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## Exhibiting Culture in Legal Settings: Courts, Agencies, and Tribes

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## EXHIBITING CULTURE IN LEGAL SETTINGS: COURTS, AGENCIES, AND TRIBES

Allison M. Dussias\*

This morning's presentations focused on issues related to museums and Indians. In the past, Indian cultures were put on display in museums by non-Indians, to satisfy non-Indian interests, and exhibited through the lens of non-Indian expectations and understandings. More recently, Indians increasingly have become involved, often in partnership with non-Indian museum officials, in shaping museum exhibits and in making the point that Indian cultures are *living* cultures, not the extinct or soon-to-be-extinct cultures of a dead or dying race. Museum exhibits, so conceived, can emphasize the continuity between the past and the present and serve as a bridge to the future. This approach has been apparent in the creation and ongoing curation of the Smithsonian's National Museum of the American Indian.

This panel was assembled to look at law and culture more broadly—and the topic of “law and culture” is indeed a broad one. What I have set out to do in my allotted time and space is to widen the discussion of “exhibiting culture” to look at another setting in which Indian culture is sometimes “put on exhibit”—the legal setting. More specifically, I would like to focus on two other arenas in which Indian cultures are exhibited, and in which law and culture can intersect: the litigation process and the regulatory process. I will speak about two situations in which two different Indian nations—one in the United States and one in Canada—have exhibited aspects of their culture in an effort to assert and vindicate legal rights. The first situation involves litigation brought by a Canadian First Nation, the Gitksan Nation, to claim ownership—more specifically, aboriginal title—over its traditional territory. The second situation involves efforts by a tribe in the state of Virginia, the Mattaponi Tribe, to halt a reservoir project that, if completed, would adversely impact areas with cultural and religious significance for the Tribe. My goal is to show how these tribes presented their culture as evidence in these legal settings and to assess whether their willingness to share their cultures with courts and agencies has paid off. I will also draw some parallels between tribes' experiences with exhibiting culture in the legal and museum settings and offer some concluding thoughts on the lessons about exhibiting culture that can be learned from the Gitksan and Mattaponi experiences.

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I. TWO STRUGGLES, TWO CULTURES ON EXHIBIT: THE GITXSAN NATION AND THE MATTAPONI TRIBE

A. *Putting on a Show: Defining "Exhibit"*

Before examining the experiences of the Gitxsan Nation and the Mattaponi Tribe with exhibiting their culture before courts and agencies, it is worth taking some time to think about the meaning and origin of the concept of "exhibiting" in the museum setting and the legal setting. What does it mean "to exhibit" something? Is the term defined differently in these two settings?

"To exhibit" has several definitions, including the following: "to present to view," and more specifically, "to show publicly: put on display in order to attract notice to what is interesting or instructive . . ."<sup>1</sup> This definition makes sense in the museum setting, certainly, but also in the legal setting.

"To exhibit" can also mean "[t]o submit (as a document) to a court or officer in course of proceedings; . . . to present or offer officially or in legal form . . ."<sup>2</sup> This definition relates to the legal setting specifically and fits the use of the term in proceedings of government administrative agencies as well as courts.

Of course, "exhibit" can also be used as a noun. It can refer to something that is displayed<sup>3</sup> in either a museum or legal setting. The term can also be used, in the legal setting, to refer to "a document or material object produced and identified in court or before an examiner for use as evidence."<sup>4</sup> Used in this sense, exhibits include writings and illustrations that are appended to a legal document, like a legal brief, a court's opinion, a submission to an agency, or an agency's report, to support or supplement the legal document.

Note that in both meanings of "exhibit"—the more general and the more specifically legal—the same kind of action is taking place. Someone, whether it is a curator in a museum or an attorney before a court or agency, is presenting something and putting it on display for others to see. The goal is to convey a particular message about what is being displayed and to inform and educate the viewer or reader.

One final preliminary point: if we look at the origin of the word "exhibit"—its etymology—we see that it literally means to "hold out." This literal meaning works in both the museum and legal settings. In both the museum and legal settings, those who put together the exhibits are holding out the items of interest to others in the hope that viewers may see, accept, and come to understand what is being held out in a certain way.<sup>5</sup> Of course, if the item held out is displayed inaccurately or inappropriately, then the viewer or reader is misled and will draw erroneous conclusions about the item in question. This phenomenon occurred all too often in museums in the past, where non-Indian curators presented inaccurate and even demeaning portrayals of Indians and

1. Webster's Third New International Dictionary 796 (8th ed., Merriam-Webster 1981).

2. *Id.*

3. *Id.* (defining "exhibit" as "something exhibited; . . . an article or a collection of articles displayed in an exhibition").

4. *Id.*

5. *Id.* ("[ME *exhibiten*, fr. L. *exhibitus*, past part. of *exhibere* to present, show, fr. *ex-* . . . + *hibere* (fr. *habere* to have, hold) . . ."). The prefix *ex* means "out of" or "away from." Webster's, *supra* n. 1, at 790.

Indian culture. This problem has not, however, been confined to the museum setting. Inaccurate portrayals of Indian cultures have colored judicial decisions as well. Perhaps the most noteworthy, and most damaging, inaccurate portrayal of Indian cultures occurred in the Supreme Court's opinion in *Johnson v. M'Intosh*.<sup>6</sup> In *Johnson*, the Court adopted the so-called Discovery Doctrine, maintaining that European discovering nations gained title to non-Christian lands, such as the lands of the tribes of North America, that were as yet unknown to other Christian nations.<sup>7</sup> A corollary provided that the non-Christians who occupied the land had the legal right to do so, but did not have legal title.<sup>8</sup> Underlying the Court's decision was an inaccurate portrayal of all Indians as roving bands of hunters and warriors whose land use practices could not be the basis for establishing legal title. In Chief Justice Marshall's view, "the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . ."<sup>9</sup> Marshall's depiction of the culture of the tribe whose land was at issue in *Johnson* was erroneous; whether this misrepresentation stemmed from ignorance or design is less clear.<sup>10</sup> In short, inaccurate depictions of tribal cultures have had deleterious consequences for tribes and, in the legal setting, the costs of these misrepresentations can be even higher than in the museum setting.

The inaccurate and inappropriate display of Indian cultures and items of cultural significance is not the only obstacle to a full understanding of what is being exhibited. In both the museum setting and the legal setting, those to whom cultural items are displayed approach the exhibits with their own preconceived notions and levels of knowledge (or ignorance) of what is being exhibited to them. Some are more open than others to putting aside their preconceived notions, and even prejudices, in order to truly see and listen to what is exhibited before them. The experiences of the Gitksan Nation and the Mattaponi Tribe with courts and government agencies, discussed below, bear out this observation.

#### B. *Choosing Whose "Exhibits" to View*

The two nations whose exhibiting of their cultures I will speak about are the Gitksan (or Gitksan) Nation<sup>11</sup> of western Canada and the Mattaponi Tribe of Virginia. I

6. *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

7. *Id.* at 573 ("[D]iscovery gave title to the [European] government by whose subjects, or by whose authority, it was made, against all other European governments . . ."). Chief Justice Marshall noted that the commission granted by Henry VII to the Cabots in 1496 was confined to discovery of countries "then unknown to Christian people . . ." *Id.* at 576 (emphasis original). England thus asserted "a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery." *Id.* at 576–577.

8. *Id.* at 574. "[T]he original inhabitants were . . . admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their . . . power to dispose of the soil at their own will . . . was denied by the original fundamental principle, that discovery gave exclusive title to those who made it." *Johnson*, 21 U.S. at 574.

9. *Id.* at 590.

10. See Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. Rev. 637, 643–670 (1999) (providing an analysis of *Johnson v. M'Intosh* and of the cultures and land use practices of relevant tribes which were misrepresented in Chief Justice Marshall's opinion).

11. I have chosen to use the spelling "Gitksan" in this article because this spelling is used on the website of the Nation's Chiefs' Office. Gitksan Chief's Office, *Home*, [www.gitksan.com](http://www.gitksan.com) (last accessed Oct. 29, 2009).

chose to focus on these two nations for several reasons. First, I chose them because of what their experiences can teach us about the challenges involved in exhibiting culture before courts and government agencies. Second, I chose them because they both are represented at the National Museum of the American Indian and both in interesting ways.

The Gitksan Nation was included in an exhibition called “Listening to Our Ancestors: The Art of Native Life along the North Pacific Coast.” At the National Museum’s website, virtual visitors can watch a video, prepared as part of the exhibition, in which Shirley Muldon, as a representative of the Gitksan Nation, holds and speaks about an object in the collection. It is a shaman’s spirit canoe in the form of a land otter, and Ms. Muldon speaks about the way in which the spirit canoe can be used by the shaman as a helper in his work.<sup>12</sup>

The National Museum devotes several exhibits to the tribes of the area in which the Museum is located, the Chesapeake region. There is a wonderful interactive exhibit in which a visitor can travel by boat—virtually—along the waterways of the homeland of the Mattaponi Tribe, and the related Pamunkey Tribe, accompanied by a narration from a tribal member. By using a set of boat-style controls and watching the large screen in front of you, you can get a sense of what it is like to travel by boat along the waterways of this area, as the members of the Mattaponi and Pamunkey Tribes have done since long before John Smith and his compatriots arrived on their land. The exhibit leaves a vivid impression of the natural environment of the area, which is threatened by a project that I am going to address. The Mattaponi Tribe is also featured in an insightful guide, prepared by the National Museum for high school teachers, which is entitled *We Have a Story to Tell: Native Peoples of the Chesapeake Region*.<sup>13</sup> The guide discusses not just the culture of the tribes of the region, but also their legal struggles, past and present, including the litigation that I will discuss shortly.<sup>14</sup>

### C. Identifying Goals—Why Did These Nations Choose(?) to Exhibit Their Cultures?

Why did these two Nations choose to exhibit aspects of their cultures before judges, bureaucrats, and other outsiders? Or, to ask what is probably the more accurate question, why did they feel that they had no choice but to exhibit their cultures publicly, before strangers? After all, the leaders of these Nations are not museum curators, in the business of educating and entertaining tourists and other museum-goers.

It is important to explore, as a preliminary matter, how the role played by the tribal “curators” who presented aspects of their cultures to outsiders was not as voluntary, and based on unfettered choices, as it may first appear. While it may seem that the tribal

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12. The video featuring Sheila Muldon, *Gitksan Spirit Canoe Curing Aid*, is available online. Natl. Museum of the Am. Indian, *Podcasts*, [http://americanindian.si.edu/podcasts/podcasts\\_listening.html](http://americanindian.si.edu/podcasts/podcasts_listening.html) (last accessed Oct. 29, 2009); see also Natl. Museum of the Am. Indian, *Listening to Our Ancestors*, [http://americanindian.si.edu/listening/nwArt\\_101507.swf](http://americanindian.si.edu/listening/nwArt_101507.swf) (last accessed Oct. 29, 2009).

13. Gabrielle Tayac & Edwin Schupman, *We Have a Story to Tell: Native Peoples of the Chesapeake Region* (Mark Hirsch ed., Natl. Museum of Am. Indians 2006) (available at <http://www.nmai.si.edu/education/files/chesapeake.pdf>).

14. *Id.* at 13 (noting that since the early 1990s the Mattaponi Tribe has been engaged in litigation to halt a reservoir and dam project near the Tribe’s reservation).

curators have complete control over what is exhibited, and how it is exhibited, to courts and agencies, the voluntary nature of exhibition in these contexts can be illusory. First, the basic choice to exhibit aspects of their culture is not entirely free; it is the price that they are required to pay to assert legal rights that are under threat. Second, the form of exhibition is also to some extent forced upon them, both as to content and method. They must display what non-Indians have decided is significant, and must display it in a way that is dictated by non-Indian expectations and ignorance of the Nations' cultures.

In a general sense, the two Nations had the same goals as those who exhibit culture in a museum setting: they sought to educate and inform others. They also had more specific goals, of course, which were shaped, first, by the *legal claims* that they were making to the court or administrative agency in question and, second, by the *legal rules* that existed with respect to making those claims. In other words, they could not simply present what *they* know to be significant about the various aspects of their culture. They had to think about what the court or agency wanted to hear about or else increase the chances that what they said would fall on deaf ears. Thus, each Nation had to shape its exhibiting of its culture to fit the particular claim that it was making.

#### 1. The Gitxsan Nation: Exhibiting Culture to Courts

The Gitxsan are a First Nation (to use the Canadian term)<sup>15</sup> whose members “derive their strength from the 33,000 square kilometers of traditional territory in northwest British Columbia, Canada.”<sup>16</sup> The English translation of their name is “People of the River of Mist,” a name that reflects their connection to the Skeena River.<sup>17</sup> In the early 1980's, thirty-five Hereditary Chiefs of the Gitxsan Nation brought suit in the Canadian court system in a case called *Delgamuukw v. British Columbia*.<sup>18</sup> The Gitxsan Nation and their co-plaintiff, the Wet'suwet'en Nation,<sup>19</sup> sought recognition of both their aboriginal title to the lands of their territory and their jurisdiction over the territory.<sup>20</sup> They chose this course of action only after land claims negotiations with the government had broken down.<sup>21</sup>

“Aboriginal title” is the legal interest, pre-dating the existence of Canada, that First Nations hold in their lands, recognized by the Canadian courts based on principles that were adopted by the United States Supreme Court in *Johnson v. M'Intosh*.<sup>22</sup> To make

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15. For an explanation of the term “First Nation” and other terms used in Canada when referring to Canadian indigenous peoples, see Indian and Northern Affairs Canada, *First Nations*, <http://www.aicn-inac.gc.ca/ap/fin/index-eng.asp> (last accessed Nov. 20, 2009).

16. Gitxsan Chiefs' Office, *Who We Are: The People*, <http://www.gitxsan.com/html/who.htm> (last accessed Nov. 20, 2009).

17. *Id.*; see also Gitxsan Chiefs' Office, *Who We Are: The Land*, <http://www.gitxsan.com/html/who/people/land.htm> (last accessed Oct. 29, 2009) (describing the Nation's relationship with the Skeena River and other rivers).

18. [1997] 3 S.C.R. 1010.

19. Members of the Wet'suwet'en Nation also live in the territory claimed in the case, in an area east and south of where members of the Gitxsan Nation live. *Id.* at ¶ 8.

20. The plaintiffs' claim was originally characterized as a claim for recognition of their ownership of the territory identified in their suit and of their jurisdiction over it, but at the Canadian Supreme Court, it was primarily presented as a claim for recognition of aboriginal title to the territory. *Id.* at ¶ 7.

21. See Gitxsan Chiefs' Office, *Treaty Talks*, <http://www.gitxsan.com/html/treaty.htm> (last accessed Nov. 20, 2009).

22. See e.g. *Guerin v. R.*, [1984] 2 S.C.R. 335, ¶¶ 83–84 (noting the consistency between the 1973

out a claim for aboriginal title,<sup>23</sup> a plaintiff must first show that it occupied the land to which it claims title prior to the assertion of sovereignty over the land by the British Crown.<sup>24</sup> In trying to prove occupation, aboriginal laws in relation to land, such as laws related to land tenure, that existed at the time of sovereignty are relevant.<sup>25</sup> Second, if the claimant is relying on present occupation as proof of pre-sovereignty occupation (because “[c]onclusive evidence of pre-sovereignty occupation may be difficult to come by”), there must be continuity between present and pre-sovereignty occupation.<sup>26</sup> Finally, a claimant must show that at sovereignty, its occupation was exclusive.<sup>27</sup> Proof of the element of exclusive occupation must “take into account the context of the aboriginal society at the time of sovereignty,” so exclusivity may be established even if other Nations “frequented the claimed lands.”<sup>28</sup>

The *Delgamuukw* plaintiffs discussed aspects of their culture, including their law related to land tenure, to establish their use and occupancy of the land to which they claimed aboriginal title. In their effort to achieve recognition of their aboriginal title, the plaintiffs were obliged to exhibit aspects of their culture to three courts: the Supreme Court of British Columbia,<sup>29</sup> the British Columbia Court of Appeal,<sup>30</sup> and, ultimately, the Supreme Court of Canada.<sup>31</sup>

## 2. The Mattaponi Tribe: Exhibiting Culture to Government Agencies

The ancestors of the Mattaponi Tribe were members of the Powhatan Confederacy, the confederacy of Virginia tribes that found Captain John Smith and other English would-be settlers trespassing on their land in the early seventeenth century. In 1677 these tribes signed a treaty, referred to as the *Treaty at Middle Plantation*,<sup>32</sup> with the government to whose rights and obligations the United States succeeded after the American Revolution, i.e., Great Britain. Among other provisions, the Treaty:

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Canadian Supreme Court case *Calder v. Atty. Gen. of Brit. Colum.*, [1973] R.C.S. 313, as to the source of aboriginal title and discussing Chief Justice Marshall’s views on Indian land title and the “principle of discovery” in *Johnson*); see also *supra* nn. 6–10 and accompanying text (discussing *Johnson*).

23. The elements of a claim for aboriginal title were set out in definitive form in the decision of the Canadian Supreme Court in *Delgamuukw*, but the basic elements were established in earlier cases dealing with aboriginal rights. See *Delgamuukw*, 3 S.C.R. at ¶¶ 140–143 (discussing the need to adapt the test for aboriginal rights laid down in the Canadian Supreme Court case *R. v. Vanderpeet*, [1996] 2 S.C.R. 507, to suit claims for aboriginal title and listing the criteria that must be satisfied in order to make out a claim for aboriginal title).

24. See *Delgamuukw*, 3 S.C.R. at ¶ 144.

25. *Id.* at ¶ 148.

26. *Id.* at ¶ 152.

27. *Id.* at ¶ 155.

28. *Id.* at ¶ 156.

29. The British Columbia Supreme Court trial judge rejected their claims in a 1991 decision. *Delgamuukw v. Brit. Colum.*, [1991] 3 W.W.R. 97 (B.C. S.C.); see *infra* nn. 107–113 and accompanying text.

30. *Delgamuukw v. Brit. Colum.*, [1993] 104 D.L.R. 470 (B.C. C.A.); see *infra* n. 115.

31. The Supreme Court of Canada ordered a new trial in 1997. *Delgamuukw*, 3 S.C.R. 1010; see *infra* nn. 116–122 and accompanying text (discussing the decision).

32. *The Treaty at Middle Plantation with Tributary Indians after Bacon’s Rebellion*, in *Early American Indian Documents: Treaties and Laws, 1607–1789*, vol. 4, *Virginia Treaties, 1607–1722* 82, 82–87 (Alden T. Vaughan & W. Stitt Robinson eds., U. Pub. of Am. 1983) [hereinafter *Treaty at Middle Plantation*]. The Treaty at Middle Plantation is also available online at Baylink, *Treaty Between Virginia and the Indians 1677*, <http://www.baylink.org/treaty/Default.html> (last accessed Nov. 20, 2009).

established a three-mile buffer zone between the Tribes' lands and colonists' lands,<sup>33</sup> recognized tribal fishing and gathering rights,<sup>34</sup> and established a tribal commitment to offer an annual "rent" of animal skins to the Governor of Virginia<sup>35</sup>—an obligation which the Tribe continues to fulfill each year.<sup>36</sup> The Tribe has a 150-acre reservation in Virginia, recognized by the state, which dates to the seventeenth century.<sup>37</sup> The Tribe has not yet received official administrative acknowledgement of its status as a tribe from the United States.

Since the 1980's, the Tribe, along with the Chesapeake Bay Foundation, the Alliance to Save the Mattaponi, and the Virginia Chapter of the Sierra Club, has been involved in efforts to stop a project called the King William Reservoir Project (the "KWR Project"). The KWR Project was proposed by the City of Newport News, Virginia, to satisfy the seemingly ever-increasing demands of the city and its neighbors for water by piping in water from an inland county, King William County.<sup>38</sup> Thus, the primary intended benefits of the project would be enjoyed by the residents of Newport News and other coastal cities, whose lawns and golf courses would be kept green and swimming pools kept full.<sup>39</sup> The costs of the project, on the other hand, would be borne by the Mattaponi Tribe and its neighbors.

The KWR Project involves building a 1500-acre reservoir by damming a creek (Cohoke Creek), which lies in a valley between the Pamunkey River and the Mattaponi River; these rivers join to form the York River.<sup>40</sup> Over 400 acres of wetlands would be flooded and over 21 miles of streams would be eliminated.<sup>41</sup> The dam creating the reservoir would be 1,700 feet long and 78 feet high.<sup>42</sup> Water—up to 75 million gallons

33. *Treaty at Middle Plantation*, *supra* n. 32., at 83, art. IV ("[N]o English, shall Seat or Plant nearer then Three miles of any Indian Town . . .").

34. *Id.* at 84, art. VII. "That the said *Indians* have and enjoy their wonted conveniences of Oystering, Fishing, and gathering Tuchiahoe, Curtenemons, Wild Oats, Rushes, Puckoone, or any thing else (for their natural support) not useful to the *English*, upon the *English* Dividends . . ." *Id.* (footnotes omitted).

35. *Id.* at 85, art. XVI. "That every *Indian* King and Queen in the Month of *March* every yeare, with some of their Great Men, shall tender their Obedience to the Right Honourable His Majesties Governour at the place of his Residence, whereever it shall be, and then and there pay the accustomed Tribute of Twenty Beaver Skins, to the Governour . . ." *Id.*

36. In recent years, the Governor usually has been presented with, and has accepted, deer or other wild game, rather than beaver skins. In addition, the delivery time has been changed to November. See Jim Nolan, *Tribes Look Ahead at Tribute: At Ritual Marking Treaty, Virginia Indians Sense Federal Recognition Near*, *Richmond Times-Dispatch* B1 (Nov. 27, 2008) (describing the 2008 ceremony). For further discussion of the annual tribute ceremony, see Powhatan Museum of Indigenous Arts and Culture, *Annual Treaty Ceremony*, [http://www.powhatanmuseum.com/Annual\\_Treaty\\_Ceremony.html](http://www.powhatanmuseum.com/Annual_Treaty_Ceremony.html) (last accessed Nov. 20, 2009).

37. See Va. Council on Indians, *Virginia Indians Today: Mattaponi Tribe*, <http://virginiaindians.pwnet.org/today/mattaponi.php> (last accessed Nov. 20, 2009) (noting that the Reservation was established in 1658).

38. See U.S. Army Corps of Engineers, *Final Recommended Record of Decision of the District Commander: On Permit Application Number 93-0902-12 Submitted by the City of Newport News on Behalf of the Regional Raw Water Study Group: For the King William Reservoir Project on Cohoke Creek in King William County, Virginia* 1 (U.S. Army 2001) (available at <http://www.nad.usace.army.mil/kwr/KWRFRROD.pdf>) [hereinafter *Army Corps*] (indicating that the City of Newport News submitted the application on behalf of a group of municipalities that were members of an organization called the Regional Raw Water Study Group).

39. The jurisdictions to be served by the project were the cities of Newport News, Hampton, Poquoson, and Williamsburg, and York and James City Counties. *Id.* at 3. The bulk of the water (82%) would go to Newport News. *Id.*

40. *Id.* at 1.

41. *Id.* at 2.

42. *Army Corps.*, *supra* n. 38, at 1.



per day<sup>43</sup>—would be pumped from the Mattaponi River into the reservoir via an intake structure and pumping station to be built in the freshwater tidal portion of the river.<sup>44</sup> New pipelines would be constructed to transport the water from the intake structure to the reservoir, and from the reservoir to Newport News and other coastal cities.<sup>45</sup>

Several state permits and approvals must be in place for the KWR Project to proceed.<sup>46</sup> In addition, a federal permit from the Army Corps of Engineers is required, under Section 404 of the Clean Water Act, because of the impact the Project would have on wetlands.<sup>47</sup> If the Project goes forward, it would represent the largest single permitted wetland loss in the Mid-Atlantic region since the enactment of the Clean Water Act.<sup>48</sup>

Such a potentially devastating impact on wetlands and related environmental degradation led many individuals, organizations, and governmental bodies to have very serious concerns about the KWR Project and to seek to persuade the Corps to deny the permit as being contrary to the public interest. For the Mattaponi Tribe, the Project also poses a more specific threat to its culture and its legal rights. The Tribe's reservation is on the Mattaponi River, "approximately three miles downstream of the proposed intake structure" for the project.<sup>49</sup> The Tribe objected to the Project because of the adverse impact it would have on its members "environmentally, culturally, and economically."<sup>50</sup> In its efforts to protect the lands and waterways of the area, as well as its treaty rights, the Tribe attempted to persuade the Corps to deny the permit needed for the Project by offering evidence of its culture. More specifically, the Tribe raised concerns about the threat to tribal members' way of life through the loss of hunting, gathering, and fishing habitat, and through changes to their reservation's rural setting from increased residential growth that would accompany the KWR Project; the severing of ties to their ancestors within the Cohoke Valley by excavation and flooding of settlement and burial sites; the loss of, or irreparable harm to, their subsistence shad fishery and hatchery operation caused by changes in salinity and impacts to shad eggs from the intake structure to be built on the Mattaponi River;<sup>51</sup> and the adverse impact of the Project on the Tribe's religious practices and traditional way of life.<sup>52</sup>

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43. *Id.* at 3.

44. *Id.* at 1. For a more detailed description of the intake structure, *see id.* at 2–3.

45. *Id.* at 2. A 1.5-mile long pipeline would be constructed to carry water from the intake structure to the reservoir. *See Army Corps., supra* n. 38, at 2. Approximately 11.7 miles of new pipeline, which would also impact wetlands, would be required to transport the water to an existing reservoir closer to Newport News. *Id.*

46. For a description of the required state authorizations, *see id.* at 4–5.

47. The Clean Water Act prohibits the "discharge of dredged or fill materials" into U.S. waters unless a permit has been obtained. 33 U.S.C. § 1344(a) (2006). The Secretary of the Army is authorized by Section 404 of the Clean Water Act to issue such a permit when certain conditions are met, as outlined in the statute. 33 U.S.C. § 1344. Review of permit applications is subject to binding guidelines established by the Army Corps of Engineers and the Environmental Protection Agency. *See* § 404(b)(1), *Guidelines for Specification of Disposal Sites for Dredged or Fill Materials*, 40 C.F.R. § 230 (2007).

48. *Alliance to Save the Mattaponi v. U.S. Army Corps of Engrs.*, 606 F. Supp. 2d 121, 126 (D.D.C. 2009).

49. *Id.*

50. *Army Corps., supra* n. 38, at 219.

51. *See id.* at 219–220.

52. *See id.* at 197.

## II. TAKING THE LEAD IN EXHIBITING THE NATION'S CULTURE: THE ROLE OF "CURATORS"

In the museum setting, curators who are in charge of exhibiting aspects of a people's culture determine what can and should be shown in an exhibit. A curator will decide, after reviewing the relevant contents of the museum's collection, what objects will be included in the exhibit, how the objects will be displayed, what text will be used to describe them, and whether the exhibit will include any other aids to understanding, such as an audio or video component. To borrow legal terminology, these decisions could be seen as relating to the issue of *admissibility*, i.e., the issue of what kinds of evidence should be considered relevant to drawing conclusions about the culture that is being presented in the exhibit. The curator may seek to foster a particular understanding of the items being exhibited on the part of those who view it. To borrow legal terminology, once again, the curator thus considers issues of *proof*, i.e., what the exhibit is intended to prove about the culture to those who view the exhibit.

In the legal setting, when a people's culture is being presented, precisely which aspects of the culture are exhibited is not shaped primarily by the professional judgment and personal interests of the curator, as it would be in the museum setting. Rather, as noted above,<sup>53</sup> the relevant legal principles and tests play a crucial role. The legal principles determine what is relevant—what the plaintiffs must *prove*, and what kind of evidence the decision makers (courts or agencies) will consider *admissible*<sup>4</sup> to prove it. In addition, the legal decision makers will determine how much *weight* is given to the admissible evidence that is presented, particularly as against other, conflicting evidence.

These are the kinds of issues that members of the Gitxsan Nation and the Mattaponi Tribe, working with their allies, have had to confront as they took on the responsibility of exhibiting their cultures to courts and agencies in their efforts to assert and vindicate their legal rights. To borrow terminology from the museum setting, they were called upon to act, on behalf of their nations, as the "curators" for these "exhibits." They played an important role in determining what to present, how to present it, and how to describe it, orally and in writing, but always within the confines established by the relevant legal principles and the courts' and agencies' decisions on the admissibility of their evidence.

### A. *The Gitxsan Nation's "Curators"*

The representatives of the culture of the Gitxsan Nation in the *Delgamuukw* litigation were, first and foremost, the Hereditary Chiefs who brought suit on behalf of themselves and their Houses.<sup>54</sup> They were assisted by other members of the Nation, including other Chiefs, as well as by attorneys and anthropologists. Anthropologists helped to gather statements from members of the Nation and prepare them for presentation, in written form, to the Court.<sup>55</sup> The trial, which lasted 374 days,<sup>56</sup>

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53. See *supra* pt. I(C).

54. *Delgamuukw*, 3 S.C.R. at ¶ 7 (noting that the action was commenced by Gitxsan and Wet'suwet'en hereditary chiefs, claiming 133 individual territories on behalf of 71 Houses).

55. See generally Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (UBC Press 2005). Richard Daly worked with the Gitxsan plaintiffs and their lawyers. See *id.* at 9.

generated about 23,500 pages of transcript evidence.<sup>57</sup> About 9,200 exhibits, totaling over 50,000 pages, were filed.<sup>58</sup> Several of the Chiefs also went to court, in person, to share their knowledge of Gitxsan culture and bear witness to it. They came to the Court because it was their responsibility to do so as Chiefs of their Houses, speaking on behalf of “those who ‘have gone before’ . . . and for those not yet born.”<sup>59</sup> The presence of the Hereditary Chiefs seems particularly appropriate and even necessary, given that the claim related to aboriginal title. As the Chiefs who delivered an opening address to the British Columbia Supreme Court explained, the Chiefs’ relationship with the land is the basis for the ownership and sovereignty claimed by the plaintiffs:

[t]he ownership of territory is a marriage of the Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life of the land. From such encounters come power. The land, the plants, the animals and the people all have spirit—they all must be shown respect. That is the basis of our law.<sup>60</sup>

At times, the Gitxsan witnesses were assisted by interpreters<sup>61</sup> who tried to render into English words Gitxsan words and concepts for which there might well be no true equivalent in English. “Word spellers” were also present during the trial to offer English spellings of Gitxsan words to assist the court reporters.<sup>62</sup>

### B. *The Mattaponi Tribe’s “Curators”*

The Mattaponi Tribe was also represented by its Chief and other leaders in the efforts to fight the destruction that the KWR Project would bring to the Mattaponi homeland. Other members of the Tribe provided assistance, as did a number of attorneys.<sup>63</sup> Most of the evidence relating to Mattaponi culture was submitted in written form to the Norfolk District of the Army Corps of Engineers. Much of the evidence ultimately was made public as part of the regulatory process.<sup>64</sup>

In addition, members of the Tribe welcomed the Army Corps of Engineers’ Norfolk District Commander, Colonel Allan Carroll, and members of the Norfolk District staff to the Tribe’s reservation.<sup>65</sup> This gave Colonel Carroll and staff members the opportunity to see and hear firsthand what was at stake.

56. *Delgamuukw*, 3 S.C.R. at ¶ 5 (noting that the trial judge heard 374 days of evidence and argument).

57. *See id.* at ¶ 89.

58. *See id.*

59. Val Napoleon, *Delgamuukw: A Legal Straight Jacket for Oral Histories?* 20 Can. J.L. & Soc’y. 123, 149 (2005); Daly, *supra* n. 55, at 6.

60. Napoleon, *supra* n. 59, at 126 (footnote omitted) (quoting Chiefs Delgamuukw (Gitxsan) and Gisday Wa (Wet’suwet’en) from Gisday Wa & Delgam Uukw, *The Spirit in the Land* 7 (Reflections 1989)).

61. *See Delgamuukw*, 3 S.C.R. at ¶ 89 (quoting the trial judge’s opinion, which noted that many witnesses used translators).

62. *Id.*

63. For information on the role played by the attorneys who worked with the plaintiffs in the litigation, see e.g. Southern Environmental Law Center, *SELC in Virginia: King William Reservoir (VA)*, [http://www.southernenvironment.org/virginia/king\\_william\\_reservoir\\_va/](http://www.southernenvironment.org/virginia/king_william_reservoir_va/) (last accessed Nov. 1, 2009); see also Georgetown U. School of L., *Environmental Law Projects: Water Quality: Mattaponi Tribe–King William Reservoir*, <http://www.law.georgetown.edu/clinics/ipr/environmental.html> (revised Aug. 27, 2009) (providing information on the role played by the attorneys who worked with the plaintiffs in the litigation).

64. *See generally* Army Corps., *supra* n. 38.

65. *See id.* at 189 (noting that Norfolk District staff members visited the Mattaponi Reservation with the former Norfolk District Commander in 1997 and that Commander Carroll visited the Reservation in 1998).

### III. MOUNTING THE EXHIBIT: THE EVIDENCE PRESENTED BY THE NATIONS

As discussed above,<sup>66</sup> the choice of the aspects of their cultures that the Gitksan Nation and the Mattaponi Tribe presented in court and to government agencies was necessarily influenced by the relevant legal principles and other factors. Working within the limitations imposed by these considerations, what aspects of their cultures did each of the Nations exhibit? What challenges did they face as they did so?

#### A. *The Gitksan Nation's "Exhibits"*

In seeking judicial recognition of their aboriginal title to their land in the *Delgamuukw* litigation, members of the Gitksan Nation shared many aspects of their culture with the courts. They presented evidence related to land ownership, resource management, their economy, social and governance structures and systems, history, and spirituality.<sup>67</sup> Much of the evidence related to the content and practice of Gitksan law as it is embedded in Gitksan culture. The interconnectedness of Gitksan law and culture is suggested by the following words of the late Gwis Gyen (Stanley Williams), one of the named plaintiffs: “[a]ll the Gitksan people use a common law. This is like an ancient tree that has grown roots right deep into the ground. This is the way our law is . . . .”<sup>68</sup>

At the heart of the proof offered to establish aboriginal title were the *adaawks* of the Gitksan Houses. The Houses (*wilps*) are the basic political units of the Nation, and each person is born into his or her mother’s House.<sup>69</sup>

The Supreme Court of Canada defined an *adaawk* as a House’s “collection of sacred oral tradition about their ancestors, histories and territories.”<sup>70</sup> Professor Val Napoleon has described an *adaawk* as “[t]he major formal institution that preserves the identification and conceptual foundation of a House-owned territories, crests, songs, names, major events, and relationships with other Houses . . . .”<sup>71</sup> An *adaawk* thus identifies and describes the history, land ownership, and cultural property of each House. It is more than just a cultural artifact; rather, it is part of the law of the Gitksan Nation.<sup>72</sup>

The content of an *adaawk* includes its physical representations, such as a totem pole. The *adaawk* also identifies and provides the foundation for crests that are displayed on totem poles.<sup>73</sup> The crests and poles link the House to its land, as the following comment explains:

66. See *supra* pt. I(C).

67. Napoleon, *supra* n. 59, at 124.

68. *Id.* at 124–125 (footnote omitted) (quoting Don Monet & Skanu’u (Ardythe Wilson), *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet’suwet’en Sovereignty Case* 101 (New Socy. Publishers 1992) (quoting Gwis Gyen)).

69. *Delgamuukw*, 3 S.C.R. at ¶ 12; see also Gitksan Chiefs’ Office, *Who We Are: Gitksan Overview*, <http://www.gitksan.com/html/who/people/overview.htm> (last accessed Nov. 20, 2009) (noting that the Gitksan have a “[m]atrilineal system with House members tracing lineage through mother’s side” and that “[a]ll Gitksan belong to a *wilp* (House group), which is the basic unit for social, economic and political purposes”).

70. *Delgamuukw*, 3 S.C.R. at ¶ 13.

71. Napoleon, *supra* n. 59, at 126 (footnote omitted).

72. *Id.* at 123.

73. *Delgamuukw*, 3 S.C.R. at ¶ 13. A crest is “a specific named power or privilege drawn from the *adaawk* that may be represented on poles, robes and regalia, headdresses, or other objects.” Napoleon, *supra* n. 59, at 127 (footnote omitted).

[T]he crests displayed on its pole encode the history of the House . . . [and] recreate the link with the spirit forces that gives the people their power. Reaching upward, yet firmly planted in the ground, the pole links humans, spirit and land.<sup>74</sup>

The evidence as to the *adaawks* presented in *Delgamuukw* included information about their preservation and authentication—in other words, how the *adaawks* are preserved, in a form that is recognized as authentic, so that they can continue to function as important institutions for the Gitksan. The *adaawks* are “repeated, performed, and authenticated at important feasts” hosted by Chiefs, for significant events and transactions, in the feast halls of their Houses.<sup>75</sup> Guest Chiefs and others who witness the recital of a House’s *adaawk* may “object if they question any detail and, in this way, held [sic] ensure the authenticity of the *adaawk*[,]” along with helping to preserve it.<sup>76</sup> By retelling the *adaawks* in their feast halls, the Houses “identify their territories to remind themselves of the sacred connection that they have with their lands.”<sup>77</sup>

The description of the preservation and authentication of the *adaawks* provided above is couched in the language of non-Gitksan judges and anthropologists. “Authentication” is, after all, a legal term of art, used in the law of evidence to refer to giving authority, or legal authenticity, to evidence, so that it is admissible in legal proceedings.<sup>78</sup> The following comment, on the other hand, was made in court by a member of the Gitksan Nation, Chief Gyoluugyat (Mary McKenzie), in response to the question of why it is important to tell the *adaawks*:

Because the *Adaawk* tells, in a Feast House . . . who are the holders of fishing places, creeks and mountains that belong to each House of the chiefs, where they get food, like berry picking . . . [T]hey tell the owner and the location . . . [H]ow I have my knowledge now is by attending the feasting of any chief, even if it’s my own feasting, I hear the chiefs repeat or tell of the *Adaawk* of theirs and ours. This is the importance of the feasting, that these *Adaawks* are told.<sup>79</sup>

Asked about the truthfulness of the *adaawk* of her House, Chief Gyoluugyat (sounding almost incredulous at the question) responded as follows: “In Gitksan law all *Adaawks* are true. . . . How could the *Adaawk* be repeated if it’s not true to the Gitksan people? They got to be accurate and I know. . . from experience . . . that they are accurate.”<sup>80</sup>

In the *Delgamuukw* litigation, Chief Gyoluugyat and other witnesses told portions of the *adaawks* of their Houses as “proof of the existence of a system of land tenure law internal to the Gitksan, which covered the whole territory claimed . . . .”<sup>81</sup> The *adaawk*

74. Napoleon, *supra* n. 59, at 127 (footnote omitted) (quoting Gisday Wa & Delgam Uukw, *supra* n. 60, at 26).

75. *Delgamuukw*, 3 S.C.R. at ¶ 93 (quoting the opinion of the Supreme Court of British Columbia, *Delgamuukw*, 3 W.W.R. at ¶ 338).

76. *Id.* at ¶ 93. Chiefs and others who are invited to hearing the recounting of an *adaawk* thus play the role of *niid’nt*, meaning “the ones who approve.” Napoleon, *supra* n. 59, at 126 (footnote omitted).

77. *Delgamuukw*, 3 S.C.R. at ¶ 14.

78. *Black’s Law Dictionary* 151 (Bryan A. Garner ed., 9th ed., West 2009); see also Fed. R. Evid. 901(a) (“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”).

79. Napoleon, *supra* n. 59, at 123 (citation omitted).

80. *Id.*

81. *Delgamuukw*, 3 S.C.R. at ¶ 94.

thus established the Nation's historical use and occupation of the territory to which it claimed aboriginal title.<sup>82</sup>

*B. The Mattaponi Tribe's "Exhibits"*

In its efforts to protect the lands and waterways of their homeland from the proposed KWR Project, the Mattaponi Tribe presented evidence of several aspects of the Tribe's culture. The Tribe tried to convey a sense of their significance above and beyond the importance that people who were not members of the Tribe might attach to them. In short, the Tribe sought to explain how they fit within, and were invaluable to, the Tribe's culture.

1. Early Settlement and Burial Sites

First, the Tribe presented evidence of the locations of earlier tribal settlements, which were included among almost eighty sites that might be eligible for inclusion in the National Register of Historic Places.<sup>83</sup> To outsiders, these were simply archaeological sites, which (if they were of sufficient interest to archaeologists) might be excavated prior to their destruction by flooding. Once they were excavated and documented, their loss might be considered unfortunate, but their continued preservation was no longer necessary. To the Tribe, however, these sites have a greater significance, which necessitates their preservation:

The places have tremendous emotional and symbolic significance for the tribe, not only have they been important to us for centuries, but also because they represent some of the last remaining physical links we have with our ancestors. Other sites have already been wiped out by development from hundreds of years of encroachment. If the King William reservoir is built, we will lose an historic and cultural heritage that these sites represent.<sup>84</sup>

The Tribe was especially concerned about possible disturbance of burial sites and stated that any disturbance of their ancestors' burial sites would be unacceptable.<sup>85</sup>

2. Shad Fishing and Species Preservation

Secondly, the Tribe discussed the importance of fishing for shad to the livelihood and identity of tribal members. The Tribe was concerned about the KWR Project's impact on the area's shad population, a concern that was shared by the U.S. Fish and Wildlife Service.<sup>86</sup> Shad is an anadromous species which travels up the waterways of the Tribe's homeland from the Atlantic Ocean and uses the tidal freshwater areas of the

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82. *Id.*

83. For a discussion of the culturally and historically significant sites that were threatened by the KWR Project, see Army Corps., *supra* n. 38, at 189–196.

84. Pub. Hrg. on Fed. Consistency Certification for King William Reservoir–Regl. Raw Water Supply Plan for Lower Peninsula Transc. 8:23–9:6 (Oct. 20, 2004) (available at <http://www.deq.virginia.gov/export/sites/default/eir/documents/KWRPublicHearing.pdf>) (Chief Carl Custalow speaking on behalf of the Mattaponi Tribe).

85. See Army Corps., *supra* n. 38, at 191.

86. *Id.* at 173 (noting the Service's concern that saltwater intrusion resulting from the KWR Project could "decrease the tidal freshwater zone of spawning habitat on the Pamunkey and Mattaponi Rivers [and thus] could seriously impact populations of American shad").

Mattaponi River for spawning and nursery grounds.<sup>87</sup> The proposed intake structure was to be built in the prime spawning area for shad and other anadromous fish.<sup>88</sup>

To many outsiders, fishing is simply a recreational activity, in which they can participate elsewhere, such as in the King William Reservoir, if it were built.<sup>89</sup> For the Mattaponi Tribe, though, fishing on the Mattaponi River, and for shad in particular, has been a tribal activity since time immemorial. It has an incalculable value in the Tribe's culture, as Chief Carl Custalow has explained: "[t]he river is more than a source of food and money for the tribe. The river and the shad are the basis of our culture and traditions."<sup>90</sup>

Because of over-fishing by non-Indians and habitat degradation, shad stocks in Virginia's rivers became severely depleted, which led to the imposition of a moratorium on shad fishing.<sup>91</sup> Tribal members are not subject to the moratorium, because of treaty rights, and play a crucial role in species preservation and restoration efforts through the Tribe's fish hatchery.<sup>92</sup> The historic importance of fishing is reflected in the Treaty at Middle Plantation's fishing rights provision.<sup>93</sup> All of this is threatened by the KWR Project. For the Tribe, the possibility of being able to fish for non-native species, along with other state residents, with which the proposed King William Reservoir was to be stocked,<sup>94</sup> would not be an adequate replacement for the loss of the treaty right to fish for shad on the Mattaponi River.

### 3. Hunting and Gathering Rights

Thirdly, the Tribe presented evidence of the continuing importance to tribal members of hunting and gathering activities in the area. A substantial portion of tribal members' food comes from hunting game, along with fishing.<sup>95</sup> Tribal members still gather about sixty wild plant species for food, medicinal, and ceremonial purposes on their reservation and in the surrounding area.<sup>96</sup> One of the plants still gathered is

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87. *Id.* at 172. In addition to American shad and Hickory shad, other anadromous fish using the Mattaponi River for spawning include the Alewife and the Blueback Herring. *Id.*

88. *Id.* at 173. In addition, the construction of the reservoir would permanently obstruct the potential passage of spawning anadromous fish into the upper reaches of Cohoke Creek. Army Corps., *supra* n. 38, at 179.

89. *Id.* at 178 (noting Newport News' claim that "an enormous freshwater fishery would be created by the reservoir which would more than compensate for the project's impacts to resident fisheries").

90. Pub. Hrg., *supra* n. 84, at 6:3-5 (Chief Carl Custalow addressing the panel).

91. See Army Corps., *supra* n. 38, at 172. For a description of shad's endangered status, the imposition of a 1994 moratorium on shad fishing, and ongoing efforts to restore the shad population in Virginia's waters, see Va. Dept. of Game and Inland Fisheries, *On the Road to Recovery: American Shad Restoration*, <http://www.dgif.virginia.gov/fishing/shad-restoration> (last accessed Nov. 20, 2009).

92. See Army Corps., *supra* n. 38, at 172-173; see also Mattaponi Indian Reservation, *Mattaponi Home Page*, <http://sites.communitylink.org/Mattaponi/index.html> (last accessed on Nov. 20, 2009) (Mattaponi Tribe's description of the tribal fish hatchery); Va. Council on Indians, *Mattaponi Tribe*, <http://indians.vipnet.org/tribes/mattaponi.cfm> (last modified on Dec. 12, 2008) (the council's description of the hatchery).

93. See *Treaty at Middle Plantation*, *supra* n. 32, at 84, art. VII.

94. See Army Corps., *supra* n. 38, at 179. The U.S. Fish and Wildlife Service agreed with the Tribe that the replacement of native species with game species was not the "resources enhancement" that it was claimed to be. *Id.*

95. *Id.* at 214.

96. *Id.*

tuckahoe, which the Tribe has express rights to gather under the provisions of the Treaty at Middle Plantation.<sup>97</sup>

To many outsiders, hunting and gathering look like recreational activities. Animals can be hunted and plants can be gathered elsewhere. For the Tribe, on the other hand, engaging in these activities, in this area, has been part of tribal life for thousands of years. Tribal members have voiced fears that the KWR Project's adverse impact on these activities, due to habitat destruction and development, would alter their way of life and ultimately end their very existence as a tribe.<sup>98</sup>

#### 4. The River and Spirituality

Finally, the Tribe presented evidence of members' religious practices and way of life and of the adverse effects that the KWR Project would have on them. At the heart of this concern is the Mattaponi River itself, which "is a gift of life from the Great Spirit that provides and completes the circle of life" and "unites tribal members through baptism and other religious ceremonies."<sup>99</sup> The Tribe explained that "alterations to the natural state of the river would compromise the sanctity of these religious ceremonies" and dishonor the Tribe's ancestors.<sup>100</sup>

The late Chief Webster Custalow used the following words to describe the Tribe's connection to the River and the sustenance, both physical and spiritual, that it provides:

All my life, I've fished out there. From a little boy on up . . . You had to eat the fish, you had to get out here and dig in the earth to get what you needed to live . . . We wouldn't be here today without that river.<sup>101</sup>

To many outsiders, on the other hand, reared in the "drill, baby, drill" culture of the dominant society and unaccustomed to looking at the impacts of today's decisions seven generations into the future,<sup>102</sup> the Mattaponi River is simply a resource to be exploited, as quickly and as cheaply as possible. In the case of the KWR Project, the greatest cost of exploitation is to be borne by the Mattaponi Tribe and its neighbors, rather than by Newport News and the other backers of the KWR Project.

In addition to voicing concerns about protecting the River, the Tribe very reluctantly shared information about a sacred site that is located in the valley of Cohoke Creek, which would be dammed to create the reservoir. The Tribe explained that destruction of the site would "undercut the cultural identity of the tribe itself."<sup>103</sup> Faced with a grave threat to this site, the Tribe felt forced to, in effect, exhibit an aspect of

97. See *Treaty at Middle Plantation*, *supra* n. 32, at 84, art. VII.

98. See *Army Corps.*, *supra* n. 38, at 214–215. Other food plants, in addition to tuckahoe, include a local species of wild cactus, wild rice, and yucca. *Id.* at 214. Medicinally valuable plants include myrtle, flag root, and foxglove. *Id.*

99. *Id.* at 185.

100. *Id.*

101. Robert Little, "We've Had Enough": *Mattaponi Tribe Cites 320-Year-Old Treaty to Thwart County's Reservoir Plans*, Va. Pilot & Ledger-Star A1 (Apr. 6, 1997) (available at 1997 WLNR 2209537) (quoting Webster Custalow, then Chief of the Mattaponi Tribe).

102. *Id.* ("We always look seven generations ahead . . . You take somebody like Newport News, they're looking right now—for the business. For the dollar.") (quoting Assistant Chief Carl Custalow).

103. *Army Corps.*, *supra* n. 38, at 198 (quoting a letter from the Institute for Public Representation, dated June 30, 1999, describing the Tribe's concerns).



tribal culture that is not meant to be made available for public consumption, but rather to be treasured and protected by those who understand its value. This experience highlights a dilemma that can be faced by tribes making claims related to cultural preservation—the price for seeking (perhaps in vain) protection of the tribe’s culture is publicly revealing aspects of the culture that are supposed to be private.

KWR Project proponents questioned the validity of the site and its connection to the Tribe.<sup>104</sup> The truthfulness of the Tribe’s evidence thus was called into question, much as the truthfulness of the Gitxsan *adaawks* was questioned by the Supreme Court of British Columbia in *Delgamuukw*.<sup>105</sup> At any rate, the proponents opined, the site could simply be relocated to prevent its destruction by the Project. For the Tribe, however, relocation was simply an impossibility. The site’s spiritual integrity could not just be moved to another location.<sup>106</sup>

#### IV. THE REACTIONS OF “VIEWERS” TO THE NATIONS’ “EXHIBITS”: CRITICAL SUCCESS OR FAILURE?

Ultimately, was it worth it for the Gitxsan Nation and the Mattaponi Tribe to share their cultures with outsiders? In other words, did exhibiting aspects of their cultures bring about the outcome that they had sought?

##### A. *The Gitxsan Nation*

For the Gitxsan Nation, the initial answer was a disappointing “no.” In considering the Nation’s territorial claim, British Columbia Supreme Court Chief Justice Allan McEachern, the trial judge, ruled the *adaawks* admissible,<sup>107</sup> but gave no independent weight to the evidence of use and occupancy that they contained.<sup>108</sup> Chief Justice McEachern decided that they could not serve “as evidence of detailed history, or land ownership, use or occupation.”<sup>109</sup> In short, the British Columbia Supreme Court gave little to no respect to these highly significant aspects of Gitxsan culture that the Nation shared in the courtroom to demonstrate their attachment to the territory that they claimed. Chief Justice McEachern accordingly rejected the claims of the Nation,<sup>110</sup> whose pre-contact lifestyle he disparagingly characterized as “nasty, brutish and short.”<sup>111</sup>

He acknowledged the sincerity of the plaintiffs’ belief in their legal rights to the territory claimed, but went on to say that courts are “frequently unable to respond” to “subjective considerations” such as “beliefs, feelings, and justice.”<sup>112</sup> He continued:

[T]hese plaintiffs . . . must understand . . . that our courts are courts of law which labour

104. *Id.* at 196.

105. *See infra* n. 117 and accompanying text.

106. *See Army Corps., supra* n. 38, at 198.

107. *See Delgamuukw*, 3 S.C.R. at ¶ 95.

108. *Id.* at ¶ 97.

109. *Id.* at ¶ 96 (quoting the opinion of Chief Justice McEachern).

110. *Id.* at ¶ 30 (noting that Chief Justice McEachern dismissed the plaintiffs’ claims for ownership and jurisdiction and for aboriginal rights in the territory claimed).

111. *Delgamuukw*, 3 W.W.R. at ¶ 111 (quoting Hobbes).

112. *Id.* at ¶ 64.

under disciplines which do not always permit judges to do what they might subjectively think (or feel) might be the right or just thing to do in a particular case . . . . I am sure that the plaintiffs understand that although the aboriginal laws which they recognize could be relevant on some issues, I must decide this case only according to what they call “the white man’s law” . . . .<sup>113</sup>

Commenting on the decision, one member of the Gitxsan Nation, Maas Gak (Don Ryan), reported that Gitxsan elders told him that “[t]his is the last time that the sacred boxes of our people will be opened for the white man to look at.”<sup>114</sup>

This was not the end of the story, however. Following a mixed reception before the British Columbia Court of Appeal, the *Delgamuukw* case ultimately made its way to the Supreme Court of Canada.<sup>115</sup> The Supreme Court held that the Chief Justice McEachern had erred in his treatment of the Gitxsan *adaawks* and other oral history evidence. If the trial judge’s reasoning were followed, then “the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system . . . .”<sup>116</sup> The Court faulted the trial judge for discounting the *adaawks* as being not “literally true” and for questioning the utility of the *adaawks* to demonstrate use and occupation because they were “seriously lacking in detail” about specific lands.<sup>117</sup> This approach did not give the *adaawks* the weight that they should have been given. Had they been assessed correctly, the factual findings might have been very different.<sup>118</sup>

The Court concluded that the factual findings could not stand, and a new trial was warranted. At a new trial, the evidence could be considered in light of what the Court said about the proper treatment of the *adaawks* and other oral history evidence.<sup>119</sup> The Supreme Court reiterated its statement in an earlier case that courts must “interpret the evidence of aboriginal peoples in light of the difficulties inherent in adjudicating aboriginal claims.”<sup>120</sup> Among these so-called difficulties is the fact that the evidence that First Nations’ members offer to support their claims may well differ from the kinds of evidence to which courts are accustomed. Although the use of oral histories indeed creates challenges, “the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with . . . .”<sup>121</sup>

While it concluded that a new trial was warranted, the Supreme Court indicated a preference for negotiation of a settlement over continued litigation as an approach that was more likely to lead to reconciliation between aboriginal societies and the

113. *Id.* at ¶¶ 64, 67.

114. Robin Ridington & Jillian Ridington, *When You Sing It Now, Just Like New: First Nations Poetics, Voices, and Representations* 231 (U. of Neb. Bd. of Regents 2006) (citing Mass Gak (Don Ryan)).

115. The Court of Appeal unanimously rejected the trial judge’s finding that the plaintiffs’ aboriginal rights had been extinguished. A majority (3-2) of the court also declared that the plaintiffs had aboriginal rights as to much of the claimed territory, but not ownership. For a description of the Court of Appeal proceedings, see *Delgamuukw*, 3 S.C.R. at ¶¶ 31–71.

116. *Id.* at ¶ 98.

117. *Id.* at ¶ 97; see also *id.* at ¶¶ 99–106 (outlining other errors with respect to treatment of evidence presented by the plaintiffs).

118. *Id.* at ¶ 107.

119. *Delgamuukw*, 3 S.C.R. at ¶ 108.

120. *Id.* at ¶ 98.

121. *Id.* at ¶ 87.

government.<sup>122</sup> This is the path that the Gitxsan Nation had initially pursued without success,<sup>123</sup> but the Nation and the province started down this path once again. The Nation is involved in ongoing negotiations with British Columbia for settlement of its claims.<sup>124</sup> The negotiations are taking place within the six-stage treaty process that the province has developed for aboriginal claims.<sup>125</sup> The Gitxsan Nation and the province are currently in Stage 4 of the process, which involves the negotiation of an agreement in principle.<sup>126</sup> The Nation also achieved an additional litigation victory in the British Columbia Supreme Court in 2002 in the *Yal* case, in which Justice Tysoe ruled “[o]n the basis of the direct evidence and oral histories,” that the Nation “has a good *prima facie* claim of aboriginal title and a strong *prima facie* claim of aboriginal rights with respect to at least part of the areas claimed . . . .”<sup>127</sup> The Nation has noted, however, that treaty negotiations have not proceeded as quickly as it would like.<sup>128</sup> Thus, the ultimate outcome of the Gitxsan Nation’s efforts to obtain recognition, based on cultural and other evidence, of aboriginal title to its homeland remains unclear, but considerable progress has been made toward the negotiation of a treaty to address its claims.

#### B. *The Mattaponi Tribe*

At least initially, the Mattaponi Tribe’s exhibition of its culture seemed to have been much more successful than the Gitxsan Nation’s initial experience. Colonel Carroll, the Army Corps of Engineers Norfolk District Commander, recommended against the granting of a permit for the KWR Project.<sup>129</sup> The U.S. Fish and Wildlife Service and the Environmental Protection Agency (EPA) agreed with this decision.<sup>130</sup> Colonel Carroll explained that “the risk to the continued way of life” of the Mattaponi Tribe along with the risk to the environment and an entire watershed is too great to grant the permit.<sup>131</sup>

122. *Id.* at ¶ 186.

123. See Gitxsan Chiefs’ Office, *supra* n. 21, and accompanying text (noting the Nation’s earlier efforts to negotiate a settlement).

124. *Id.* (noting that “[o]nce the Delgamuukw decision was handed down by the SCC Dec. 11, 1997, the Gitxsan once again made their preferences for negotiation over litigation known. Small progress was made and a bilateral Reconciliation Agreement was signed with the province in 1999. B.C. agreed to come back to the treaty table with the Gitxsan and Canada under the B.C. Treaty Process in 2001”).

125. The stages of the treaty process are as follows: 1. statement of intent to negotiate; 2. readiness to negotiate; 3. negotiation of a framework agreement; 4. negotiation of an agreement in principle; 5. negotiation to finalize a treaty; and 6. implementation of a treaty. Brit. Colum., Ministry of Aboriginal Rel. and Reconciliation, *British Columbia Treaty Commission Agreement Six-Stage Treaty Process*, <http://www.gov.bc.ca/arr/treaty/negotiating/sixstage.html> (last accessed Nov. 20, 2009).

126. See Brit. Colum., Ministry of Aboriginal Rel. and Reconciliation, *Gitxsan Treaty Society*, <http://www.gov.bc.ca/arr/firstnation/gitxsan/default.html> (last accessed Nov. 20, 2009).

127. *Gitxsan Houses v. Brit. Colum. (Minister of Forests)*, [2002] 10 B.C.L.R. 126, ¶ 72 (B.C. S.C.). Consequently, the province had a duty to consult the Gitxsan Nation before consenting to a change in control of a business with forest licenses covering land subject to its ongoing claims. *Id.* at ¶ 86. *Yal* (Aubrey Jackson) was the first named plaintiff in the suit.

128. Gitxsan Chiefs’ Office, *supra* n. 21 (commenting that “[t]alks have been slow due to the B.C. Liberal government’s decisions to refuse to discuss governance issues and to hold a provincial vote on minority rights described as a treaty referendum”).

129. Army Corps., *supra* n. 38, at 340. He concluded that issuance of a permit for the KWR Project would be contrary to the public interest and that the discharge of fill material that was proposed in the Project does not comply with the § 404(b)(1) Guidelines. *Id.*

130. See *Alliance to Save the Mattaponi*, 606 F. Supp. 2d at 125.

131. Army Corps., *supra* n. 38, at 337.

His Record of Decision reveals the significance of the Tribe's culturally based concerns in his decision making.

As to "archaeological" sites, Colonel Carroll noted the Tribe's concerns and stated that because of these concerns, data recovery—the usual approach of archaeologists to a site—was not necessarily the appropriate approach in this context.<sup>132</sup> The Tribe would need to be consulted further, he said, if the KWR Project were to proceed.<sup>133</sup>

Responding to concerns raised over the Project's effects on fishing, Colonel Carroll noted the importance of shad fishing to the Tribe, both economically and culturally.<sup>134</sup> He determined that monitoring and an amelioration plan would be needed, if the permit were ultimately issued, to protect the Tribe's interest in shad fishing.<sup>135</sup> As to hunting and gathering activities, Colonel Carroll noted the dependence of tribal members on these activities for thousands of years.<sup>136</sup> He acknowledged the Tribe's concerns about the destructive impact of the KWR Project, and the residential and commercial development that were to accompany it, on these activities.<sup>137</sup>

Finally, addressing the threat to the Tribe's religious practices and traditional way of life, Colonel Carroll showed his understanding that the Tribe's concern went beyond worrying about disturbing access to the Mattaponi River; rather, the Tribe was worried about the spiritual and religious aspects of the River being disturbed.<sup>138</sup> While the religious aspects of the River "may not be fully appreciated by non-native people[.]" this "lack of appreciation by non-Indians does not depreciate or invalidate this value" to the Mattaponi Tribe.<sup>139</sup>

Colonel Carroll acknowledged the Tribe's concerns about revealing the location of the sacred site, noting that he had found no reason to reject the Tribe's information about the site.<sup>140</sup> He noted that the Tribe agreed to reveal the site's existence only "when faced with the untenable choice of either disclosing the site's identity and risk[ing] its desecration by pothunters and profiteers or failing to mention it and risk[ing] its loss."<sup>141</sup> Colonel Carroll respected the Tribe's request for confidentiality and did not include a detailed description of the site in his Recommended Record of Decision.<sup>142</sup>

Colonel Carroll did not, however, have the last word on the permit request. The Governor of Virginia was not pleased with Colonel Carroll's conclusions and asked the North Atlantic Division of the Corps to consider the permit request.<sup>143</sup> The North

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132. *Id.* at 200.

133. *Id.*

134. *Id.* at 172 (economic importance); *see also id.* at 214 (economic and cultural importance).

135. Army Corps., *supra* n. 38, at 184 (noting the need to resolve concerns regarding monitoring if the permit were issued); *see also id.* at 181–184 (discussing issues related to monitoring).

136. *Id.* at 214.

137. *Id.* at 214–215 (noting that planned development would decrease the habitat available for hunting and gathering and that the Tribe views the development "as further trespass on their historic lands").

138. *Id.* at 231.

139. Army Corps., *supra* n. 38, at 232.

140. *Id.* at 197–198.

141. *Id.* at 197 (quoting a letter from the Institute for Public Representation, dated June 30, 1999, describing the Tribe's concerns).

142. *Id.* at 196.

143. *Alliance to Save the Mattaponi*, 606 F. Supp. 2d at 125.

Atlantic Division rejected Colonel Carroll's recommendation and granted the permit.<sup>144</sup> The key guiding principle in the North Atlantic Division Engineer's decision process seems to have been that views of state and local officials are to be given "great weight" in evaluating how the interest of the public was affected by the KWR Project.<sup>145</sup> With this principle in mind, the Division Engineer glibly discounted those aspects of the Tribe's culture that Colonel Carroll had treated respectfully and concluded would be threatened by the Project. For example, the Division Engineer noted the Tribe's concern over the impact of the Project on spiritual beliefs and practices, but cited the fact that the River was already disrupted elsewhere, as if this meant that further disruptions could not be legitimate grounds for complaint.<sup>146</sup>

In response to the North Atlantic Division's decision, the Tribe and a number of environmental groups challenged the decision in the U.S. federal court system. In a March, 2009 decision, the Federal District Court for the District of Columbia found fault with the conduct of both the Army Corps of Engineers and the Environmental Protection Agency in connection with the issuance of the permit for the KWR Project, holding that they both acted arbitrarily and capriciously. More specifically, the court ruled that the Corps acted arbitrarily and capriciously when it found that the KWR Project "was the least damaging practicable alternative,"<sup>147</sup> that "it [would] not cause or contribute to significant degradation of the waters of the United States[.]"<sup>148</sup> and that the issuance of the permit was in "the public interest."<sup>149</sup>

The Corps' errors were compounded by the inaction of the EPA, which acted improperly when it decided not to veto the permit.<sup>150</sup> The EPA is authorized by the Clean Water Act to veto a permit upon determining that the discharge of materials that would be allowed by the permit would "have an unacceptable adverse effect on the environment."<sup>151</sup> The EPA acted arbitrarily and capriciously because the decision not to veto the permit was not based on a determination that the permit would not have unacceptable adverse effects. The decision was based on "other reasons completely divorced from the statutory text," such as the need to address Newport News' claimed water supply needs.<sup>152</sup>

In the wake of the court's decision, Randy Hildebrandt, the Newport News City Manager, announced that Newport News was suspending all work on the KWR Project, explaining that "[t]here are not a lot of reasons to be optimistic" about it.<sup>153</sup> His

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144. The North Atlantic Division issued its Final Record of Decision on July 29, 2005 and issued the permit on November 15, 2005. *Id.* at 126; see Army Corps of Engineers—North Atlantic Division, *Record of Decision Memorandum for Permit Application Number 93-0902-12 (Norfolk District) by the City of Newport News Virginia for the King William Reservoir Project* (U.S. Army July 29, 2005) (available at <http://www.nad.usace.army.mil/kwr/decision.pdf>) [hereinafter Atlantic Div. ROD].

145. Atlantic Div. ROD, *supra* n. 144, at 15.

146. *Id.* at 46.

147. *Alliance to Save the Mattaponi*, 606 F. Supp. 2d at 130.

148. *Id.* at 134.

149. *Id.* at 136.

150. *Id.* at 140 (agreeing with the plaintiffs that EPA's failure to veto the permit was arbitrary and capricious).

151. *Alliance to Save the Mattaponi*, 606 F. Supp. 2d at 139 (citing and quoting 33 U.S.C. § 1344(c) (1987)).

152. *Id.* at 140.

153. Chesapeake Bay Found., *King William Reservoir: Down for the Count?*

pessimism proved to be appropriate, as the U.S. Department of Justice notified the plaintiffs in June 2009 that it would not appeal the court's decision.<sup>154</sup> Reacting to the Justice Department's decision, the mayor of Newport News, Joe S. Frank, stated, "[t]he ability to move forward no longer exists . . . . As far as I am concerned, this project has no future."<sup>155</sup> Newport News had already spent more than \$50 million on the reservoir and turned its attention to determining how to "unwind" the Project, including the land acquisitions and some mitigation work that had already occurred.<sup>156</sup>

After the March court ruling, the Corps suspended the permit for the Project but without permanently revoking it.<sup>157</sup> The Chesapeake Bay Foundation's Virginia executive director, Ann F. Jennings, expressed confidence that "if the Corps makes a full and reasoned scientific evaluation of the project, it will conclude that issuance of a federal permit is not warranted."<sup>158</sup> In September 2009, the Newport News City Council decided to terminate the KWR Project.<sup>159</sup> In short, barring an attempt to revive the project, the Mattaponi Tribe has succeeded in its efforts to defend its cultural heritage, and its vibrant living culture, against the proponents of the King William Reservoir.

## V. CONCLUSION

What lessons can be learned from the experiences of the Gitksan Nation and the Mattaponi Tribe about the challenges that arise when law encounters culture in the disposition of tribal claims, either before courts or government agencies? First of all, their experiences reveal that exhibiting culture before courts and agencies carries with it certain risks. It involves putting on public display cultural knowledge that may not be ordinarily shared with outsiders. The knowledge may not even be customarily shared with all members of the tribe, if the knowledge is entrusted to members who play a particular role within the tribe. Moreover, exhibiting culture may put some cultural treasures at risk of desecration or destruction, as was the case with the sacred site that the Mattaponi Tribe revealed only with great reluctance.

Secondly, exhibiting culture is fraught with practical difficulties. Legal rules as to admissibility of evidence, proof of claims, and weighting of evidence can limit the ability of tribal litigants to exhibit to courts and agencies the aspects of their cultures that they know to be most significant to the claim at hand. Also, it may be difficult to exhibit aspects of culture in a way that is comprehensible to courts and agencies. Translation of several different kinds may be required. Words must be translated into another language, which may have no true equivalents for them. Concepts must be explained, perhaps by

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<http://www.cbf.org/Page.aspx?pid=1202> (May 1, 2009) (quoting Randy Hildebrandt).

154. Sabine Hirschauer, *Reservoir Ruling Won't Be Appealed*, Daily Press (Newport News, V.A.) A1 (June 26, 2009) (available at 2009 WLNR 12271895).

155. *Id.*

156. *Id.* Deputy City Manager Neil Morgan has stated that the city "will not just leave equipment in the creeks and on properties [and is] trying to figure out how to shut it down in an honorable fashion." *Id.*

157. *Id.*

158. Hirschauer, *supra* n. 154. Jennings has noted that the Corps "must now review the permit in light of more recent developments concerning the need for the reservoir and the impacts to the environment and historic cultural sites." *Id.*

159. Cathy Grimes, *Tap is Finally Turned Off for King William Reservoir*, Daily Press (Newport News, VA) A4 (Sep. 23, 2009) (available at 2009 WLNR 18770965).

use of analogies, to members of a culture in which the concepts, such as an *adaawk* or a House, have no counterparts. U.S. tribes have repeatedly encountered this problem in litigation over sacred sites and religious practices.<sup>160</sup> Enough of the context in which the word or concept is relevant must also be conveyed. Much may be lost in translation, hampering the effectiveness of the sharing of cultural knowledge.

Thirdly, courts and agencies may not treat what is exhibited, and those who exhibit it, respectfully. Cultural evidence may be treated dismissively and regarded as quaint at best, or as primitive and savage at worst, an attitude that the Gitksan Nation encountered in the British Columbia Supreme Court. Those who present the evidence, such as those who testify in court, may not be treated with the deference that is due them because of their status within their Nation. Judges and opposing counsel may not act as respectfully toward a Chief who is testifying in court as they would expect the Chief to act toward them. An elderly woman who is a Chief of considerable status within her Nation may be repeatedly interrupted by the judge and lawyers, for example, and the lawyers may look directly into her eyes, which, among her people, is an insolent and discourteous way to behave toward a Chief.<sup>161</sup> As she testifies, she would be asked to sit in a box where criminal defendants are also seated, a place which is, literally and metaphorically, below the judge.<sup>162</sup> A judge may express impatience with the length of time that it takes for a witness to complete his or her testimony, as Chief Justice McEachern did in the *Delgamuukw* litigation.<sup>163</sup> For a Nation that has already waited long for recognition of its claims, disrespectful treatment in public of its leaders and elders surely must add insult to injury.

Fourthly, there is no guarantee that the ultimate outcome of the court or agency proceeding will be worth the risks and difficulties that are attendant upon exhibiting culture, as the rights being asserted by a tribe may be denied. Faced with such an outcome, a tribe will have revealed the contents of its cultural treasure box in vain. To put it another way, when a tribe exhibits aspects of its culture to courts and agencies, it can be seen as presenting a gift of knowledge to a perhaps unappreciative recipient. The testimony of the Gitksan Nation witnesses as to the *adaawks* of their Houses, for example, amounted to a gift of "public education about an ancient way of life," presented "to a community in search of truth."<sup>164</sup> By discounting the value of this evidence and treating it as background noise to the real legal business at hand, Chief Justice McEachern, in effect, returned the gift unopened.<sup>165</sup> Such experiences may lead, understandably, to anger, frustration, and sadness. Tribal members may feel that their

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160. For an analysis of the problems of translation that tribes have confronted in their efforts to protect religious rights, see Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 *Stan. L. Rev.* 773, 815-819 (1997).

161. See Daly, *supra* n. 55, at 7-8 (describing disrespectful treatment in court of a hypothetical Chief, based on his experience observing the proceedings in the *Delgamuukw* litigation).

162. *Id.* at 6-7. Also, the judge would be announced and she would have to stand for his entrance; he, on the other hand, would not even acknowledge her presence. *Id.*

163. Napoleon, *supra* n. 59, at 138 (describing Chief Justice McEachern's impatience with the length of the evidence provided by the Gitksan witnesses).

164. Daly, *supra* n. 55, at 47.

165. *Id.*

culture was subjected to a trial, in some sense, and rejected, a sentiment voiced by Gitxsan Nation Chief Yagalahl (Dora Wilson): “[o]ur cultur~~e~~ was on trial. We were told we didn’t exist.”<sup>166</sup>

Ultimately, however, the experiences of these two Nations suggest that at least in some instances, exhibiting aspects of culture to the potentially hostile audiences of judges and bureaucrats may be worth the effort, the risks, and the indignities that this endeavor may entail. Although exhibiting their cultures has not yet completely and definitively secured to both the Gitxsan Nation and the Mattaponi Tribe the legal victories that they were seeking, the discussion above has shown, I believe, that there is room for (cautious) optimism that their bearing witness to their cultures in the legal systems of Canada and the United States has not been in vain.

I will conclude with two quotations, both from legal documents that are significant to the struggles of these Nations. Read together, they provide guidance on the proper treatment of tribal claims that rest on cultural considerations and require that tribes exhibit aspects of their culture in order to assert their claims.

The first quote is drawn from the Treaty at Middle Plantation, signed by the ancestors of the Mattaponi Tribe in 1677. The Treaty identified the reason for its being drawn up in the following words:

for the firm Grounding, and sure Establishment of a *good and just Peace* . . .  
[a]nd that it may be a Secure and Lasting one (Founded upon the strong Pillars  
of Reciprocal Justice) by Confirming to [the Indians] their Just Rights.<sup>167</sup>

The second quotation is the final statement of the Chief Justice of the Supreme Court of Canada in his opinion in *Delgamuukw v. British Columbia*. This statement followed his urging that settlement be considered as an alternative to a continuation of litigation and his voicing of hopes for reconciliation between First Nations and Canada. Chief Justice Lamer wrote: “Let us face it, we are all here to stay.”<sup>168</sup>

If the many cultures residing on the continent of North America—both those which are indigenous to the continent and those which settled on top of them—are indeed “all here to stay,” and if the American and Canadian legal systems want to foster “a good and just Peace” between these cultures, then the kind of treatment that indigenous peoples’ cultures received at the hands of the Supreme Court of British Columbia and the Atlantic Division of the U.S. Army Corps of Engineers must be abandoned. Courts and agencies must be more willing to hear and to heed the culture-linked claims and cultural evidence presented to them by North America’s First Nations. Only through such a commitment will the Canadian and American legal systems truly and at last be able to confirm these Nations’ “just Rights.”

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166. Napoleon, *supra* n.59, at 129 (footnote omitted) (quoting Yagalahl (Dora Wilson), *It Will Always Be the Truth*, in *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* 199, 201 (Frank Cassidy ed., The Inst. for Research on Pub. Policy 1992)).

167. *Treaty at Middle Plantation*, *supra* n. 32, at 82 (emphasis added).

168. *Delgamuukw*, 3 S.C.R. at ¶ 186.



