A Finding of Fact? The Risks of Courts Settling Uncertain Histories

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This article asks whether law and history are at cross-purposes as disciplines. At first glance, it seems that the two seek to achieve different — and incompatible — things. Historians are loath to provide definitive answers about what happened in the past, while legal processes seek certainty and finality. This theoretical tension reveals itself in three case studies: Canadian indigenous rights litigation, the South African Truth and Reconciliation Commission and the Waitangi Tribunal. New Zealand, in particular, faces a unique issue regarding the interaction between law and history: how the Waitangi Tribunal should treat Māori modes of knowledge and incorporate Māori histories into its own reports. Ultimately, despite the apparent incompatibility, law and history do not necessarily have to be at cross-purposes. Historians need to acknowledge that courtrooms are producing just one type of history that does not preclude other stories about the past being told. Similarly, judges should be aware of the limitations inherent in their procedures and institutions.

I INTRODUCTION

The move to allow the Waitangi Tribunal to consider claims extending back to 1840 has generated immense historiographical debate. Historians found themselves appearing as expert witnesses in a new legal arena. They began to query whether legal processes could allow them to produce histories to the standard they would like.

The debate surrounding the histories of the Waitangi Tribunal is complex and varied. Some historians felt that tight timeframes and a lack of opportunity for peer review hindered accuracy. The approach the Tribunal took to evidence was very different from the approach to which academic historians were accustomed. Some historians accused the Tribunal of making history that was overly post-colonial and highly politicised, while others supported the Tribunal's approach.[1]

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1 David V Williams "Historians' context and lawyers' presentism: Debating Historiography or Agreeing to Differ" (2014) 48(2) New Zealand Journal of History 136 at 145–148.

These debates are in part a result of the disagreement about how historians in the Waitangi Tribunal behave. More importantly, the debates implicitly contest what the nature of history is. The unspoken premise implicit in the claim that the Waitangi Tribunal should not create presentist history is that history should be a commentary on the past which excludes concerns of the present.[2] The debates are therefore not merely concerned with the procedure of the Waitangi Tribunal. Instead, they are part of a much larger discussion: whether the doctrines and philosophies of history are compatible with those of the courtroom.

This article considers one possible area of incompatibility between history and the courtroom: whether the disciplines are at cross-purposes. The courtroom aims to make definitive claims about what happened based on the evidence before it, whereas historians are loath to do so. Instead, historians embrace the possibility that different groups of people remember the past in different ways. When a court engages in the construction of history, then, its approach is at odds with history as a discipline, because the court seeks to settle debates about the past once and for all, rather than to add to and encourage discussion.

I begin in Part II with a consideration of the theoretical reasons why history and the courtroom have different and incompatible objectives. I consider what history is as an academic discipline, what a court process sets out to achieve, and how history and the courtroom might come into conflict. I also suggest ways in which any prima facie incompatibility might be reconciled. Then, in Part III, I examine how incompatibilities between law and history have played out in practice. I assess the approach taken in three case studies: indigenous rights claims in the Canadian courts, the Truth and Reconciliation Commissions (TRC) in South Africa, and Māori claims in the Waitangi Tribunal. All three jurisdictions have taken a different approach to hearing historical claims. New Zealand prefers a commission of inquiry model, while Canada seeks to resolve such claims through litigation in the regular courts. In contrast, the TRC was in part a commission of inquiry and in part something different altogether: it had an added nation-building purpose with a focus on procuring public apology. Comparing these different types of juridical processes is useful to understanding whether changes to court processes can negate any theoretical incompatibility. Finally, in Part IV, I note that an examination of what history is in New Zealand cannot be complete without considering Māori epistemologies of remembering the past. I examine ways in which the Waitangi Tribunal has responded to Māori modes of history and the extent to which it has incorporated such approaches into its reports.

One brief point regarding the scope of my argument should be made clear: this article should not be interpreted as an assertion that the courtroom should prioritise good historical methodology above all else; the main purpose of claims is to provide some form of compensation to present-day claimants,

2 See generally WH Oliver "The future behind us: The Waitangi Tribunal's retrospective utopia" in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past – A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001).

many of whom are in desperate need of redress. If it is necessary to put historiography to one side to achieve this outcome, we should do so. This article merely argues that we should be aware of any limitations of the history being produced by the courtroom.

II ARE THE PURPOSES OF LAW AND HISTORY ANTITHETICAL?

The most important issue raised in the debates surrounding the histories created by the Waitangi Tribunal is what the purposes of law and history are, and whether those purposes conflict with one another. Concerns as to presentism, politicisation and post-colonial approaches are all concerns about the nature of the history that the Tribunal writes. As a result, they seem easily resolved by a change in the Tribunal's approach. However, if the two disciplines are at cross-purposes, then the question is no longer whether a tribunal or court has taken the *correct* approach to history, but rather becomes *how much* of the discipline we must sacrifice to achieve the court's aims.

What is the Purpose of History?

> "What do you say when people ask you what the point of history is?"
>
> "Get out."[3]

EH Carr in his seminal 1961 work *What is History?* proposes a definition of history that sets it apart from other records of the past.[4] He does not doubt that "facts and documents are essential to the historian" and indeed stresses the importance of putting aside preconceptions to seek objective truths about the past.[5] Nonetheless, he believes that facts alone "do not by themselves constitute history".[6] The necessary additional step is the interpretation and evaluation of historical facts by historians.[7] History is the process of explaining the past in a way that makes it meaningful to a present-day audience: identifying patterns, explaining causes and effects, and overlaying frameworks. Therefore, for Carr, history "is a continuous process of interaction between the historian and his facts, an unending dialogue between the present and the past".[8]

Academic history has seen two important developments since Carr proposed his definition. First, the evaluative function of history has broadened significantly. Carr's notion of what this evaluation might look like was, as a result of his time, heavily influenced by the high politics and sweeping

3 Interview with James Belich, Professor of Commonwealth and Imperial History (Finlay MacDonald, Auckland Museum, 28 November 2017). The excerpt is a question MacDonald put to Belich.
4 EH Carr *What is History?* (2nd ed, Macmillan, Hampshire, 1986).
5 At 6–24.
6 At 13.
7 At 24.
8 At 24.

historical narrative of Marxist history. However, over the last 50 years, historians have taken many different approaches. Activist historians seek to retell historical narratives in a way that emphasises the role of women or ethnic minorities.[9] More recently, cultural history has come into vogue, telling stories about ordinary people and events rather than focussing on sweeping narratives or the 'great men' of history.[10] Their evaluative purpose is to "enhance our appreciation of the human condition" by highlighting the often alien experiences of those in the past.[11]

Secondly, Carr's conception of history — as factual inquiry followed by evaluation — came up against a strong challenge: postmodernism. Postmodernists popularised the notion that people should naturally be sceptical of being able to access truth about the past.[12] They propose that people remember the past in a way that is distorted by present-day power relations.[13] They contend that history consists only of evaluation.[14] Historians are so tied to their present-day preconceptions that the histories they wrote were entirely invented.[15] Historical facts — or truth — "[were] in essence irrecoverable".[16] Although radical scepticism as to whether an objective truth exists at all has not become the mainstream position, the post-modernist impact on historiography is significant and sets the discipline further apart from the courtroom. Giselle Byrnes notes, "historians now accept that archival research cannot simply recover 'what actually happened'".[17]

Having differing conceptions of what history should be makes the purpose of history hard to discern. There is no longer a unified approach; that in itself tells us that history as a discipline is inherently uncertain. Historians are clearly comfortable about the existence of multiple narratives about the past. By and large, they accept that even if an objective historical record does exist, there will likely be no consensus as to what that record contains. However, if any cohesive thread runs through the various schools of thought, it would perhaps be some attempt at providing accuracy. James Belich in his description of history in 2017 does not stray too far from Carr's 1960s definition, noting that history exists to "transform information into understanding".[18]

9 Richard J Evans "Prologue: What is History? - Now" in David Cannadine (ed) *What is History Now?* (Palgrave Macmillan, New York, 2002) at 6.
10 At 8–9.
11 At 9.
12 Willie Thompson *Postmodernism and History* (Palgrave Macmillan, New York, 2004) at 16–17 and 36.
13 At 16–17 and 36.
14 Keith Jenkins *On 'What is History?': From Carr and Elton to Rorty and White* (Routledge, London, 1995) at 101–106.
15 At 101–106.
16 Evans, above n 9, at 7.
17 Giselle Byrnes *The Waitangi Tribunal and New Zealand History* (Oxford University Press, Melbourne, 2004) at 76.
18 Interview with James Belich, above n 3.

Differences in motive aside, at a base level historians are "engaged in finding out what happened in the past, and why".[19] Revisionist historians embark on their retellings because they feel the dominant narrative has omitted important aspects of the story, and wish to set the record straight.[20] Cultural historians tell tales of the everyman because they feel it important to have a fuller, more comprehensive picture of the past that extends beyond high politics. Even post-modernist historians challenge historical truths to make people challenge their assumptions and, in doing so, arrive at a more accurate assessment of what they might or might not know about the past.

Does the Purpose of the Courtroom Align with the Purpose of History?

Now that we have set a standard for how historians might explain a set of facts, we can do the same for the law. The purpose of the courtroom is twofold. First, it aims to establish the facts. The court has extensive processes and rules to determine which competing version of events should be preferred; which evidence will allow the fact-finder to make an objective assessment of the case and which evidence is too prejudicial; and which facts are material to the case and which are unrelated. The second purpose is to then determine whether those facts amount to wrongdoing. The court slots parts of the story into elements of actions.

At first, this process seems uncannily similar to Carr's conception of history. The first stage involves an inquiry into the facts, and the second involves overlaying a framework through which the facts can be assessed.

However, a crucial difference separates the two disciplines. The courtroom seeks to arrive at a definitive, final answer. Conversely, historians seek to ascertain an answer that is as accurate as possible. The explosion of different historical disciplines — be they political, cultural or feminist — shows that there are differing opinions on how to arrive at the right answer. Consequently, where historians will acknowledge opacities and uncertainties, the law will prioritise certainty. The law essentially chooses the most likely course of events and treats it as absolute fact.[21] For example, the very existence of standards of proof requiring only the balance of probabilities reveals the courtroom's preference for expediency. A version of events that is only 51 per cent likely will be set in stone as the official, legal version. In deciding whether what was done was lawful, it is necessary to create a black-and-white version of event and to clear up any grey areas. Claimants want dispute resolution rather than extensive ruminations regarding the obtainability of objective truth. This means that historians' and lawyers' approaches are at cross-purposes.

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19 Giselle Byrnes "Jackals of the Crown? Historians and the Treaty Claims Process" in Bronwyn Dalley and Jock Phillips (eds) *Going Public: The Changing Face of New Zealand History* (Auckland University Press, Auckland, 2001) 110 at 113.

20 Marnie Hughes-Warrington *Revisionist Histories* (Routledge, Abingdon, 2013) at 1–2.

21 Michael Belgrave "Something Borrowed, Something New: History and the Waitangi Tribunal" in Bronwyn Dalley and Jock Phillips (eds) *Going Public: The Changing Face of New Zealand History* (Auckland University Press, Auckland, 2001) 92 at 100.

The law's need for certainty also changes the way the two disciplines approach the evaluative aspect of what they do. The court requires a system where its evaluation will be correct in perpetuity: it is crucial that the precedents they set that are final and certain. Of course, historians also build upon each other's work, but they are much more willing to accept that there are other conflicting views on why a particular event happened, or whether it was good or bad. Historians are willing to accept that their interpretations may eventually be overturned when new information or possibilities come to light. When it became clear that Marx's dialectic was an inadequate explanation for how societies behaved, new theories and frameworks came to the fore.[22] Closer to home, Paul McHugh charted a shift in New Zealand historiography from "an 'old Whig tradition' of history", which emphasises the ascendance of the European settler state, to a "revisionist" approach which centred New Zealand history around Māori experiences.[23] Historians trust peer reviews and new research gradually alter the way histories are interpreted and, with some luck, increase the accuracy of historical thought.

Of course, the law is not totally inflexible. Precedents can be overturned and retrials ordered if new information comes to light. Nonetheless, to maintain public confidence in the judiciary and ensure, as far as possible, the finality of judgments, the law will always err towards setting the factual record in stone — something historians would usually avoid.

Such a focus on finality can be particularly problematic when historical wrongdoing is adjudicated in legal contexts. In trying to achieve certainty of outcome, the courts may accept a version of history that is contested at the time or may be challenged in the future as new ways of looking at the past emerge. For example, Jessica Day cautions against the inclusion of historical narratives in settlement Acts.[24] The historical findings of the Waitangi Tribunal are given the full weight of Parliamentary approval as the official and correct version of events. When the law decides what the historical record should be in perpetuity, it seeks to put a full stop in Carr's dialogue between the present and the past.

Can the Two Disciplines be Reconciled?

1 Does the Existence of Historical Truth Matter?

Carr accepts that historical facts "cannot exist in a pure form: they are always refracted through the mind of the recorder".[25] Similarly, Byrnes believes that "[f]or historians, the concept of a fact is highly problematic — facts not being very different from interpretations."[26] Unlike Byrnes and others influenced by

22 Evans, above n 9, at 6.
23 PG McHugh "Law, History and the Treaty of Waitangi" (1997) 31 New Zealand Journal of History 38 at 42–43. See also at 39.
24 Jessica Day "Waitangi Tribunal History: Interpretations and Counter-facts" (2009) 15 Auckland U L Rev 205 at 224.
25 Carr, above n 4, at 16.
26 Byrnes "Jackals of the Crown?", above n 19, at 114.

postmodernist approaches to history, Alan Ward believes that, over time, history as a discipline can gradually get closer to ascertaining the truth.[27] Although she does not agree with Ward that such historical truth exists, Day suggests that believing in an objectively correct history may provide a pathway to reconciling history and law as disciplines.[28] If it is possible to establish empirically what did and did not happen in the past, it is acceptable for a court to embark on this process and arrive at a conclusion about what is historically correct.

In my view, this argument is unsatisfactory. The problem with a tribunal or court choosing which version of history to prefer is not just that it might be the case that no one truth can be found — it is also that the tribunal or court might be misguided. Day's argument requires an extra step in the logical chain: that we can be sure that the histories currently before courts and tribunals are in fact the objective historical truth. Our present-day sensibilities are generally offended by the Eurocentric attempts to tell New Zealand history in the past. It is conceivable that in 50 or 100 years' time, future historians will look on our understandings of New Zealand history with similar scorn. Therefore, even if we accept that objective historical truth exists, it remains antithetical to the discipline of history to allow courts to create *final* versions of history.

2 Do Ever-Broadening Schools of Historical Thought Assist in Resolving the Tension between Law and History?

In my initial assessment of history as a discipline, I noted the impressive expansion of new sub-disciplines of history. The explosion of different fields has been so great that Keith Jenkins goes so far as to claim that "history is a formal and thus empty mechanism to be filled according to taste".[29] Such reasoning suggests that the evaluative function of history is now so generalised that the kind of finalised, definitive histories written for legal purposes could be considered their own form of historical inquiry. Scholars such as Andrew Sharp and David V Williams refer to such histories as "juridical histories"[30] — as a new approach to making sense of the past. The evaluative benefit they provide in the present is a cogent, broad-stroke series of events with no confusion or vagueness.

If we view juridical histories as just one possible history among many different histories, it may be possible to reconcile the two disciplines. If the type of history that tribunals and courts produce is just one of the many versions of the past, then juridical history does not seek to definitively resolve the past. It does not preclude other writers telling other interpretations or halt

27 Alan Ward "Historical Method and Waitangi Tribunal Claims" in Miles Fairburn and WH Oliver (eds) *The Certainty of Doubt: Tributes to Peter Munz* (Victoria University Press, Wellington, 1996) 140 at 152–155.

28 Day, above n 24, at 207–208.

29 Jenkins, above n 14, at 8.

30 Andrew Sharp "Recent Juridical and Constitutional Histories of Maori" in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past – A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 31 at 31; and Williams, above n 1, at 136.

the general process of historical advancement. Moreover, Jacobus du Pisani and Kwang-Su Kim suggest that it may be actually be desirable for historians to accept such non-academic histories.[31] They accept that "[f]or historians, it is unthinkable to 'close the book of the past.'"[32] However, in their evaluation of history produced by the TRC, they note:[33]

> … if [historians] aspire to break down the barriers between ivory tower and popular versions of history, they must be attuned to popular perceptions and acknowledge that there are other versions of the past which exist alongside academic history. Those versions often operate in a non-historical mode … but they are significant for people coming to terms with their heritage … .

Essentially, if the histories produced by legal processes are meaningful to people, we should be loath to view them as invalid simply because they do not align with academic anxieties regarding objective truth. Academic histories and juridical histories can coexist.

This line of argument is not without problems. Byrnes notes that, in the New Zealand context, even if the Tribunal does produce only one version of the truth, it will still be perceived by the public at large as the absolute truth.[34] To that extent, it limits the ability of other narratives about the past to be heard. Furthermore, I would suggest that in order to view juridical history as its own particular field, courts and tribunals would need to have some awareness that this was the case. Courts and tribunals would need to acknowledge that, while their versions of history were necessary to resolve grievances, these versions were not intended to survive in perpetuity. Without acknowledging this, the explicit aim of courts and tribunals remains to make definitive and final rulings on the past. It would signal a belief that that new ways of looking at the past cannot be legitimate, and shut down future historical debate.

III THREE CASE STUDIES

In order to assess how the incompatibility between history and the courtroom has been dealt with in practice, this Part will examine three particular judicial forums: the indigenous rights litigation in Canada, the Truth and Reconciliation Commission in South Africa and the Waitangi Tribunal in New Zealand. I will ask whether each forum, and the processes that they adopt, promotes final histories, or whether it writes histories in a way that acknowledges the theoretical problems identified above. A comparison of the

31 Jacobus A du Pisani and Kwang-Su Kim "Establishing the Truth about the Apartheid Past: Historians and the South African Truth and Reconciliation Commission" (2004) 8(1) African Studies Quarterly 77 at 87.

32 At 86.

33 At 87.

34 Byrnes "Jackals of the Crown?", above n 19, at 118.

three case studies is useful to determine which style of judicial inquiry best aligns with producing good history.

Canadian Indigenous Rights Litigation

1 Overview

Canadian litigation, like the New Zealand experience, has largely been based on treaties between the Crown and indigenous nations. Although Canada lacks an overarching treaty analogous to the Treaty of Waitangi, the Royal Proclamation of 1763 establishes some basic principles relevant to historical claims. King George III prohibited settling on indigenous land and required all purchases to be made by the Crown.[35] Many indigenous nations would go on to sign land surrender treaties with the Crown, although such treaties were not universal.[36] Whether through treaty or otherwise, many indigenous nations were forced to yield valuable lands and resources as more settlers poured into the country.[37] This left indigenous communities marginalised and in need of redress.

Canada, in a similar vein to New Zealand, eventually adopted policies such as direct negotiations with the Crown, and the Canadian Indian Claims Commission, to address some of these injustices.[38] However, the vast majority of public and scholarly attention has been on litigation, and it is on these cases that this section focusses.[39] The landmark case *Calder v Attorney-General of British Columbia* began the process of historical claims.[40] The appellants from the Nishga Nation sought a declaration that they had title in their land, then exclusively held by the Crown, which had not been lawfully extinguished.[41] Although the appellants were ultimately unsuccessful, the majority of the Court accepted that indigenous peoples had titles in their land which existed at common law and did not require the approval of a treaty or grant.[42] Numerous historical cases concerning indigenous land have been litigated since *Calder*. Such trials often include large amounts of complex evidence. The Tsilhqot'in Nation's legal proceedings, which ran from 2002 and 2007, spent 339 days examining the historic record.[43]

Similarly, William Wicken is one of a number of historians who testified in *Marshall v The Queen in right of Canada*, a case where a Mi'kmaq

35 Christina Godlewska and Jeremy Webber "The Calder Decision, Aboriginal Title, Treaties and the Nisga'a" in Hamar Foster, Heather Raven and Jeremy Webber (eds) *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press, Vancouver, 2007) 11 at 11.
36 At 12–15.
37 Arthur J Ray *Aboriginal Rights Claims and the Making and Remaking of History* (McGill-Queen's University Press, Montreal, 2016) at 17–18.
38 At 97–104.
39 At 104.
40 *Calder v Attorney-General of British Columbia* [1973] SCR 313.
41 At 313.
42 Mark D Walters "Promise and Paradox: The Emergence of Indigenous Rights Law in Canada" in Benjamin J Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Portland, 2009) 21 at 39.
43 At 41.

defendant challenged his conviction for over-fishing on the grounds that a 1760s treaty protected his rights to catch and sell fish.[44] All historians involved were subject to extensive direct cross-examination; Wicken alone spent 14 and a half days in the witness box.[45] In other trials, a wide range of social scientists, including anthropologists and historians, have also acted as expert witness.[46]

2 How Have the Canadian Courts Treated History?

The academic response to the treatment of history by the Canadian courts has not been complimentary. Arthur J Ray is the most prolific writer on the use of history in indigenous rights cases and has been an expert witness in a number of claims. One of his many concerns relates to the tension between academic history and the finality sought by the courts. He believes that, by continuing to provide new perspectives, academic historians keep stories from the past alive and relevant to new generations.[47] In contrast, when the courts make definitive rulings on indigenous history, they halt this process and "use history to bury the past rather than to continually revisit it".[48]

The courts' need for finality is a feature of their procedure as well as their judgments. What a historian says in the witness box will become the finalised evidence.[49] Because appeals are conducted on errors of law rather than errors of fact, any misstatements or ambiguities cannot be remedied. Such an approach is particularly problematic when determining a difficult historical narrative. A good example can be found in the fishing case *Marshall v Her Majesty The Queen* from the Supreme Court of Canada.[50] Stephen Patterson, the historian engaged as an expert witness for the Crown, spoke of a "'right to sell fish'" during cross-examination — a somewhat ambiguous phrase.[51] Because the Court could not hear new evidence on appeal, it had to debate precisely what type of rights Patterson was referring to.[52] Essentially, the Court had to attempt to evaluate the original historical evaluation. Limiting the information before the courts to transcripts of witness examinations increases the likelihood that courts will misunderstand the evidence in front of them. It also conflicts with the approach that historians would take, which would be to encourage discussion and exposition of unclear aspects of the historical record.

The Canadian literature notes two other ways that history and law might be incompatible. First, the fact that courts believe there is one version

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44 *Marshall v The Queen in right of Canada* (1997) 146 DLR (4th) 257 (NSCA).
45 William C Wicken *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (University of Toronto Press, Toronto, 2002) at 9–10.
46 Michael Belgrave "Looking Forward: Historians and the Waitangi Tribunal" (2006) 40 New Zealand Journal of History 230 at 233.
47 Arthur J Ray *Telling It to the Judge: Taking Native History to Court* (McGill-Queen's University Press, Kingston (Ontario), 2011) at 152.
48 At 152.
49 Wicken, above n 45, at 68.
50 *Marshall v Her Majesty The Queen* [1999] 3 SCR 456 (SCC).
51 Wicken, above n 45, at 68.
52 *Marshall* (SCC), above n 50, at [37]–[38].

of history that can be settled upon can lead them to select older, less accurate historical accounts. In his scathing critique of the lower court's use of history in *Delgamuukw v British Columbia*,[53] Robin Fisher notes that Chief Justice McEachern preferred histories written decades before the case was heard.[54] Courts, accustomed to viewing a much-cited source as good and settled precedent, applied the same logic to histories.[55] They selected histories that had been extensively peer-reviewed by sheer virtue of having been written some time ago. In doing so, the courts discounted revisionist histories based on newer historical research and interpretive models. For Fisher and Ray, this approach indicates the courts' unwillingness to consider new and different analyses.

The second way in which law and history might be incompatible concerns the way courts approach documentary evidence. Lawyers in *Delgamuukw* argued that there was no need to hear Ray's expert evidence on historical treaties because such documents are "'plain on their face'".[56] Such an argument essentially queries the evaluative function of history. It indicates a belief that the court can establish the meaning of a document produced in a wholly different time, between two parties with vastly different beliefs and expectations to a judge in the present day. Such an approach puts the courts in tension with history because it denies that historians can provide evaluations that are of any use.

At times, the courts have acknowledged and responded to these criticisms. Binnie J, delivering the majority judgment for the Supreme Court of Canada in *Marshall*, acknowledged the difficulties the Court experienced in making findings on historical issues.[57] He listed a number of historians who have criticised judicial treatment of history.[58] He appreciated that "[t]he law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible."[59] Binnie J preferred to accept this tension rather than suggest a path to reconcile it.[60] He argued that finality is necessary to achieve results for litigants, and concluded that, when dealing with history, "[t]he judicial process must do as best it can."[61]

3 A More Optimistic View of Canadian Litigation?

The use of history in legal contexts was also considered in the British Columbia Court of Appeal, hearing the appeal from Chief Justice

53 *Delgamuukw v Her Majesty The Queen in Right of the Province of British Columbia* [1997] 3 SCR 1010 (SCC).
54 Robin Fisher "Judging History: Reflections on the Reasons for Judgment in Delgamuukw v BC" (1992) 95 BC Studies 43 at 53.
55 Ray, above n 47, at 154–155.
56 At 158.
57 *Marshall* (SCC), above n 50, at [37].
58 At [36].
59 At [37].
60 *Marshall* (SCC), above n 50, at [36]–[37] as cited in Hamar Foster "Another Good Thing: *Ross River Dena Council v Canada* in the Yukon Court of Appeal, or: Indigenous Title, 'Presentism' in Law and History, and a Judge Begbie Puzzle Revisited" (2017) 50 UBC Law Rev 293 at 314.
61 *Marshall* (SCC), above n 50, at [37].

McEachern's *Delgamuukw* decision, if only in the dissenting judgment.[62] Lambert J openly accepted that new discoveries or interpretations could prove the court's version of history to be wrong.[63] He accepted that historical research will continue and may even supersede his judgment. In doing so, Lambert J recognised that the history he had been asked to determine was just one among many historical interpretations, rather than a definitive ruling meant to provide one official historical record.

Lambert J offered several suggestions as to how to minimise the risk of having the "trial judge's findings of fact stranded as forever wrong".[64] First, judges should only make findings of fact that are absolutely necessary to resolve the dispute before them.[65] By doing so, judges ensure that there is room for parts of the historical record to be revisited and revised. Secondly, Lambert J advised judges to only accept interpretations of the past over which historians are generally in consensus because these are, in his view, the least likely to be overturned.[66] Peter Hutchins suggests that Lambert J's comments indicate a willingness by the judiciary to engage with criticisms and improve its practice, going so far as to label Lambert J part of a "judicial sea change" in the treatment of history.[67]

Gwynneth Jones also takes a slightly more optimistic view than Ray. In reflecting on her own work as an expert witness in indigenous land claims, she accepts the underlying problem: that courts often have to choose one version of history when evidence points in multiple directions.[68] However, she believes there are steps historians can take as expert witnesses to discourage courts from discounting contradictory evidence. By explaining to the court the context and motivations of a particular account of history, historians can explain why two historical sources might both be valid recollections of the same event.[69] Such explanations allow the court to accept both versions as part of the historical record, rather than having to accept one and reject the other.

Similarly, historians can explain the methodologies they use. For example, Bob Beal, when acting as an expert witness for a case, was at pains to explain to the court what history as a discipline tries to achieve.[70] He explained that history should be an evaluation rather than a compilation, he discussed historiography, and he even charted the shift from a focus on 'great men' and high politics towards cultural histories of the everyman.[71] When

62 *Delgamuukw v The Queen in right of British Columbia* (1993) 104 DLR (4th) 470 (BCCA) per Lambert J dissenting. Lambert J's dissent was later upheld in the Supreme Court. See *Delgamuukw* (SCC), above n 53.

63 *Delgamuukw v British Columbia* (BCCA), above n 62, at 697.

64 At 697.

65 At 696.

66 At 696–697.

67 Peter W Hutchins "Holding the Mirror Up to Nature: Law, Social Science, and Professor Arthur Ray" in Arthur J Ray *Telling It to the Judge: Taking Native History to Court* (McGill-Queen's University Press, Kingston (Ontario), 2011) xxiii at xxviii.

68 Gwynneth CD Jones "Documentary Evidence and the Construction of Narratives in Legal and Historical Contexts" (2015) 37(1) The Public Historian 88 at 93.

69 At 93–94.

70 Peter W Hutchins "The Victor Buffalo Case: Cautionary Tale or Radical Hope Vindicated" (paper presented to Pacific Business & Law Institute, Ottawa, November 2007) at 27–28.

71 At 27.

historians inform the court of the methodological difficulties in choosing one version of history, the court becomes more likely to recognise their limitations in making rulings about history.

Lambert J's awareness that the legal record is just one of multiple competing historical narratives is a far more nuanced approach than Binnie J's claim that historical quibbles must be set aside for expediency. However, the suggestions made by both Lambert J and Jones would not completely resolve the tension between law and history outlined in Part II; they only minimise the conflict. Lambert J was optimistic in suggesting that rulings could be more accurate if judges only accepted points on which historians were in consensus. In Part II, I charted a shift from the 1960s, when the orthodox position was to believe that all of history could be explained in terms of class conflict, to the present day, where such views have been thoroughly discredited. If historical consensuses can change so much in a few decades, it seems unlikely that a judge can trust that what historians currently believe will remain the position in perpetuity.

The South African Truth and Reconciliation Commission

This case study was chosen for two reasons. First, like the Waitangi Tribunal, the TRC was a commission of inquiry, making it a quasi-judicial setting rather than the full courtroom in the Canadian context. As a result, it might indicate ways that legal frameworks can adapt to accommodate historical inquiries. Secondly, the TRC took a radically different approach to the use of academic historians than New Zealand and Canada, who both welcomed historians as expert witnesses. In comparison, only one historian was given a leading role in the TRC.[72]

1 Overview of the TRC

The TRC investigated gross human rights violations that had occurred during the apartheid period. Apartheid was a brutal era. Non-white South Africans were deprived of the right to vote, to own certain lands and to access basic services. The violence near the end of the apartheid era saw thousands killed and tens of thousands detained without justification.[73]

The TRC culminated in its final *Truth and Reconciliation Commission of South Africa Report* (*TRC Final Report*) into the extent, nature and cause of the human rights violations, published in 1998.[74] The Report found a staggering number of gross human rights violations, and held that the apartheid state had engaged in extrajudicial killing and torture.[75] An important

72 Christopher Saunders "Historians and the South African Truth Commission" (2004) 2 History Compass 1 at 1.

73 Ole Bubenzer *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process* (Martinus Nijhoff, Leiden (Netherlands), 2009) at 7.

74 See *Truth and Reconciliation Commission of South Africa Report* (29 October 1998). The Report was published in five volumes, with two subsequent codicils.

75 At 10.

part of the Report is concerned with telling the individual stories of those who gave testimony.[76] For example, it attempts to situate the apartheid regime in a broader context of racism, decolonisation and even the Cold War.[77]

Unlike other truth and reconciliation commissions across the world, the TRC did not offer total amnesty to those who were implicated. Amnesty was conditional on a full public confession from a person accused of perpetrating a wrong.[78] After the TRC's work concluded, a small number of criminal prosecutions occurred. Thus, the TRC was not just a fact-finding body, but also served a decision-making function in deciding which people were deserving of amnesty and which cases should proceed to criminal trials.[79]

2 Analysing the TRC's Approach to History

The *TRC Final Report* takes both positive and negative approaches to history. Encouragingly, despite the lack of involvement from academic historians, the TRC recognised its inability to tell a complete history.[80] In the foreword to the *TRC Final Report*, Chairperson Desmond Tutu acknowledged that:[81]

> It is not and cannot be the whole story; but it provides a perspective on the truth about a past that is more extensive and more complex than any one commission could, in two and a half years, have hoped to capture.

The Commission was wary of claiming to hold an absolute monopoly on the truth about the apartheid era. Indeed, Tutu urged others to "take up and pursue" the task of capturing the "unspoken truths" in the *TRC Final Report*.[82] The Report, therefore, anticipates that future historical work may analyse the era in a way not contemplated by the TRC. Overall, Tutu's foreword indicates that tensions between law and history may be less present in the TRC than in other juridical forums.

However, despite the tone set in the initial pages, in later sections, the TRC does in fact err towards definitive pronouncements about history. A particularly problematic example is the decision to produce a final "Closed List of Victims" of gross human rights violations.[83] The Government accepted this list as the official record, and this had important implications. Only those listed could access financial reparations, meaning that of the 33,000,000 non-white South Africans who endured apartheid, only 16,837 were able to receive compensation.[84] More salient to the interplay of law and history, though, is that many victims of apartheid who were unable to testify were excluded from

76 Rafael Verbuyst "History, historians and the South African Truth and Reconciliation Commission" (2013) 66 New Contree 1 at 8.
77 *Truth and Reconciliation Commission of South Africa Report* (29 October 1998) vol 2 at 6–8.
78 *Truth and Reconciliation Commission of South Africa Report* (29 October 1998) vol 1 at 119.
79 At 54.
80 Verbuyst, above n 76, at 6.
81 *Truth and Reconciliation Commission of South Africa Report* (vol 1), above n 78, at 2.
82 At 4.
83 At 86.
84 Julian Simcock "Unfinished Business: Reconciling the Apartheid Reparation Litigation with South Africa's Truth and Reconciliation Commission" (2011) 47 Stan J Intl L 239 at 247.

the official historical narrative. The TRC acknowledged in a later codicil of its report that the closed list policy may be inappropriate because it inevitably meant that its records were incomplete.[85] Due to logistical and administrative shortfalls, large numbers of people were unable to submit testimonies, as over 8,000 people missed out because their statements were submitted out of time.[86] The continuation of the closed list policy even after these problems were noted indicates that the TRC could not reconcile its legal requirements with its historical function: the political necessity of providing a list of victims triumphed over the desire for historical accuracy.

In addition to creating a final list of victims, the section of the report dedicated to amnesty determinations is one of the more legalistic sections. It is concerned less with recording victims' experiences and more with determining whether cases fall within the statutory framework. The Promotion of National Unity and Reconciliation Act 1995 (South Africa), in establishing the TRC, required it to grant amnesty where the alleged human rights violation was "an act associated with a political objective".[87] The Act prescribed six features for determining whether an act had a political objective.[88] If an act was done for personal gain or out of personal malice, it was not "associated with a political objective".[89] This requirement, in particular, meant that the TRC had less scope for total accuracy. Many acts of violence were likely driven by more than one motive and could have occurred both because of a belief that apartheid should be upheld, and out of personal malice to a particular victim. The TRC did not have the option to conclude that multiple motives existed simultaneously. Instead, it had to create an arguably artificial dichotomy of crimes: those that were committed exclusively in line with political objectives, and those that were not.

3 What Does the TRC Reveal About the Interplay Between Law and History?

It is telling that such tendencies towards final pronouncements are strongest in the most judicial sections of the report. It adds credence to the thesis that history and law are at cross-purposes: it affirms that the law will sacrifice accuracy in the name of expediency. In practice, maintaining a critical perspective on historiographical issues might be a difficult task for courts and commissions, especially those which are already under immense pressure to produce results in a limited period of time.

Perhaps the acceptance of the complexities and limitations of historical analysis in the report's foreword reflects the fact that the TRC had a different focus to the other case studies. Both the Waitangi Tribunal and the Canadian cases are precursors to redress. They require a consistent historical narrative before they can consider compensation. Conversely, a truth and

85 *Truth and Reconciliation Commission of South Africa Report* (21 March 2003) vol 6 at 575–576.
86 At 575–576.
87 Section 20(1).
88 Section 20(3).
89 Sections 20(1) and 20(3).

reconciliation commission is intended to be redressed in itself. Underlying the commissions is the idea that the process of affirming the victim's stories and hearing perpetrators confess is a way to acknowledge wrongs and provide closure.[90]

Furthermore, uncovering information such as the whereabouts of abduction victims or the location of hidden graves is also a form of redress.[91] Indeed, the telling of so many previously unheard tales was particularly important in South Africa, where the apartheid regime had instituted legislation banning alternative non-State histories.[92] Overall, then, it is not that the TRC was better placed to reconcile law and history, but rather that its functions extended beyond ordinary judicial pathways.

The Waitangi Tribunal

1 Overview of the Claims Process

The final case study is the closest to home: the Waitangi Tribunal. The Tribunal enquires into claims by Māori that they have been prejudicially affected by acts or omissions of the Crown.[93] The Tribunal is not bound by the rules of evidence to which an ordinary court would be held when hearing historical claims.[94] The Tribunal can draw on sources such as reports written by professional historians, oral histories and documentary records to assist in its investigations.[95] The Waitangi Tribunal publishes a report on each claim it hears, which outlines the findings of fact it has made and lists recommendations to guide the subsequent settlement process.

Of course, the Waitangi Tribunal is not the only vehicle for historical claims. Many important claims have also been heard by the courts. However, the following analysis is confined to the Waitangi Tribunal. As a commission of inquiry, the Tribunal has more procedural flexibility than ordinary courts. As such, it provides a useful counterpoint to the Canadian litigation discussed above.

2 The Waitangi Tribunal's Approach to History

It is easy to see how the problems surrounding the creation of finalised histories in both the Canadian and South African contexts might also apply to the Waitangi Tribunal. Tribunal reports set out the Tribunal's findings as to exactly what happened in the past. The Tribunal exists to ensure grievances are investigated so redress can be either granted or denied. Accordingly, it

90 Annelies Verdoolaege *Reconciliation Discourse: The case of the Truth and Reconciliation Commission* (John Benjamins, Amsterdam, 2008) at 17.
91 Kenneth Christie *The South African Truth Commission* (MacMillan Press, London, 2000) at 5.
92 At 7.
93 Treaty of Waitangi Act 1975, s 6.
94 Schedule 2 cl 6.
95 Grant Phillipson "Talking and writing history: Evidence to the Waitangi Tribunal" in Janine Hayward and Nicola Wheen (eds) *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget Williams Books, Wellington, 2004) 41 at 41.

must make decisions on uncertain areas of history. In contrast, historians working in these areas would modify or broaden the scope of their enquiry to avoid making a definitive call without adequate evidence.[96] Where the historians' academic concerns conflicts with the Tribunal's legal responsibilities as a commission of inquiry, "the historians are always going to lose".[97]

Tribunal decisions about history are treated as authoritative statements that will guide the level and type of redress included in "durable" settlement deals.[98] The findings also form the basis for official Crown apologies to Māori.[99] Alan Ward gives a good example of how the Tribunal might stifle history. He argues that "[i]f the task [of settlements] is done well now, there should be no need to revisit history."[100] This way of thinking both places undue trust in the Tribunal to assess claims accurately, and anticipates that the Tribunal will create a version of history that will stand in perpetuity.

On the whole, I suggest that the Waitangi Tribunal manages problems of creating definitive histories relatively well. In Part II, I suggested that, should a court or tribunal accept that their historical records may be debated and altered by future historians, we can view such juridical histories not as an attempt to set the past in stone, but rather one version among many competing histories. Examining the language used in both the *Ngai Tahu Land Report*, one of the earlier reports produced by the Tribunal, and *The Taranaki Report: Kaupapa Tuatahi* (*Taranaki Report*), which was released several years later, indicates that the Waitangi Tribunal has been aware that it is just one participant in a broader historical discussion.[101]

The *Ngai Tahu Land Report* was released in 1991. The claims made by Ngāi Tahu were extensive and complex, and this case was one of the first times that the Tribunal had encountered such a large amount of historical evidence — as Alan Ward put it, "three metres on my shelves".[102]Even written before much of the historical criticism levied at the Tribunal emerged, the Report indicated an awareness that the Tribunal should not seek to provide a full historical narrative. For example, evidence was tendered challenging the continuity of Ngāi Tahu's land possession, citing migrations and wars that had altered where hapu were based.[103] The Tribunal held that there was sufficient

96 Belgrave, above n 21, at 99.

97 Michael Belgrave *Historical Frictions: Maori Claims and Reinvented Histories* (Auckland University Press, Auckland, 2005) at 14.

98 Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna. Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (June 2018) at 24.

99 See generally Therese Crocker "History and the Treaty of Waitangi Settlement Process" (2014) 18 Journal of New Zealand Studies 106 at 109–112.

100 Alan Ward *An Unsettled History: Treaty Claims in New Zealand Today* (Bridget Williams Books, Wellington, 1999) at 180.

101 See Waitangi Tribunal *Ngai Tahu Land Report* (Wai 27, 1991); and Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996) [*Taranaki Report*].

102 Alan Ward "History and Historians before the Waitangi Tribunal: Some Reflections on the Ngai Tahu Claim" (1990) 24 New Zealand Journal of History 150 at 151.

103 *Ngai Tahu Land Report*, above n 101, at [3.1.1]–[3.1.10].

continuity but refused to elaborate further on the historical narrative. It noted that:[104]

> Each of these [war and migration] stories has many versions and to try and isolate which events occurred where and in what order has the danger of turning the rich and varied traditions of the tribe into a fixed and sterile narrative.

By limiting itself only to matters directly related to the claim before it, the Tribunal sought to avoid finalising histories unnecessarily.

The *Taranaki Report*, released in 1996, considered the land losses and war suffered by Taranaki iwi, as well as the invasion of Parihaka.[105] The *Taranaki Report* may seem an unusual case study: it generated controversy after labelling the events "the holocaust of Taranaki history".[106] Nonetheless, the Report more explicitly acknowledged that Tribunal reports should not be viewed as a definitive version of the past. The Tribunal specifically stated, "[i]t is not our function to write the history of Parihaka".[107] When providing an overview of the historical context, the Tribunal noted again that it was "not wishing to write a definitive history".[108] This indicated the Tribunal's desire to avoid its work being cast as the official historical narrative of the nation. The Waitangi Tribunal reports, therefore, intend to complement rather than overrule other histories.

Such an interpretation is bolstered by the fact that the literature surrounding Waitangi Tribunal histories constructs the reports as a particular sub-field of historical writing. Byrnes writes that "[t]reaty claims research is, therefore, a specialised kind of public history".[109] Similarly, Michael Belgrave refers to the reports themselves as "Tribunal history".[110] Importantly, the Tribunal has spurred, rather than limited, the expression of other histories. A range of works have emerged which, although influenced by Tribunal histories, also offer critiques of Tribunal writing or suggest new approaches to the past.[111]

Conclusions

The examination of three forums that have had to determine historical claims leads me to propose two broad conclusions about the way courtrooms or tribunals treat history. First, many of the problems identified in the case studies above occur in some cases, but not others. This indicates that some incompatibilities are not fundamental, but rather can be remedied through procedural changes. Secondly, although courts and tribunals need to make

104 At [3.1.11].
105 *Taranaki Report*, above n 101.
106 At [12.3.3]. See also Belgrave *Historical Frictions*, above n 97, at 111–112.
107 *Taranaki Report*, above n 101, at 200.
108 At [2.3].
109 Byrnes "Jackals of the Crown?", above n 19, at 113.
110 Belgrave "Looking Forward", above n 46, at 232.
111 At 231.

definitive rulings in order to meet the needs of claimants, they are aware of the risks of doing so. Particularly in New Zealand, the recognition that juridical histories are just one of many versions of the past suggests that the theoretical tension identified in the Part II may not be as worrisome as initially thought.

1 Jurisdiction-Specific Problems with the Treatment of History

Some of the ways that courts or tribunals promote finality and stifle historical discussion are specific to the particular vagaries and procedures of the jurisdiction. A good example is the criticism levied at the Canadian courts. Fisher and Ray argue that, in preferring older — but more out-of-date — versions of history for their greater precedent value, the Canadian courts were stifling historical progress and discussion by refusing to accept more revisionist narratives. In contrast, the Waitangi Tribunal has been criticised for the exact opposite. It has been challenged for writing heavily revisionist histories and "reinvent[ing] history" to explain the past in a way more favourable to a judicial context.[112] Perhaps this indicates that the Canadian preference for out-of-date historical writing can be explained as merely a problem specific to some Canadian judges, rather than a fundamental incompatibility between law and history.

Another problem only raised in the Canadian context is the issue of appellate courts relying on ambiguous historical evidence finalised in the trial stage. This issue is more likely to emerge in the Canadian context than in New Zealand or South Africa for two reasons. First, the Waitangi Tribunal and the TRC do not have an analogous appeals process. Secondly, as commissions of inquiry, the Tribunal and the TRC have a far more flexible approach to procedure and evidence. The Treaty of Waitangi Act 1975 empowers the Waitangi Tribunal to "regulate its procedure in such manner as it thinks fit".[113] Similarly, although legislation specified some of the TRC's amnesty decision-making procedures, the TRC was generally allowed to determine its methods of gathering and analysing evidence, guided only by a list of general principles.[114]

The fact that both these examples are problems that emerged in Canada but not in New Zealand or South Africa might suggest that commissions of inquiry are better at handling historical claims than courts. Canadian judges have often suggested that negotiations may be a better forum than the courts for resolving historical grievances.[115] Because courts are more constrained by procedure and are accustomed to dealing with everyday matters rather than specialised historical inquiries, they may have more difficulty managing complex historical questions.

112 Belgrave *Historical Frictions*, above n 97, at 25–27.
113 Schedule 2, cl 5(9).
114 Promotion of National Unity and Reconciliation Act 1995 (South Africa), s 11.
115 Walters, above n 42, at 42.

2 Theoretical Incompatibilities Can Be Managed in Practice

All three case studies provide examples of courts or tribunals creating final, official versions of history out of expediency. In Canada, Binnie J believed that conflict between perfect historical method and the operations of the court were inevitable.[116] In South Africa, despite Chairperson Tutu's insistence that he would not settle the past, the TRC created a final list of apartheid victims.[117] Similarly, the Waitangi Tribunal's findings have been enshrined in Crown apologies, becoming "legislated history".[118]

Equally, though, all three case studies indicate that courts and tribunals are aware of the dangers of finalising history and recognise that they are unlikely to stumble upon the correct answer. Lambert J in Canada was comfortable with the possibility that his findings would be eventually disproven as historical knowledge increases.[119] Similarly, the Waitangi Tribunal has been careful to limit its findings to issues absolutely necessary for reporting the claim. Where it does set out conclusions on marginal areas of history, the Tribunal has expressed that those conclusions should not be considered determinative.[120] More generally, the wealth of historical inquiries and debates generated by research for legal claims indicates that the Tribunal's work has furthered, rather than stifled, historical progress.

The TRC's decision to eschew academic historians highlights why it is important that historians accept judicially created histories. A central complaint from historians is that "complexity and nuance were often lost [in the TRC report] because of the focus on 'fact-finding'".[121] The TRC was "concerned as much with promoting reconciliation as with establishing historical truth".[122] Historians' instinct to frame and explain the past interfered with the particular way the TRC sought to achieve reconciliation. The TRC preferred the emotional power of victim testimony over the packaging of evidence into an academically sound explanation.[123] In its view, such narratives would be better communicated to the public outside the confines of academic history. This reinforces du Pisani and Kim's view that it is desirable to accept juridicial histories as legitimate. If the purpose of history is to communicate the past in a way that makes sense to those in the present, there is value in engaging with, and building upon, a work that captured the minds of so many South Africans. We should view juridical histories as a useful type of public history that complements rather than excludes other historical narratives.[124]

116 *Marshall* (SCC), above n 50, at [37].
117 *Truth and Reconciliation Commission* (vol 1), above n 79, at 86.
118 Day, above n 24, at 222–224.
119 *Delgamuukw* (BCCA), above n 62, at 697.
120 *Ngai Tahu Land Report*, above n 101, at [3.1.11].
121 Verbuyst, above n 76, at 10.
122 Saunders, above n 72, at 1.
123 See David Thelen "How the Truth and Reconciliation Commission Challenges the Ways We Use History" (2002) 47 South African Historical Journal 162 at 166–169.
124 Williams, above n 1, at 155–156.

IV ARE MĀORI CONCEPTIONS OF HISTORY COMPATIBLE WITH THE COURTROOM?

So far, the historical traditions considered have been almost exclusively European. However, particularly in the New Zealand context, examining only European conceptions of history as a discipline can never be sufficient.

The Waitangi Tribunal seeks to be a bicultural forum.[125] Its empowering legislation advises the Tribunal to "adopt such aspects of te kawa o te marae as [it] thinks appropriate".[126] More importantly, recognition of tikanga is necessary as a form of redress in and of itself. If the Crown relied upon European judicial structures to grant redress, it would disrespect Māori as its treaty partner by assuming that European institutions are preferable or more legitimate. If we genuinely want the Waitangi Tribunal's work to be a cross-cultural process, we must also adopt a cross-cultural approach in determining what *counts* as reliable historical evidence.

In this final Part, I consider Māori conceptions of history and examine whether the law might be in tension with these epistemologies. I ask whether oral histories, the primary mode of expressing Māori histories, are adequately respected. Not only has the transmission of information by spoken word, as compared to written word, been criticised as unreliable, the different evaluative functions of Māori history, such as explaining the world in terms of whakapapa, have led some to label Māori history as inappropriate legal evidence. Although the examples in this section are drawn mainly from the Waitangi Tribunal, the Canadian treatment of oral histories is also useful to consider.

It should be noted that it is not universally accepted that Māori ways of explaining the past are a type of history at all. Te Maire Tau argues that Māori versions of the past are so tied to Māori epistemologies and culture that they cannot be understood in relation to Western ideas such as history or law.[127] To accept Tau's argument would be to suggest that Māori conceptions of the past are incompatible with the courtroom. However, the fact that the Waitangi Tribunal was established as a bicultural forum implies that the Tribunal takes the opposite view: it believes it is possible to reconcile the two — albeit very different — conceptions of the world. The remainder of this Part, therefore, presumes that reconciliation of Māori histories and Western legal procedures is not prima facie impossible.

125 Ann Parsonson "Te Rōpū Whakamana I Te Tiriti o Waitangi - The Waitangi Tribunal: A Unique Institution" (2016) 69 Te Manutukutuku 24 at 27.

126 Treaty of Waitangi Act, sch 2 cl 5(9).

127 Te Maire Tau "Matauranga Maori as an epistemology" in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past – A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 61 at 64–65.

Māori History and the Law

Māori have a strong oral tradition for transmitting narratives, philosophies and histories across generations,[128] while Europeans employ the written word to tell their stories. Despite differences between these modes of communication, Judith Binney's overview of Māori history is not dissimilar to Carr's conception of history. She describes Māori history as "a continuous dialectic between the past and the present, as the past is reordered and the present reinterpreted".[129]

However, what Carr might dub *the evaluative function of history* is very different from a Māori viewpoint. For Māori, a primary purpose of history, and the lens through which histories are understood, is genealogy.[130] The concept of whanau defines the identity and mana of individuals, and so must also define the ways histories are explained.[131] This different purpose means Māori history is told in different ways to European histories. For example, stories may be rearranged to refer to appropriate ancestors.[132] Narrators may insert themselves into stories that took place long before they were born.[133] History may be explained in a way that gives events mythological or religious significance.[134]

These differences have led some to conclude that Māori history is ill-suited to be used as legal evidence. At a basic level, rules against hearsay evidence conflict with stories that have been repeated across generations in a way they might not with a documentary record.[135] The Waitangi Tribunal has circumvented this problem with its more flexible approach to evidence. Canada has also allowed oral history to be used in the courtroom. *R v Delgamuukw* confirmed that because aboriginal title claims are a unique type of claim, indigenous oral evidence is admissible.[136]

However, there is no guarantee that once such evidence has been admitted, it will be weighted fairly.[137] Lawyers trained in European traditions rarely understand the importance of giving respected indigenous figures the opportunity to present their own evidence, rather than hearing it from expert witnesses. Lawyers in earlier Canadian cases opted to call expert witnesses first, then supplemented expert testimony with indigenous witnesses where necessary, if at all. This implies a belief that the experts are a more legitimate

128 Jane McRae *Māori Oral Tradition: He Kōrero nō te Ao Tawhito* (Auckland University Press, Auckland, 2017) at 11.
129 Judith Binney "Maori Oral Narratives, Pakeha Written Texts: Two Forms of Telling History" in Judith Binney (ed) *The Shaping of History: Essays from The New Zealand Journal of History* (Bridget Williams Books, Wellington, 2001) 3 at 4.
130 At 7.
131 At 7.
132 At 7.
133 At 10.
134 At 6.
135 Ray, above n 37, at 19–20.
136 Miranda Johnson "Making History Public: Indigenous Claims to Settler States" (2008) 20 Public Culture 97 at 105.
137 At 105–106.

source of knowledge than indigenous oral histories.[138] Because academic archaeologists, historians or anthropologists give evidence in modes with which the court is more familiar, their evidence may be weighed more favourably than evidence from indigenous people directly involved in the dispute.[139]

Joan Metge, an anthropologist who worked with claimant groups for the Waitangi Tribunal, notes similar confusions arising in New Zealand.[140] A kaumātua giving evidence during the Muriwhenua land inquiry told a sweeping tale that began with an account of the creation of the world and progressed towards the events in question.[141] His own lawyers were unaware not only of the importance of the link between ancestral stories and historical events, but also that he was telling a story learned by heart from a whare wānanga that he was unable to abridge.[142]

Metge also criticises Crown representatives for failing to adequately present oral evidence of their own.[143] Not only are Crown representatives reluctant to call oral evidence, they often challenge the veracity of claimant oral histories in an attempt to improve their own case. Although the Tribunal is a commission of inquiry rather than a regular courtroom, it often becomes an adversarial environment because the claims are contested by the Crown.[144] The fact that Crown representatives challenge the legitimacy of Māori modes of history seems to fly in the face of the need to respect Māori as an equal treaty partner.

Opinions on the appropriate weight to be given to Māori histories vary greatly. There is a general perception, particularly among Māori, that oral history is not given as much weight as European documents.[145] Conversely, scholars such as Bill Oliver have criticised the Tribunal for the faith it places in Māori history, particularly in the *Muriwhenua Land Report*.[146] When documentary records are assessed for their similarity to oral traditions, he claims, the oral tradition is necessarily presumed to be less biased and more reliable.[147] Grant Phillipson takes a position somewhere in the middle. He argues that the Waitangi Tribunal is a good forum to weigh the respective merits of oral and documentary evidence because it holds hearings on marae and immerses itself in Māori culture before passing judgment.[148]

138 Hutchins, above n 67, at xxvi–xxviii.
139 Ray, above n 37, at 20–21.
140 Joan Metge "Kia Tupato! Anthropologist at Work" (1998) 69 Oceania 47 at 50–53.
141 At 50. See Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997).
142 At 50.
143 At 50–51.
144 Andrew Erueti and Alan Ward "Maori land law and the Treaty claims process" in Bain Attwood and Fiona Magowan (eds) *Telling Stories: Indigenous history and memory in Australia and New Zealand* (Bridget Williams Books, Wellington, 2001) 161 at 169–170.
145 Phillipson, above n 95, at 42.
146 Bill Oliver "Is bias one-sided?" (1997) 7(2) New Zealand Books. See *Muriwhenua Land Report*, above n 141.
147 Oliver, above n 146.
148 Phillipson, above n 95, at 43.

How Has the Tribunal Incorporated Māori Histories?

From some of its earliest hearings, the Waitangi Tribunal has attempted to adopt procedures that accommodate Māori oral traditions. In the Ngāi Tahu hearings, it adopted a policy of not cross-examining kaumātua.[149] Such a policy recognises the authority of the histories recounted by kaumātua.[150] However, it also challenges courtroom conceptions of natural justice by limiting the ability of one party to challenge evidence.

Although some procedures were put in place to accommodate Māori historical traditions in the Ngāi Tahu hearings, they are remembered by Tribunal members as situations of "legal formality" compared to the "intense bicultural encounter" of the Muriwhenua hearings.[151] There, procedures were further altered to better reflect oral traditions. Witnesses did not have to swear oaths as a recognition that much of the evidence given was a mixture of opinion and fact.[152] Instead, the Tribunal trusted that the presence of other people on the marae who were knowledgeable about the historical record would compel witnesses to tell the truth and encourage correction of errors.

The *Muriwhenua Land Report* provided useful commentary on how the Tribunal assessed Māori histories.[153] The Tribunal took the approach that the documentary record was one-sided and, therefore, not reliable on its own.[154] Where written documents were signed by a group with an oral tradition, the written document was not the entirety of the agreement, but rather "evidence[d] no more than that which the party who drafted it sought to achieve".[155] Given this, documents had to be assessed in light of oral testimonies given by claimants. The Tribunal was aware that Māori histories could be presented in ways that distorted the record in favour of emphasising ancestors or religious narratives. However, they did not believe that this negated the veracity of the evidence:[156]

> While the metaphors of oral tradition needed to sustain messages over generations have resulted in powerful accounts, the tradition may remain vitally honest for the inner truths conveyed. In reviewing Muriwhenua history, therefore, our greater concern has been not with the vagaries of oral tradition, but with the power of the written word to entrench error and bias.

It was statements like this that led Oliver to argue the Tribunal had privileged oral evidence above the documentary record.[157] Interestingly, in subsequent inquiries, the Tribunal has not maintained the approach taken in the Muriwhenua investigation. A very differently constituted Tribunal took a step

149 Erueti and Ward, above n 144, at 170; and *Ngai Tahu Land Report*, above n 101, at [1.6.7].
150 Johnson, above n 136, at 113.
151 Barry Rigby "Landmark Inquiries: Muriwhenua" (2016) 69 Te Manutukutuku 52 at 52.
152 Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988) [*Muriwhenua Fishing Report*] at 12.
153 *Muriwhenua Land Report*, above n 141.
154 At 2.
155 At 56.
156 At 3.
157 See Oliver, above n 146.

backwards in *The Kaipara Report* in 2006.[158] Instead of inserting themselves into a historiographical debate about how to use Māori histories, they merely noted the Crown critique of oral history and the claimant support of oral history without giving a firm position.[159] Nonetheless, the *Muriwhenua Land Report* remains a useful indicator of how the Tribunal *can* decide to weight Māori history when determining claims.[160]

Assessing the reports over time, I would argue that the Tribunal has evolved in its approach to both oral evidence and the modes in which the Tribunal writes its reports. There is a general trend towards the increased inclusion of the whakapapa of claimant groups. The *Ngai Tahu Land Report* gives only the historical background that it considers to be directly relevant to the claim.[161] The *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, also an early claim, includes oral histories given by claimants that span back to the canoes that brought their ancestors to New Zealand.[162] Unfortunately, it is consigned to an appendix. The *Muriwhenua Land Report*, released eight years later, places some more mythological elements of Māori history into the main report. Although it notes that "[i]t is not necessary to record the detail of the traditional evidence", the Report does provide several paragraphs summarising oral testimony, which extended through detailed memories of the main canoe landings at Muriwhenua to the events in question.[163] *The Kaipara Report* takes something of a step back, deciding that "it is not the function of the Tribunal to write Tribal histories".[164] The first volume of the Waitangi Tribunal report *Te Urewera* (*Te Urewera Report*), published in February 2018, shows a far greater appreciation of the central role that genealogy plays in Māori history, perhaps as a consequence of Binney's role as a historian for the claimants.[165] The opening lines of the *Te Urewera Report* reference the waka on which ancestors of Te Urewera iwi arrived in New Zealand.[166] The Tribunal then includes a chapter on the origins and traditions of the people of Te Urewera, making it clear that "this chapter reflects the way in which the histories, and the values of those who shaped them, were presented to us in hearings by the people themselves".[167] The inclusion of genealogies at the start of Waitangi Tribunal reports, explaining how the iwi concerned came to be, indicates that the Tribunal is incorporating the evaluative purposes of Maori histories into its own writing. The increasing inclusion of the genealogies of claimant groups does not detract from any legal processes; rather, it increases the biculturalism of the histories that the Tribunal is engaged in writing. Such steps should be encouraged.

158 Waitangi Tribunal *The Kaipara Report* (Wai 674, 2006).
159 At 336.
160 See *Muruwhenua Land Report*, above n 141.
161 See *Ngai Tahu Land Report*, above n 101.
162 *Muriwhenua Fishing Report*, above n 152, at 255–263.
163 *Muruwhenua Land Report*, above n 141, at 15–19.
164 *The Kaipara Report*, above n 158, at [2.3].
165 See Waitangi Tribunal *Te Urewera* (Wai 894, 2018) vol 1 [*Te Urewera Report*]. The evidence that Binney presented to the Tribunal has been published. See Judith Binney *Encircled Lands: Te Urewera, 1820–1921* (Bridget Williams Books, Wellington, 2009).
166 *Te Urewera Report*, above n 165, at [1.1].
167 At 21.

V CONCLUSION

History and the courtroom do appear at first glance to be at cross-purposes. The law is required to settle matters definitively; it must make decisions even where there is conflicting evidence. When the law makes pronouncements, it must treat them as the final and objectively correct answer.

Historians are sceptical that such final pronouncements are possible. They are loath to make conclusions where the facts are unclear. They also accept that multiple versions of history can coexist and supersede one another. These new interpretations keep the past alive for new generations.

Irrespective of these problems, history and the courtroom do not necessarily have to be at cross-purposes. The histories produced in commissions of inquiry and in courtrooms are just one type of history that does not preclude other stories about the past being told. Moreover, given the important role juridical histories play in engaging the public in historical discussions, historians should accept and work with them, rather than condemn them as methodologically unsound. The fact that the TRC chose to tell history without the assistance of professional historians speaks to the risks of failing to engage with juridical histories.

Time pressures and knowledge gaps are likely to continue to challenge courtrooms hearing historical claims. Nonetheless, all three case studies show a willingness by courts and tribunals to accept their own limitations in producing history. All three jurisdictions have at times contemplated historiographical issues and acknowledged that they were not generating a final history. Juridical histories have encouraged, rather than stifle, historiographical debate.

The case studies may also indicate that the law requires a more flexible approach to procedure when dealing with complicated historical inquiries. Many of the critiques levied at the Canadian courtrooms focus on particular restrictive procedural issues. Commissions of inquiry like the Waitangi Tribunal and the TRC are perhaps better equipped to write history because they are less constrained by procedure.

It is important that judges accept their limitations when dealing not only with academic historians, but also with indigenous modes of explaining history. Having bicultural procedures in place is not enough if decisions are still made in a way that disproportionately relies on evidence produced by only one culture. Judges need to understand how historical information is produced by Māori in order to weight it appropriately. The incorporation of elements of Māori history into the *Te Urewera Report* is also a positive development: it indicates the Waitangi Tribunal's decision to write in a way informed by Māori approaches. Overall, it seems that the key to reconciling legal processes with both Western and indigenous histories is knowledge and awareness. History, whether it stems from Western or indigenous traditions, is compatible with the law, so long as the law is equipped with the knowledge and resources to engage with it.