, it is probably most accurate to speak of most Kekchi in Toledo today as Kekchi-Chols.

### ***Kekchi Ancestral Relationship to Mopan Maya Speakers***

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. The relationship of immigrating people known as Kekchis to the earlier historical populations of Toledo is more complex. In my opinion, however, this group may also claim roots in these earlier populations.

70. Despite the linguistic differences between Kekchi and Mopan (the latter is a Yucatecan Maya language), there is a great deal of

*overlap between contemporary Kekchi and Mopan names in the Toledo District. A quick inspection of the names indicates a longstanding pattern of Kekchi-Mopan intermarriage. The high degree of obvious intermarriage strongly suggests that this practice has been in place for many years, likely long preceding the later 19<sup>th</sup>-century recorded migration of Kekchi and Mopan Maya to the Toledo District. A substantial number of names in the region can be traced to earlier Mopan, Manche Chol, and other Chol-speaking groups, and even unidentified ethnic groups recorded in Belize as early as 1677.*

71. *I have carried out unpublished research on the ethnic composition of peoples who lived in San Luis, Peten, Guatemala in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries. My sources are baptismal registers from that town, recorded by Spanish Catholic missionaries from Yucatan, new Spain (Mexico) who served in Peten. These records are preserved in the Apostolic Archive of the Catholic Church of Flores, Peten and provide names of baptized infants, their parents and their godparents, and locations of parental origin.*

72. *These registers indicate that Mopan and Itza peoples, not surprisingly, dominated the population of San Luis during this period, reflecting both the 17<sup>th</sup> century removal of these groups from the Toledo District as well as a longstanding indigenous population of Mopans in San Luis (which was known also as "Mopan" in the 17<sup>th</sup> and 18<sup>th</sup> centuries). Of additional interest, however, is the evidence in these records that people with Chol and Kekchi surnames began migrating from Verapaz to San Luis during the 1770s, intermarrying with the local population and, by inference, learning their language (Mopan), and taking on local customs.*

73. *These facts demonstrate 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, just as they confirm that Chols forcibly removed from Toledo intermarried with Kekchis in Verapaz, thus creating a Kekchi-Chol ethnic population.*

97. Professor Jones cautions in Part VI of her statement that the sources for evidence of the historical origins of Maya groups, such as Mopans, must be undertaken with the understanding that Maya identity and Spanish colonialism knew no national boundaries. People inter-married and moved back and forth for centuries between territories that only later became distinct with the creation of national boundaries, including the Belize-Guatemala border.
98. Thirdly, much the same point is made by Professor Richard Wilks in his first affidavit where at paras. 15 through 38: he deposes of the historical ethnic fluidity among Mopan, Kekchi and Manche Chol groups in what is today the Toledo District. But Wilks creditably withstood what it is fair to say, was blistering cross-examination by Ms. Young SC for the defendants. I find no difficulty believing his testimony on the ancestral and cultural continuity between the claimants and the original inhabitants of what is today Toledo District.
99. I am consequently satisfied beyond peradventure that on the evidence there are historical, ancestral, social and cultural links between the original inhabitants of what is today Toledo District and the claimants. I find on the evidence, these links continue and endure to this day.
100. The assertion by the defendants that the claimants 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 claimants 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.
101. I therefore find, and hold, that the historical, ancestral and cultural continuity between the claimants and the original inhabitants of what is

today Toledo District entitles them to lay claim to customary rights and interests in land in the area.

102. **C. Has there been an extinguishment of any rights or interests in the lands of the claimants by the assertion of Spanish sovereignty in the area in 1540 and upon later assertion of British sovereignty in the area?**

This issue, like the issue of the existence of Maya customary land tenure in the area has also a considerable element of *déjà vu*. It featured as well in the **Maya Land Rights case** (see paras. 76 to 93 of the judgment of the court in that case).

103. Not surprising therefore, Ms. Moore SC for the claimants, tried to have the portions of the Amended Defence that sought to re-activate this issue of extinguishment struck out. The Court, however, allowed *de bene esse*, the challenged portions to stand until trial. This was in the hope that this time around, the defendants would bring forth fresh evidence and or more compelling evidence and or authority that on the assumption of sovereignty over the area first by Spain, then by Britain, that this effected in law, an extinguishment of rights and interests in land that had existed in the indigenous inhabitants in the area.

This hope was, in the event, forlorn, for no new evidence or authority was presented to substantiate the claim that the acquisition of sovereignty by Spain and later by Britain over the area resulted, in and of itself, in extinguishing those pre-existing indigenous rights and interests in lands in the area.



This is certainly no reflection on the industry and learning of the learned senior counsel, Ms. Young SC for the defendants. It is simply to state that no fresh evidence or new authority was available.

On this score alone, I think Ms. Moore SC has made good her initial attempts to estopp the defendants from re-agitating this issue of extinguishment all over. This court in the **Maya Land Rights case** had decided this issue against the defendants: see in particular paras 76 to 93 of the judgment in that case.

*Extinguishment Redivivus?*

104. Having perused the evidence and listened carefully to Ms. Young SC for the defendants, and out of deference for her industry as well as that of Mr. Williams SC for the interested party, I decided to re-examine the contention they advanced for them that the **grant of leases** in the Toledo District, pursuant to the Crown Lands Ordinance of 1872 and successive Crown Lands Acts and culminating now with the National lands Act 1991, Chapter 191 of the Laws of Belize, Revised Edition 2000, operated to extinguish any indigenous land rights in the area. The reason being that the grant of these various leases were inconsistent with any indigenous title to land and they therefore trumped the latter.
105. Mr. Jose Cardona in his affidavit filed on 12<sup>th</sup> February 2009 for the defendants, deposes at paras. 18, 19, 20, 21 and 31 about the grants and leases of lands in the area.
106. Mr. Manuel Rodriguez, the Commissioner of Lands and Surveys in the second defendant's ministry in his first affidavit filed on 3<sup>rd</sup> June 2009, also deposes at para. 4 about Crown Grants and Leases up to 1997. He

exhibits as **MR 3** a list of these. He exhibits as **MR 5** a list of Crown Grants issued in the Toledo District for the period 1997 to 2008.

107. It is however to be observed that **most** of the lands in the lists, though in the Toledo District, are not within the Maya villages, the subject of these proceedings.
108. Be that as it may however, does the grant of a lease by the Crown over lands to which indigenous, native or aboriginal people claim rights or interests extinguish those indigenous rights and interests in favour of the lease?
109. I am fortified by 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: **Mabo** supra; **Mitchell v MNR (2001) 1 SCR 991** at para. 10; **R v Marshall**; **R v Bernard (2005) 2 SCR 220** at para. 39. For extinguishment to occur, which would happen by legislation, the legislative intent to do so has to be plain and clear: **R v Sparrow (1990) 1 SCR 1075** at 1099; **Delgamuku v British Columbia (1997) 3 SCR 1010** at para. 180; **Nireaha Tamaki v Baker (1901) AC (PC) 561** at 577-79; **Wallis v Solicitor General for New Zealand (1903) AC 173**; **Ngati Apa v Attorney General (2003) 3 NZLR 643 (C.A.)**.
110. I am unable to find, in the text of the first Crown Lands Ordinance 1872 and its successors, including the National Lands Act, any clear, plain and express intention that the granting of a lease over any lands in which there existed indigenous rights and interests effected an extinguishment of those indigenous rights and interests in those lands. This conclusion in my view, is supported by the provision of section 62 of the Crown Lands Ordinance, 1872 (reproduced in para. 89 of the **Maya Land Rights case**) and the definition of ‘national lands’ in section 2 of the National lands Act

and section 7 thereof relating to the power of the Minister to grant leases. There is nothing in these that can, in my view, provide any warrant for the contention that the grant of a lease, in and of itself, works an automatic extinguishment of existing indigenous rights and interest in land at common law.

111. I am further fortified in this view by the recent decision of the Supreme Court of British Columbia in **Tsilhqot'in Nation v British Columbia (2007) BCSC 1700**. The Report of this case is massive, spanning over some 458 pages. In the Executive Summary to the report the following points stand out:

*The Xenigwet'in First Nations Government is one of six Tsilhqot'in bands. This action is brought by Chief Roger William in his representative capacity as Xenigwet'in Chief on behalf of all Xenigwet'in and all Tsilhqot'in people.*

*The plaintiff seeks declarations of Tsilhqot'in Aboriginal title in a part of the Cariboo-Chilcotin region of British Columbia defined as Tachelach'ed (Brittany Triangle) and the Trapline territory.*

*The Tsilhqot'in people are a distinct Aboriginal group who have occupied the Claim Area for over 200 years.*

*The Court is not able, in the context of these proceedings, to make a declaration of Tsilhqot'in Aboriginal Title. The Court offers the opinion that Tsilhqot'in Aboriginal title does exist inside and outside the Claim Area. On the evidence in this case, title lands include:*

There then follows the various areas found by the court in which aboriginal title was found to exist.

But importantly, the court held:

*Aboriginal title land is not “Crown land” as defined by provincial forestry legislation. The provincial **Forest Act** does not apply to Aboriginal title land. The jurisdiction to legislate with respect to Aboriginal title land lies with the Federal government pursuant to s. 91(24) of the **Constitution Act, 1967**.*

*The Province has no jurisdiction to extinguish Aboriginal title and such title has not been extinguished by a conveyance of fee simple title.*

112. Admittedly, the issue of extinguishment of indigenous title to land by alienation by the Crown granting an interest in such land that is wholly or partially inconsistent with a continuing right to enjoy such indigenous title was found by Brennan J (as he then was) in **Mabo supra**, to effect extinguishment of indigenous title to the extent of the inconsistency: see **Mabo supra** at p. 250 letter e to h and at p. 251 letter h to i.

This perhaps made Australia unique in the common law world in this regard for making indigenous land rights in that jurisdiction subject to extinguishment not only by legislative action but by inconsistent Crown grant or Crown appropriation and use,

113. However in the case of **The Wik Peoples v State of Queensland and others; and The Thayorre People v State of Queensland and others** (1997) 3 LRC 513 popularly known as the **Pastoral Leases** case, the issue of whether the grant of **leases** over what were aboriginal lands operated to extinguish aboriginal title in those lands had to be tackled

head-on. On a referral to the full court of the High Court of Australia (that country's highest court), of a Bench of seven judges, four (Toohey, Gaudron, Gummow and Kirby JJ) held that the leases did not operate to extinguish indigenous title to the lands: see pp. 576, 584, 586, 590, 609, 621, 623, 644, 635, 650 – 651, 667 – 669, 689 – 690. Three judges (Brennan CJ, with Dawson and McHugh JJ) however, held the leases extinguished the aboriginal titles for inconsistency therewith.

114. In the instant case before me, I am not persuaded that given the state of the evidence of the leases said to have been issued by the Crown in respect of lands in the Toledo District, that these effected an extinguishment of the indigenous title of the claimants in this case. To achieve this, in my view, requires clear, distinct and unambiguous words. I find none in this case.
115. In the lease claimed for Mr. Francis Johnston, the interested party in this case in respect of lands in Golden Stream Village, the details are sparse and it is said to date back to 1987 with lease reference 456/1987. This lease is however said to be in the name of Mr. Salvador Bochub, the other interested party who has chosen not to take part in these proceedings. Mrs. P. Noreen Fairweather, then Commissioner of Lands, deposed in her affidavit that Mr. Bochub had made an application to the Ministry of Lands to have the lease transferred to Mr. Johnston and that this has been approved although the legal documents have not been issued in Mr. Johnston's name. And only payments of lease rent by Mr. Bochub are exhibited.
116. I find this state of affairs wholly unsatisfactory to hold that this "lease" had extinguished the indigenous rights and interests of the villagers of Golden Stream to their lands. In my view, indigenous title to land or rights and interests therein recognized by the common law can only be extinguished

or abrogated by express, specific and clear statutory provision made pursuant to legislation specifically conferring that power. I therefore find that the thesis, proposition or contention that there is an implied extinguishment of the common law title of indigenous title to land or rights and interests 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.

The grant of leases under previous Crown Lands Acts and now under the National Lands Act, is not to be construed, in the absence of clear and unambiguous words, as intended to extinguish or diminish rights and interests in land under common law indigenous title.

117. On the issue of extinguishment of the claimants' indigenous title to their lands by the acquisition, first, by Spain and later by Britain, of sovereignty over the area where the lands are situate in Toledo District, as urged for the defendants by Ms. Young SC, in my respectful view, I think the correct position, supported by the common law (**Amodu Tijani v Secretary Southern Nigeria (1921) AC 399**) was stated by Brennan J in **Mabo (No. 2) supra** where he observed:

*“It is only the **fallacy** of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.”* (Emphasis added).

118. I respectfully think that it is about time, if it is has not already been given, as the authorities show, that this canard be given its quietus: change or acquisition of sovereignty does not, in and of itself, displace the rights of the inhabitants in the area to their lands.

119. Finally, on the effect of leases on indigenous (native) title, I think, again respectfully, that the correct and preferable position was stated by Toohey J, in **The Wik Peoples case** *supra*, a view with which the three other Justices forming the majority in that case agreed (Gaudron, Gummow and Kirby JJ). Toohey J stated under the heading in the judgment “Extinguishment revisited” at p. 588:

*“Undue emphasis on the term extinguishment tends to obscure what is at the heart of this issue. (At issue in that case was the effect of leases on native aboriginal title to land). It is too simplistic to regard the grant by the Crown of a limited interest in land as necessarily extinguishing native rights. It is a large step indeed to conclude that, because there has been a grant of a “lease” of many square miles for pastoral purposes, all rights and interests of indigenous people in regard to the land were intended thereby to be brought to an end. Where is the necessary implication of a clear and plain intention? The impact of such a conclusion was addressed by Lee J in North Galanja (1995) 132 ALR at 586 when he said:*

*“It may be thought to be a bold proposition that the grant of a statutory right to take possession of a vast area of a leasehold land to depasture stock, being an area which included land to which an organized social group of indigenous inhabitants resorted as of right for usufructuary or cultural purposes, demonstrated a clear*

*and plain intention by the Crown to extinguish those rights when the interest granted to the pastoral tenant by the Crown was subject to various derogations including the right of the Crown to recover the demised property by resumption or reservation, and rights of access and possession vested by the Crown in these parties, the exercise of which, in most cases, was likely to cause as much disturbance to the pastoral tenant's enjoyment of possession as the use of native title rights by indigenous inhabitants.”*

120. It is, therefore, my considered view that any such lease granted, which would supposedly be an emanation of sovereignty in the defendant as the Government of Belize or its predecessor the colonial administration, would not, in the absence of plain and clear statement, extinguish the claimants' indigenous title to and interests in the lands.
121. **D. The fourth and final issue engaged in this case which I identified at para. 38 of this judgment as the constitutional implications or purport of the claimants' rights, which were the subject of the first issue, was really answered by the judgment of this court in the Maya Lands Rights case at paras. 94 to 117.**
122. It is undoubted from that judgment and the conclusions on the issues discussed in this judgment, that the claimants 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.



123. I have at paras. 53 to 63 and 66 of this judgment, outlined the basis of the claimants' claim whose nature is more fully stated in their Claim Form in these proceedings (reproduced at para. 19 of this judgment).
124. In brief, the claimants aver that following the judgment of this court in the **Maya Land Rights case**, delivered on 18<sup>th</sup> October 2007, the defendants (the Government of Belize) initially accepted the judgment and actively pursued its implementation with the claimants. Mrs. Noreen Fairweather admits as much for the defendants at para. 3 of her affidavit in these proceedings. I have at paras, 56 to 60 reviewed these attempts and reproduced the relevant Memorandums from the defendants, The memorandum of 23<sup>rd</sup> April 2008 marked, for the claimants, the end of any serious engagement by the defendants to implement the court's decision of 18<sup>th</sup> October 2007, as the Government of Belize was insisting that it was only limited to the villages of Conejo and Santa Cruz. This, coupled with the events in May 2008 in Golden Stream Village and similar ones recounted in the relevant paragraphs of the joint affidavit of Martin Ch'en and Cristina Coc (reproduced at para. 64 of this judgment) and other affidavits of the claimants, have compelled them to have recourse to the present proceedings.
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.

Conclusion

126. I am, in the light of that judgment and the conclusions I have arrived at on the several issues discussed and determined in the instant case, constrained to grant the following relief to the claimants:

- i. I reaffirm the judgment of this court, delivered on 18<sup>th</sup> October 2007, and now declare that Maya customary land tenure exist in all the Maya villages in the Toledo Districts 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.*
- ii. I declare as well that there is an obligation on the defendants to adopt affirmative measures to identify and protect the rights of the claimants 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.*
- iii. In order to achieve (ii) above, I order the defendants , in consultation with the Maya people or their representatives, to 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.*

*iv. I further order that until such time para. iii above is achieved, the defendants 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 the government represented by the defendants, 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.*

127. I find the defendants' conduct however not wholly in keeping with the constitutional rights declared by the court in the **Maya Land Rights case**.

However, because that declaration was specifically in respect of Conejo and Santa Cruz villages, I am not able to grant any damages in the instant case for the violation of the claimants' constitutional rights. The declarations and order 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.

128. I do not find however, that there has been any deprivation by the defendants of any property of any of the claimants. The incidents in May 2008 in Golden Stream Village, involving the bulldozing of lands and clearing of cocoa farms and other plants of some of the villagers by the interested party, Mr. Johnston, is certainly unfortunate and no doubt, regrettable. But they did not rise up to the level of deprivation of property within the meaning of the Constitution or can be visited on the defendants. The affected villages might well have other remedies in private law against the perpetrators of these acts.
129. Let me in closing this judgment make this observation: In nearly every country with an indigenous, native or aboriginal inhabitants before contact with essentially European presence ('first contact' as it has been called) 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.
130. This arrangement was intermediated through legal process and sometimes through conscious political accommodation on both sides. One such arrangement through judicial process was the recent land-mark decision in Australia in the seminal case of **Mabo (No. 2)** in 1992. This

case recognized and affirmed the juridical nature and basis of native/indigenous customary rights and interests in land. Soon after that case, the Australian Legislature enacted the Native Title Act 1993 (Clth) (see in particular section 223).

131. An earlier arrangement for recognizing indigenous title and rights in their lands was by treaty between the original inhabitants (the natives/indigenes) and the settler administration. Examples of this are to be found in the USA and the Treaty of Waitang's with the Maori people in New Zealand.
132. In Canada, the legal regime for aboriginal title is to be found in section 35 of the Constitution Act 1982, which enshrines "Existing aboriginal and treaty rights" relating to land.
133. The instant case is about land. From the evidence, the Maya people have found sustenance and continuity in the lands they presently occupy which were once occupied by their forebears. Therefore for them the dispute is more than just land, although so much depends on this. It is really about their way of life and their very survival.

Also, from the evidence, successive governments have recognized the entitlement of the Maya to lands in Southern Belize. This much is evident in Point 6 of the Ten-Point Agreement concluded in 2000 between the Government of Belize and representative leaders of the Maya. Again, after the **Maya Land Rights case** judgment in 2007, the Government of Belize in 2008, to its credit, engaged with the Maya representatives and leadership to work out the implementation of that judgment.

But because of the perceived limited reach of that judgment, movement towards full implementation to include all the Maya lands, negotiations and progress towards full settlement became deadlocked.

134. It is therefore earnestly hoped that with the present judgment discussions and negotiations towards a resolution of any differences would soon re-start.

135. But this requires reconciliation which itself is a process.

To paraphrase Vickers J in Tsilhqot'in v British Columbia at para. 1382 of his judgment, I respectfully say that it is in the interest of all Belizeans that the process of reconciliation be engaged as soon as possible, so that an honourable settlement with the Maya people can be achieved.

136. In the result, I award the costs of these proceedings to the claimants. I will now hear counsel on the question of costs.

**A. O. CONTEH**  
**Chief Justice**

**DATED: 28<sup>th</sup> June 2010.**